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0283 Committees on: Dam and Reservoir Safety, and Water, Personnel

Report to the Colorado General Assembly:

**RECOMMENDATIONS FOR 1984
COMMITTEES ON:**

**Dam and Reservoir Safety, and Water
Personnel**



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COLORADO LEGISLATIVE COUNCIL

**RESEARCH PUBLICATION NO. 283
December, 1983**

Colorado Legislative Council
recommendations for 1984

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COLORADO LEGISLATIVE COUNCIL
RECOMMENDATIONS FOR 1984

NON-CIRCULATING

COMMITTEES ON:

Dam and Reservoir Safety
and Water
Personnel

Legislative Council
Report to the
Colorado General Assembly

Research Publication No. 283
December, 1983

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To Members of the Fifty-fourth Colorado General Assembly:

Submitted herewith are the final reports of the Committees on Dam and Reservoir Safety and Water, and Personnel. Both committees were appointed by the Legislative Council pursuant to Senate Joint Resolution No. 19, 1983 session.

At its meeting of December 12, the Legislative Council approved motions to transmit these reports to the Fifty-fourth General Assembly.

Respectfully submitted,

/s/ Senator Ted L. Strickland
Chairman
Colorado Legislative Council

TABLE OF CONTENTS

	<u>Page</u>
LETTER OF TRANSMITTAL.....	iii
TABLE OF CONTENTS.....	v
LIST OF BILLS AND RESOLUTIONS.....	vii
COMMITTEE ON DAM AND RESERVOIR SAFETY AND WATER	
Members of the Committee.....	1
Summary of Committee Activities and Recommendations.....	3
Committee Charge.....	7
Activities.....	8
Dam Failures in the Western United States.....	8
Dam Safety Programs in Other States.....	8
Table I: Dam Failures in the Western United States.....	9
Liability for Dam Failure in Colorado and Other States.....	10
Liability for Damages Caused Within One-Hundred-Year Floodplains.....	12
Comparison of Committee Bill with Current Law.....	17
APPENDIX A: Tour Itinerary.....	45
APPENDIX B: Tour Participants.....	51
APPENDIX C: Summary of Dam Safety Programs Responses.....	53
COMMITTEE ON PERSONNEL	
Members of the Committee.....	55
Summary of Committee Findings and Recommendations.....	57
A Short History of Legislative Concern with the Personnel System.....	59
1983 Study Activities.....	59
Higher Education Task Force Report.....	60
State Compensation Task Force Report.....	60
Special Report to the Interim Committee.....	61
Interim Committee Proceedings.....	61
Interim Committee Findings, Conclusions, and Recommendations.....	62

Amending the Constitution -- Findings and Conclusions.....	63
Approaches to Amending the Constitution.....	64
Recommendations for Constitutional Change.....	65
Amending the Statutes -- Findings, Conclusions, and Recommendations.....	66
Clarification of Roles.....	66
Committee Recommendations.....	68
Modifying Compensation and Classification Procedures..	68
Committee Recommendations.....	70
Revising the Appeals Process.....	71
Committee Recommendations.....	72
APPENDIX A: Outline of "Modernizing the Colorado Personnel System" and Testimony of Mr. William Levis.....	125
APPENDIX B: Workload Statistics from Personnel Board and Responses from Department of Personnel to Committee Questions.....	143
APPENDIX C: Testimony of Gail S. Schoettler, Executive Director, Colorado Department of Personnel.....	151

LIST OF BILLS AND RESOLUTIONS

	<u>Page</u>
BILL 39 -- Concerning Reservoirs.....	17
BILL 40 -- Concerning the Restriction of Facilities Within Reservoirs.....	41
BILL 41 -- Concerning Liability of the Federal Government for Damage Caused by Water Escaping from Federally- Owned Reservoirs.....	43
BILL 42 -- Concerning the State Personnel System.....	85
CONCURRENT RESOLUTION 5 -- Submitting to the Registered Electors of the State of Colorado an Amendment to Article XII of the Constitution of the State of Colorado, Permitting Appointments and Promotions to Offices and Employments in the State Personnel System to be Made According to Merit and Fitness, to be Ascertained, as Far as Practicable, by Competitive Tests of Competence Without Regard to Race, Creed, Color, Religion, Sex, National Origin or Ancestry, Handicap, Age, or Political Affiliation, and Repealing the Provisions Establishing the State Personnel Board and the State Department of Personnel and the Provisions Describing the State Personnel System.....	75

LEGISLATIVE COUNCIL
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SUMMARY OF COMMITTEE ACTIVITIES AND RECOMMENDATIONS

The committee was charged with conducting a comprehensive review of dam and reservoir safety and water issues. Included were matters relating to liability, dam inspections, and the enhancement of water impoundment.

The committee held a total of five meetings and on August 16 and 17, 1983, participated in a two-day bus tour of approximately twenty dams within Colorado. Included within the tour itinerary were dams and reservoirs which ranged in size from those encompassing only a few surface acres and less than one-hundred acre feet of water to Dillon Reservoir covering roughly 3,300 acres with about 253,000 acre feet of water. The sites of the Lawn Lake and Cascade Reservoir dam failures were observed as were small livestock water tanks and erosion control structures not under the state's dam safety program. During the tour, resource persons from the state engineer's office, United States Bureau of Reclamation, water conservancy districts, irrigation companies, the Denver Water Department, City of Colorado Springs, and others joined the committee and provided background and data on each of the facilities being observed. (Attached as Appendices A and B are copies of the committee's tour itinerary and a list of participants.)

Committee Recommendations

The committee recommends three bills for consideration by the 1984 session of the Colorado General Assembly.

Bill 39 -- Concerning Reservoirs

The committee's primary bill makes numerous changes in the law governing dams and reservoirs. Pages 17 to 39 of this report contain the text of the bill, compares it with the existing law, and offers a brief explanation of the major changes made therein.

In brief, major provisions of the bill:

- Add the definitions of "natural stream" and "one-hundred-year floodplain" as a part of the committee's recommendation that a dam owner should not be absolutely liable for damages caused by flows from dam failure which do not exceed the limits of the one-hundred-year floodplain. In such instances, a dam owner could be held liable only if the damages resulted from negligent actions.
- Redefine the dams which are to be under the state engineer's jurisdiction. That is, an amendment made to the definition of so-called "jurisdictional dams" by House Bill 1416, 1983 session, resulted in the removal of approximately 720 dams from the state

engineer's jurisdiction; the committee's amendment would reinstate these dams.

- Introduce a new provision which would allow the state engineer, in approving dam construction criteria, to include less stringent construction standards than would be dictated if a dam were designed to meet the maximum probable precipitation which could occur. That is, the generally accepted standard for dam design is one which would allow the dam and its spillways to control or pass the inflow of water produced by the estimated maximum possible precipitation. In fact, Colorado courts in Barr v. the Game, Fish and Parks Commission, 30 Colo. App. 482, 497 P.2d 340, have, by finding that an owner was absolutely liable for damages for the failure of a dam which was not designed to such a standard, essentially established this as the construction standard in Colorado. The committee recognized that there are areas within the state where constructing a dam to meet this standard could result in dams in which a spillway adequate to pass such precipitation would be larger than the actual dam, or precipitation of less than such a magnitude would actually be enough to totally inundate the area. For example, the committee was informed that the Big Thompson Canyon flood resulted from precipitation of less than that which would have been generated by the probable maximum precipitation. Thus, the committee believes that the state engineer should be authorized to take these factors into consideration and, perhaps, approve structures with a less stringent design standard.
- Provide that any person actually in control of a dam shall be deemed the owner for purposes of determining liability unless the true owners' names and addresses have been filed with the state engineer. This provision is intended to encourage notification of ownership of dams to the state engineer
- Direct that dam safety inspections shall be made as often as the state engineer deems necessary rather than annually as required by current law.
- Permit the state engineer to recover from the reservoir owner any expenses incurred in making an unsafe reservoir safe. While this appears to be the current situation it is believed that clear statutory authorization is needed.
- Increase the minimum fine for violations of the directions of the state engineer from \$200 to \$500 and include procedures for judicial enforcement of the state engineer's orders.
- Exempt certain structures (including mill tailings ponds) from the jurisdiction of the state engineer.

Bill 40 -- Concerning the Restriction of Facilities Within Reservoirs

Bill 40 makes it unlawful for any person, including any state or federal agency, quasi-municipal corporation, or political subdivision, to construct any permanent recreational or other facility within a reservoir below the high water level of the reservoir unless such facility would not be damaged by water or is necessary to the operation of the reservoir. Existing facilities would be exempt. Bill 40 directs the state engineer to order the removal of any facility in violation of such provision.

Bill 41 -- Concerning Liability of the Federal Government for Damage Caused by Water Escaping from Federally Owned Reservoirs

Bill 41 specifies that the word "owner" includes the federal government for purposes of sections 37-87-104 and 37-87-113, C.R.S. These sections make reservoir owners liable for damages arising from leakage, overflow, or breaking of the embankments.

Senate Joint Resolution No. 22, 1983 Session

Prior to the September session of the 1983 General Assembly, the committee reviewed the federal district court decision in Riverside Irrigation District v. Andrews. ^{1/} As a result of its review, the committee proposed that the General Assembly adopt, at its September, 1983 session, a resolution asking the U.S. Congress to amend the Clean Water Act to clarify the authority of the Corps of Engineers and the Environmental Protection Agency under section 404 of that act. The committee's recommendation was adopted by the General Assembly on September 1, 1983 (see Senate Joint Resolution No. 22, 1983 session).

The Huston Case

The committee reviewed the decision of the Colorado Supreme Court in the so-called "Huston" case ^{2/} but did not make any specific recommendations thereon. In response to that decision, however, during the September session, the General Assembly enacted Senate Bill 439 expanding on the definition of "water matters" which are to be heard by the water courts to include determinations of rights to nontributary ground water outside of designated ground water basins.

^{1/} Civil action no. 80-K-624, U.S. District Court for the District of Colorado, decided July 31, 1983.

^{2/} No. 79SA38, decided July 18, 1983, and modified November 7, 1983.

Notification of Property Owners Within a Floodplain

The committee considered a proposal to require that the developer of property which is downstream from a reservoir and within the one-hundred-year floodplain give written disclosure of such fact to purchasers and lessees of the property. Purchasers and lessees would have been permitted to rescind the sale or lease if such disclosure was not given. Finally, developers would have been required to make the disclosure in advertising brochures and other printed materials delivered or mailed to prospective purchasers and lessees. Apparently, concerned that such a program would be too complex and cumbersome to administer at either the state or local level, the committee did not adopt this proposal.

Future Considerations

In conclusion, the committee wishes to note its recognition of the importance and complexity of the assignment. The topics in the study directive were seriously considered and the committee attempted to discuss every issue therein. The above recommendations are offered not as a complete solution, but as a beginning. Much additional work needs to, and will undoubtedly, be done in the future.

DAM AND RESERVOIR SAFETY

Senate Joint Resolution No. 19, 1983 session, directed the interim Committee on Dam and Reservoir Safety and Water to study the following dam and reservoir safety and water issues:

(a) The feasibility and practical implementation of inventorying all dams in the state of Colorado to provide a classification of dams in terms of hazards, risks, size, and location;

(b) Enhancing the impoundment of water;

(c) A study of and recommendations relating to the liability and responsibility, under current statutory and common law principles, of:

(I) Individual dam owners;

(II) Ditch, lateral, and canal owners;

(III) Irrigation companies;

(IV) Municipalities;

(V) The state of Colorado, giving special consideration to liability for allowing construction in existing drainage areas and floodplains and to the responsibility for providing protection for residents downstream from a dam; and,

(VI) The federal government.

(d) The liability and responsibility of the entities listed in paragraph (c) as they are affected by multiple uses of water and water held under an interstate compact agreement;

(e) The inspection of dams and reservoirs, focusing on the questions of financing restoration and rehabilitation to bring existing dams into compliance with existing safety standards, the determination of appropriate fees and how and from whom such fees should be collected, and which facilities, such as tailing and settling ponds, should be exempted from inspection;

(f) The responsibility for rodent control;

(g) The development of inspection safety standards by local and state governments and the federal government.

Activities

Dam Failures in the Western United States

In Colorado there are roughly 2,300 dams under the jurisdiction of the state engineer and thirty-one dams have failed since 1965. Of this number, ten failed by overtopping during the 1965 floods. In an attempt to obtain an indication of how Colorado compares with other states, the Legislative Council staff surveyed, by letter, ten western states to determine the number of dam failures they have had in the last twenty years -- see Table I.

Dam Safety Programs in Other States

In 1970, the United States Committee on Large Dams prepared a "model law" for state supervision of safety of dams and reservoirs. The model was recommended as a basis for formulating state dam safety legislation and regulatory procedures, including authority to perform five basic functions to ensure the adequacy of dams and reservoirs. The five functions served as the basis for a recent February, 1983 federally sponsored study of the dam safety programs in all fifty states. ^{3/} Listed below are the five basic functions and the study's findings:

- 1) Review and approve the plans and specifications to construct, enlarge, modify, remove, or abandon dams. Forty-three states, including Colorado, currently perform this function.
- 2) Perform periodic inspections during construction for the purpose of insuring compliance with approved plans and specifications. Thirty-four states, including Colorado, currently perform this function.
- 3) Upon completion of construction, issue a permit to impound water. Twenty-nine states perform this function. This function is not performed in Colorado.
- 4) Investigate dams and reservoirs at least every five years to determine their continuing safety. Thirty-seven states, including Colorado, currently perform this function.
- 5) Issue notices when appropriate to require the owner of the dam and reservoir to perform necessary maintenance or remedial work, revise operating procedures or take other actions including breaching of the dam when deemed necessary. Forty-three states, including Colorado, currently perform this function.

^{3/} Bruce A. Tschantz, Report on Review of State Non-Federal Dam Safety Programs, to Federal Emergency Management Agency, University of Tennessee, February 28, 1983.

TABLE I
DAM FAILURES IN THE WESTERN UNITED STATES 1/

State	Number of Dams	Number of Failures	Causes of Failures	State	Number of Dams	Number of Failures	Causes of Failures
Alaska	132	5 <u>2/</u>	2-earthen structural failures 2-sheet piling structural failures 1-unknown cause	Montana	6,587 <u>4/</u>	12	11-overtopping 1-corroded outlet conduit
Arizona	186	5 <u>3/</u>	2-piping 1-embankment crack 1-spillway structure 1-unknown	Nevada	210	2	1-overtopping 1-piping
California	1,178	6	2-piping 2-overtopping 1-flood during construction 1-unknown	New Mexico	658	7	3-erosion 2-structural 2-overtopping
Colorado	2,277 <u>7/</u>	31	14-overtopping 5-piping 7-spillway washed out 5-miscellaneous <u>6/</u>	Oregon	Not reported	5	4-overtopping 1-foundation
Idaho	535	57	12-overtopping 8-piping 7-sliding 3-seepage 2-outlet works 25-miscellaneous	Utah	1,500	17	11-overtopping 6-embankment failure
				Washington	950	12 <u>5/</u>	2-inadequate spillway 2-overtopping 1-outlet tunnel plugged causing collapse 1-no spillway (poor construction) 1-inadequate spillway and seepage due to animal burrows 1-plugged culvert (logging road fill) 1-drop inlet failure 3-unknown

1/ It should be noted that this data may not be entirely comparable. For example, Colorado lists only "jurisdictional dams" -- those under the jurisdiction of the state engineer -- not all dams within the state (e.g. ponds and other small dams are excluded). Montana, for example, appears to list all known dams.

2/ Represents number of recorded failures, time interval not specified.

3/ For the period 1971-1982.

4/ 3,518 meeting Army Corp of Engineers criteria

3,069 other "small" dams

6,587 Total

5/ Number of failures since mid 1950's.

6/ Outlet works, breaching by operator/overtaken trees, silt, etc.

7/ Jurisdictional dams only -- failures since 1965

The report evaluated three additional functions necessary for an effective dam safety program -- 1) adopt rules and regulations for the purpose of carrying out the provisions of a state's dam safety program (thirty-five states, including Colorado); 2) require the establishment of a bond or fee as part of the construction permit application (nineteen states, including Colorado); and 3) require an emergency action preparedness plan for each dam or reservoir (twenty states, excluding Colorado, currently have this requirement).

In summary, the study concluded that twenty-two states have adequate dam safety legislation; twenty-four states (including Colorado) have marginal legislation, and four states (Alabama, Delaware, Hawaii, and South Dakota) have not enacted dam safety legislation. Why Colorado's program is listed as marginal is not clearly explained in the study. However, in a conversation with Mr. William S. Bivins, Chief, Federal Dam Safety, Federal Emergency Management Agency, Washington, D.C., the council staff was informed that the lack of a permit to impound water upon completion of a dam and the lack of mandatory emergency plans are the probable reasons for this conclusion. According to Mr. Bivins, these two factors are considered by the Federal Emergency Management Agency to be very important in evaluating the quality of a dam safety program. Attached Appendix C provides a summary of the responses from the fifty states on functions performed under current dam safety programs.

Information presented to the committee suggested, the above report's findings notwithstanding, that while Colorado's dam safety program does not issue permits to impound water, the state does approve the plans and specifications for dams and regularly inspects them during construction. Furthermore, House Bill 1416, 1983 session, mandated a program to identify the inundation zones below all high hazard dams within the state, and to develop maps thereof. Such information was to be provided to respective local governments by September 1, 1983. This program has been completed. Now, local governments may begin to develop emergency action plans.

According to the Division of Disaster Emergency Services (DODES), emergency action plans have been prepared for: all federal dams under the jurisdiction of the Corps of Engineers; three Bureau of Reclamation dams; and, those owned by the Denver Water Department. DODES is working closely with the state engineer in developing emergency warning and evacuation planning and is encouraging all dam owners and local governments to develop the same.

Liability for Dam Failure in Colorado and Other States

Sections 37-87-104 and 37-87-113, C.R.S., have been construed by Colorado's courts to impose an absolute liability on the owner of a reservoir should the dam, embankment, or any of its attendant facilities fail. (See, for example, Freel v. Ozark-Mahoning Co. 208 F. Supp. 93 (1962); Ryan Gulch Res. Co. v. Swartz, 77 Colo. 60, 234 P. 1059 (1925); Barr v. Game, Fish, Parks Comm., 30 Colo. App. 482,

497 P.2d 340.)

In an attempt to ascertain if other states' statutes impose a similar standard, the committee reviewed the laws governing dams in nineteen states (Arizona, California, Florida, Hawaii, Idaho, Illinois, Kansas, Minnesota, Montana, Nebraska, New Mexico, Nevada, Ohio, Oklahoma, Oregon, Texas, Utah, Washington and Wyoming). None of the states appeared to have a statute specifically identifying dam failures as being governed by the absolute liability doctrine. (Please note the above underscored terms. Only the dam safety statutes were examined, other statutory provisions such as those on general liability were not examined in detail and might contain provisions which could lead to a different conclusion in specific instances.)

Status of liability nationally. As a general statement of the law governing liability for dam failures nationally, the American Law Reports (ALR 3rd) notes:

Generally, it may be said that the owner of a dam is not an insurer with respect to the condition of the dam and is not liable for damages caused by the overflow or escape of water if the dam fails except on a showing of negligence. This is the rule adopted by the Texas Supreme Court although a few earlier Texas civil appeals cases had apparently taken the view of strict or absolute liability. (Footnotes omitted and underscoring added -- See 51 ALR 3rd, 967.)

In discussing the effect of statutory absolute liability, 51 American Law Reports, 972-973 states in part:

In some jurisdictions statutes affecting the question under annotation have been enacted. The rule of strict or absolute liability was applied to an overflow or escape of water caused by a dam failure in the following cases involving a Colorado statute providing that the owners of reservoirs shall be liable for all damages arising from leakage or overflow of water therefrom, or by floods caused by the breaking of embankments of such reservoirs.

The citations in ALR are all Colorado cases: Larimer County Ditch Co. v. Zimmerman (1893), 4 Colo. App. 78, 34 P. 1111; Garnet Ditch and Reservoir Co. v. Sampson (1910), 48 Colo. 285, 110P79; Beaver Water and Irrigation Co. v. Emerson (1924), 75 Colo. 513, 227 P. 547.

Finally, the American Law Report cites cases in Nebraska and New Hampshire in which:

...the court held that the liability of the dam owner was based only on negligence, in one case on the ground that a dam did not come within that part of the statute providing for absolute liability, and in another case on the ground that a count based on violation of a statute was based on

legal fault and not based on the doctrine of strict or absolute liability. (See 51 ALR 3rd, 974).

Both the general statements of the law found in Corpus Juris Secundum and American Jurisprudence appear to reach the same basic liability statement as does A.L.R. 4/ The only specific state cited as having a definite statutory declaration of absolute liability resulting from the failure of a reservoir is Colorado. Generally, liability appears to be dependent, at least in part, on negligence.

Liability for Damages Caused Within One-Hundred-Year Floodplains

One item discussed extensively by the committee concerned the question of a dam owner's liability for damages caused within a one-hundred-year floodplain. The term "one-hundred-year flood" does not refer to a flood which occurs only once within a one-hundred-year period. The term refers to a flood which has a one percent chance of occurring in any year. Thus, a one-hundred-year flood could occur in two (or more) successive years.

Under the existing absolute liability doctrine, if flooding occurs as a result of a dam incident, even if it is limited to the floodplain, the dam owner is strictly liable. In view of local, state and federal activities in recent years to identify, regulate, and insure property within floodplains, the committee questioned whether or not the legal doctrine of negligence should be considered in such instances.

Federal flood insurance program. In 1968 the Congress, apparently in response to prohibitive private insurance rates, established a federal flood insurance program (P.L. 90-448). While basically a voluntary program, to be eligible for flood insurance, the law required local governments to implement and enforce special land use and building restrictions in flood hazard areas.

The 1968 act required a detailed risk study to be undertaken before a community could become eligible for federal flood insurance. Because of the delays caused by such a study, the Congress established an emergency flood insurance program to permit the early sale of insurance in flood prone communities. 5/ To participate in the emergency program, a local government identifies flood prone areas in cooperation with state agencies, the Federal Emergency Management Agency, and the National Flood Insurance Administration. Preliminary floodplain management regulations must be adopted to guide new construction in flood prone areas. Insurance under the emergency

4/ See 78 Am Jur 2d, 211 and 93 C.J.S., 141.

5/ Section 408 of the "Housing and Urban Development Act of 1969" (P.L. 91-152)

program is subsidized (its apparent purpose being to assure the institution of floodplain management, rather than recover the actual premium cost) and insurance is available within two weeks of entrance. Present limits of insurance under the emergency program are \$35,000 for single family dwellings and \$100,000 on all other properties, with \$10,000 available for residential contents and \$100,000 for non-residential buildings.

Following entry into the emergency program a Flood Insurance Rate Map (FIRM) is prepared. This map details risk zones and shows special flood hazard areas where insurance is required as a condition for federal or federally related financial assistance. The map also places the entire community in various hazard zones based on the susceptibility to flooding. As of the date of publication of the FIRM a participating community is converted to the regular program and increased amounts of insurance become available.

Under the regular program the maximum amounts of insurance are as follows:

Single family residence: \$185,000 plus \$60,000
for contents;
Other residential: \$250,000 plus \$60,000 for
contents;
Small business: \$250,000 plus \$300,000 for
contents; and
Other nonresidential: \$200,000 plus \$200,000 for
contents.

It should be pointed out that subsidized flood insurance is available only on structures built prior to the completion of the FIRM. Structures built after the maps are completed must conform to the zoning, flood proofing and land use requirements of local governments and are eligible only for actuarial insurance rates which are keyed to the regulatory elevations (the one-hundred-year flood heights).

It should also be noted that communities may be suspended from the program (both emergency or regular) for such reasons as failure to enforce floodplain regulation. Policies are deemed void at the end of the policy year and the community may be ineligible for disaster assistance.

The number of communities in Colorado enrolled in the National Flood Insurance Program (NFIP) as of July 31, 1983 is summarized below.

COLORADO COMMUNITIES IN THE NFIP

	<u>Emergency</u>	<u>Regular</u>	<u>Total in NFIP</u>	<u>Total In State</u>
Counties (Includes Denver)	28	16	44	63
Cities (Excludes Denver) and Towns	<u>71</u>	<u>91</u>	<u>162</u>	<u>266</u>
Totals	99	107	206	329

According to the National Flood Insurance Status Book, as of April 30, 1983, four Colorado local governments -- Greeley, La Plata County, Las Animas County, and Loveland, have been suspended from the program.

Colorado's floodplain identification program. Beginning in 1972, the Colorado Water Conservation Board (CWCB) initiated a state program to map floodplains which required matching funds from the local government having jurisdiction on the river being mapped. In 1974, the Colorado General Assembly adopted House Bill 1041, article 65.1 of title 24, C.R.S. -- the so-called "Land Use Act." That act authorized local governments to identify and regulate areas and activities of state interest. Specifically identified therein were floodplains as areas of state interest. In brief, under the act, floodplains are to be administered so as to minimize significant hazards to public health and safety or to property. Open space activities such as agriculture, recreation, and mineral extraction are to be encouraged in the floodplains. Building of structures in the floodplain are to be designed in terms of the availability of flood protection devices, proposed intensity of use, effects on the acceleration of floodwaters, potential significant hazards to public health and safety or to property, and other impacts of such development on downstream communities such as the creation of obstructions during floods. Activities shall be discouraged which, in time of flooding, would create significant hazards to public health and safety or to property.

At the time of the Land Use Act's adoption, the General Assembly provided, and continued for several years, a funding program to assist the Water Conservation Board's floodplain mapping program. To date, about 2,800 stream miles have been studied in detail for flood hazards. The Water Conservation Board believes that approximately 6,000 stream miles in Colorado are developable and need to be evaluated. The board estimates that the stream miles which have been studied thus far represent about sixty percent of the present potentially endangered population.

In view of the more than ten years of programs designed to encourage designation and control of land use within the

one-hundred-year floodplain and with the understanding that such floods are not unusual occurrences, the committee concluded that the doctrine of absolute liability for dam incidents affecting the floodplain should be modified. Under the committee's Bill 39, except for negligent actions, the owner of a dam could not be held liable for damages within the one-hundred-year floodplain.

As a means of further encouraging the identification of floodplains, the committee discussed the concept of requiring local jurisdictions, immediately following a dam incident, to undertake the necessary studies to identify the one-hundred-year floodplain. Such action would be required only if the floodplain had not previously been identified. Furthermore, such a requirement might help reduce litigation, or be used as the official designated floodplain during any subsequent litigation. Placing this requirement on local government might also encourage more identifications before any incidents occur. Due to a shortage of time, the committee did not adopt this concept but agreed that, once proper language is drafted, it should be considered during the 1984 session.

Current Law37-87-101. Right to store waters.

(1) Persons desiring to construct and maintain reservoirs for the purpose of storing water have the right to store therein any of the unappropriated waters of the state not thereafter needed for immediate use for domestic or irrigating purposes, and to construct and maintain ditches for carrying such water to and from such reservoirs, and to condemn lands required for the construction and maintenance of such reservoirs and ditches in the same manner as now provided by law; except that after April 18, 1935, the appropriation of water for any reservoirs constructed when decreed, shall be superior to an appropriation of water for direct application claiming a date of priority subsequent in time to that of such reservoirs.

(2) Underground aquifers are not reservoirs within the meaning of this section except to the extent such aquifers are filled by other than natural means with water to which the person filling such aquifer has a conditional or decreed right.

Committee Proposal37-87-101. Storage of water.

(1) The right to store water for later application to beneficial use is recognized as a right of appropriation which is part of the customs of those who have inhabited the area which is now Colorado from the time of original occupation of the area by the United States of America and is a part of those customs which have been codified in the Colorado constitution. No water storage reservoir shall be constructed, maintained, or operated in such a manner as to impair the existing rights of any person or entity, other than the owner, owners, or proprietors of any such reservoir, to the use of water intercepted or affected by such reservoir. Acquisition of right-of-way reasonably necessary for the construction, maintenance, and operation of any water storage reservoir, together with inlet or outlet canals or other waterworks necessary to make such reservoir effective to accomplish the beneficial use of water stored or to be stored therein, can be secured under the laws of eminent domain.

Summary of Changes

37-87-101. Subsection (1) of this section rewrites existing provisions concerning the right to store water as a right of appropriation but prohibits the construction or operation of reservoirs so as to impair existing water rights.

Subsection (2) is not amended.

37-87-102. Definitions - natural streams and use thereof by reservoir owners. (1) AS USED IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "MEAN ANNUAL FLOOD" MEANS A FLOOD WHICH HAS A MAGNITUDE (PEAK DISCHARGE) WHICH IS EXPECTED TO BE EQUALLED OR EXCEEDED ONCE ON THE AVERAGE EVERY 2.33 YEARS AND HAS A FORTY-THREE PERCENT CHANCE OF BEING EQUALLED OR EXCEEDED (0.43 EXCEEDENCE PROBABILITY) DURING ANY YEAR, BY APPLICATION OF THE CRITERIA DEFINED IN SUBSECTION (2) OF THIS SECTION.

(b) "NATURAL STREAM" MEANS A PLACE ON THE SURFACE OF THE EARTH WHERE WATER NATURALLY FLOWS REGULARLY OR INTERMITTENTLY WITH A PERCEPTIBLE CURRENT BETWEEN OBSERVABLE BANKS, ALTHOUGH THE LOCATION OF SUCH BANKS MAY VARY UNDER DIFFERENT CONDITIONS.

(c) "ONE-HUNDRED-YEAR FLOOD" MEANS A FLOOD WHICH HAS A MAGNITUDE (PEAK DISCHARGE) WHICH IS EXPECTED TO BE EQUALLED OR EXCEEDED ONCE ON THE AVERAGE DURING ANY ONE-HUNDRED-YEAR PERIOD (RECURRENCE INTERVAL) AND HAS A ONE PERCENT CHANCE OF BEING EQUALLED OR

37-87-102. The existing 37-87-102 becomes subsection (4) of the committee's bill. Subsections (1) through (3) offer definitions of natural stream, annual flood, and 100-year flood, and set forth a methodology for identifying flood plains and a 100-year flood.

EXCEEDED DURING ANY YEAR (0.01 EXCEEDENCE PROBABILITY). THE TERMS "ONE-HUNDRED-YEAR FLOOD", "ONE PERCENT CHANCE FLOOD", AND "INTERMEDIATE REGIONAL FLOOD" ARE SYNONYMOUS.

(d) "ONE-HUNDRED-YEAR FLOODPLAIN" MEANS THAT AREA IN AND ADJACENT TO A NATURAL STREAM WHICH IS SUBJECT TO FLOODING AS A RESULT OF THE OCCURRENCE OF A ONE-HUNDRED-YEAR FLOOD.

(e) "ORDINARY HIGH WATERMARK" OF ANY STREAM MEANS THE VISIBLE CHANNEL OF A NATURAL WATERCOURSE WITHIN WHICH WATER FLOWS WITH SUFFICIENT FREQUENCY SO AS TO PRECLUDE THE ERECTION OR MAINTENANCE OF MAN-MADE IMPROVEMENTS WITHOUT SPECIAL PROVISION FOR PROTECTION AGAINST FLOWS OF WATER IN SUCH CHANNEL OR THE CHANNEL DEFINED BY THE MEAN ANNUAL FLOOD, WHICHEVER IS GREATER.

(2) WHENEVER THE RECORDS BASIC TO THE DETERMINATION AS REQUIRED IN PARAGRAPHS (a) AND (d) OF SUBSECTION (1) OF THIS SECTION EXTEND FOR A PERIOD OF ONE HUNDRED OR MORE YEARS, THE CALCULATION BASED UPON THOSE RESULTS SHALL BE DEEMED CONCLUSIVE. IF SUCH RECORDS DO NOT EXTEND FOR A PERIOD OF ONE HUNDRED OR MORE YEARS,

THE DETERMINATION SHALL BE CONCLUDED BY INTERPOLATION AND CORRELATION TO A FULL ONE HUNDRED YEARS OF RECORDS BY RELATING THEM TO KNOWN RECORDS OF WATER-BEARING BASINS AS SIMILAR AS REASONABLY POSSIBLE TO THE BASIN UNDER CONSIDERATION OR BY OTHER ACCEPTABLE METHODS.

(3) WHENEVER THIS ARTICLE REQUIRES A DETERMINATION OF PROBABLE FUTURE FLOWS OF WATER IN A NATURAL STREAM, THE CRITERIA FOR SUCH DETERMINATION SHALL BE BASED ON REASONABLE HYDROLOGIC AND GEOLOGIC FACTORS, INCLUDING BUT NOT LIMITED TO THE FOLLOWING:

(a) THE WATERSHED BASIN ABOVE THE PLACE WHERE PROBABLE RUNOFF IS TO BE DETERMINED, CONSIDERING:

(I) THE SIZE OF THE BASIN;

(II) THE ALTITUDE OR ALTITUDES OF THE AREA OR AREAS OF THE BASIN;

(III) THE SOIL PERMEABILITY OF THE VARIOUS PORTIONS OF THE BASIN;

(b) THE KNOWN RUNOFF AS DETERMINED BY RELIABLE STREAM GAUGING STATIONS USING INTERPOLATIONS WHEN NECESSARY FROM DOWNSTREAM GAUGING STATIONS AND RELATING TO INTERPOLATIONS TO THE CHARACTERISTICS OF THE BASIN MEASURED BY THE DOWNSTREAM

GAUGING STATION AS RELATED TO THE BASIN OF RUNOFF BEING DETERMINED;

(c) THE SLOPE OR SLOPES OF THE CHANNEL OR CHANNELS OF THE WATERCOURSE OR WATERCOURSES INVOLVED;

(d) THE MEASURED NATURAL PRECIPITATION WITHIN THE BASIN ABOVE THE PLACE OF FLOW DETERMINATION. WHEN RECORDS FROM NATURAL PRECIPITATION ARE NOT AVAILABLE, ESTIMATES SHALL BE MADE BY INTERPOLATION AND CORRELATION FROM KNOWN RECORDS PERTAINING TO SIMILAR BASINS. IN CONSIDERING THE IMPACT OF THE PRECIPITATION, CONSIDERATION SHALL BE GIVEN TO THE PROBABLE RATE OF RUNOFF, TAKING INTO ACCOUNT WHETHER SUCH PRECIPITATION OCCURRED AS RAIN OR SNOW, AND THE MAGNITUDE, DURATION, AND FREQUENCY OF NONSNOWFALL PRECIPITATION.

37-87-102. Owner of reservoir may conduct water into natural streams. The owners of any reservoir may conduct the waters legally stored therein into and along any of the natural streams of the state, but not so as to raise the waters thereof above ordinary high watermark, and may take the same out again at any point desired with due regard to the prior or

(4) The owners of any reservoir may conduct the waters legally stored therein into and along any of the natural streams of the state, but not so as to raise the waters thereof above ordinary high watermark, and may take the same out again at any point desired with due regard to the prior or subsequent rights of others to other waters in said natural streams.

Current Law

subsequent rights of others to other waters in said natural streams. Due allowance shall be made for evaporation and other losses from natural causes for the protection of all rights to the waters flowing in said streams, such losses to be determined by the state engineer.

37-87-103. Notice of release of stored waters. The owners of reservoirs who avail themselves of the provisions of this section and section 37-87-102 shall give reasonable prior notice to the irrigation division engineer of the irrigation division in which the reservoir is located or to the chief administrative water official of such irrigation division, of the date on which they desire to release stored waters into any natural streams, together with the quantity thereof in cubic feet per second of time, the length of period to be covered by such releases, and the name of the ditch, canal, pipeline, or reservoir to which the water so released from storage is to be delivered, to the end that the water officials in responsible charge of any stream into which such stored water is

Committee Proposal

Due allowance shall be made for evaporation and other losses from natural causes for the protection of all rights to the waters flowing in said streams, such losses to be determined by the state engineer.

Summary of Changes

37-87-103. Section 37-87-103 is not amended.

Current Law

released shall have ample time in which to make the necessary observations, measurements of flow and storage and records thereof, and to provide for a proper patrol of the said stream, for the protection of the reservoir owner and also all other appropriators along the stream whose interests might be affected as a result of such reservoir release. Such notice may be given to the division engineer when the reservoir from which the water is to be released and the point where the water is to be taken from the stream or again stored are in the same water district.

37-87-104. Liability of owners for damage. (1) Except as provided in subsection (2) of this section, the owner of a reservoir shall be liable for all damages arising from leakage or overflow of the waters therefrom or floods caused by the breaking of the embankments of such reservoir.

(2) No employee, shareholder, or member of a board of directors of an owner of a reservoir shall be liable for any damage arising from leakage or overflow of

Committee Proposal

37-87-104. Liability of owners for damage. (1) Except as provided in ~~subsection~~ SUBSECTIONS (2) AND (2.5) of this section, the owner of a reservoir shall be liable for all damages arising from leakage or overflow of the waters therefrom or floods caused by the breaking of the embankments of such reservoir.

(2) No employee, shareholder, OFFICER, or member of a board of directors of an owner of a reservoir shall be liable for any damage arising from leakage or

Summary of Changes

37-87-104. Subsections (1) and (2) are essentially the same as current law. In subsection (2) the term "officer" is added. Subsection (2.5) is new.

Current Law

the waters from such reservoir or for any damage arising from floods caused by breaking of the embankments of such reservoir if a valid liability insurance policy has been purchased by the owner of the reservoir and is in effect at the time such damage occurs. Such insurance policy shall insure against such damages and provide coverage in an amount of not less than fifty thousand dollars for each claim and in an aggregate amount of not less than one million dollars for all claims which arise out of any one incident. The policy may provide that it does not apply to any act or omission of an employee, shareholder, or member of a board of directors of an owner if such act or omission is dishonest, fraudulent, malicious, or criminal. The policy may also contain other reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters common to such policies of insurance. The limitation of liability pursuant to this subsection (2) shall not apply to any criminal, fraudulent, or malicious act by a member of the board of directors of the

Committee Proposal

overflow of the waters from such reservoir or for any damage arising from floods caused by breaking of the embankments of such reservoir if a valid liability insurance policy has been purchased by the owner of the reservoir and is in effect at the time such damage occurs. Such insurance policy shall insure against such damages and provide coverage in an amount of not less than fifty thousand dollars for each claim and in an aggregate amount of not less than one million dollars for all claims which arise out of any one incident. The policy may provide that it does not apply to any act or omission of an employee, shareholder, OFFICER, or member of a board of directors of an owner if such act or omission is dishonest, fraudulent, malicious, or criminal. The policy may also contain other reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters common to such policies of insurance. The limitation of liability pursuant to this subsection (2) shall not apply to any criminal, fraudulent, or malicious act by a member of the board of

Summary of Changes

Current Law

owner, a shareholder of the owner, or an employee of such owner nor shall it apply to any ultra vires act of the owner or of a member of the board of directors, a shareholder, or an employee of such owner. The provisions of this subsection (2) shall not be deemed to impose any liability upon a member of the board of directors, a shareholder, or an employee of the owner of a reservoir beyond that established by other principles or provisions of law.

Committee Proposal

directors of the owner, AN OFFICER OF THE OWNER, a shareholder of the owner, or an employee of such owner, nor shall it apply to any ultra vires act of the owner or of a member of the board of directors, AN OFFICER, a shareholder, or an employee of such owner. The provisions of this subsection (2) shall not be deemed to impose any liability upon a member of the board of directors, AN OFFICER, a shareholder, or an employee of the owner of a reservoir beyond that established by other principles or provisions of law.

(2.5) In no event shall the owner of a reservoir, in the absence of negligence, be liable for damages resulting from flows of water from such reservoir which are of insufficient magnitude to exceed the limits of the one-hundred-year floodplain as defined in section 37-87-102 (1) (a). The owner of any reservoir, without liability therefor, may pass through the reservoir inflows without diminution.

Summary of Changes

Subsection (2.5) adds an exemption from the absolute liability placed on a dam owner. That is, a dam owner may not, in the absence of negligence, be held liable for damages resulting from a dam failure if the resulting flooding does not exceed the limits of the one-hundred year flood plain. In addition, an owner without liability, may pass through a reservoir the amount of inflow, even if flooding occurs as a result.

This section should be compared with subsection 37-87-102 (4) of the committee's bill above, which allows an owner to conduct waters along a natural stream but not above the ordinary high water mark. Section 37-87-102 (4) appears to apply to "intentional" actions while this subsection (2.5) is probably intended to address only unintentional acts. Perhaps this needs to be clarified?

Current Law

(3) As used in this section, the word "owner" does not include public entities or public employees as defined in the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S.

Committee Proposal

37-87-104.5. Notification of ownership of dam - when person in control deemed owner. The person or persons actually in control of the physical structure of any dam shall be deemed, for determining liability arising from ownership of a dam and with respect to operation thereof, to be the owners thereof unless notice of the name and address of the true owner thereof, together with reasonable evidence of such ownership, has been filed in the office of the state engineer by January 1, 1985. Any change in ownership shall be immediately filed in the office of the state engineer.

37-87-105. Approval of plans for reservoir - notice of modification.

Summary of Changes

Subsection (3) is not amended.

~~37-87-104.5.~~ This section is new. It is intended to encourage dam owners to notify (and keep the notification current) the state engineer exactly who owns a dam and the address of the owner.

Under this section, the person or persons who have actual control of a dam are deemed to be the owners for determining liability unless proper notification of the actual owner along with his address has been filed with the state engineer.

37-87-105. Approval of plans for reservoir - notice of modification.

37-87-105. This section is intended to reinstate approximately 700 dams which were removed from the

Current Law

(1) No reservoir of a capacity of more than one thousand acre-feet of water nor a reservoir with a capacity of more than fifty acre-feet of water and having a dam embankment in excess of ten feet in vertical height from the bottom of the channel to the bottom of the spillway shall be constructed in this state unless the plans and specifications for the same have first been approved by the state engineer in accordance with regulations established by the state engineer governing such approval and filed in his office.

(2) The state engineer shall notify every county and municipality downstream of the proposed reservoir which may be affected by or have an interest in the project.

Committee Proposal

(1) No ~~reservoir--of--a--capacity--of--more~~
~~than--one--thousand--acre--feet--of--water--nor--a~~
reservoir with a capacity of more than ~~fifty~~ ONE HUNDRED acre-feet of water and OR having a dam embankment in excess of ten feet in vertical height from the bottom of the NATURAL channel to the ~~bottom~~ FLOWLINE CREST of the spillway, AS MEASURED AT THE INTERSECTION OF THE NATURAL CHANNEL WITH THE LONGITUDINAL CENTER LINE OF THE DAM, OR HAVING A SURFACE AREA AT THE HIGH WATER LINE IN EXCESS OF TWENTY ACRES shall be constructed in this state unless the plans and specifications ~~for-the-same~~ have first been approved by the state engineer in accordance with regulations established by the state engineer governing such approval and filed in his office.

Summary of Changes

state engineer's jurisdiction by House Bill 1416, 1983 session. That is, House Bill 1416, provided for dams with more than fifty acre-feet of water and an embankment of ten or more feet were under the engineer's jurisdiction. Under former statutes the capacity of the reservoir "OR" the height of the dam were the deciding factors. This change effectively removed the 700 dams from the engineer's jurisdiction. Under the committee's proposal the deciding factors are one-hundred acre-feet or more or any dam of ten feet or more. Additional language is added to specify how the height of a dam is determined.

Subsection (2) is not amended.

Current Law

(3) In making his determination, the state engineer shall be guided by criteria related to the hazard classification of the proposed dam and construction criteria which may be established by regulation pursuant to this article. The state engineer shall issue his written decision regarding the approval of plans and specifications within one hundred eighty days of submittal to him. The state engineer shall act as consulting engineer during the construction thereof and shall have authority to require the material used and the work of construction to be accomplished in accordance with regulations which the state engineer may establish. No work shall be deemed complete until the state engineer furnishes to the owners of such structures a written statement of the work of construction and the full completion thereof, together with his acceptance of the same, which statement shall specify the dimensions of such dam and capacity of such reservoir. The state engineer shall

Committee Proposal

(3) In making his determination FOR APPROVAL, the state engineer shall be guided by ~~criteria-related-to-the-hazard-classification-of-the-proposed-dam-and-construction-criteria-which-may-be~~ DAM, SPILLWAY, AND CONSTRUCTION REGULATIONS established by ~~regulation~~ pursuant to this article. SUCH CRITERIA MAY INCLUDE LESS STRINGENT REQUIREMENTS THAN THOSE DICTATED BY CONSIDERATION OF PROBABLE MAXIMUM PRECIPITATION. The state engineer shall issue his written decision regarding the approval of plans and specifications within one hundred eighty days of submittal to him. The state engineer ~~shall act-as-consulting-engineer-during-the-construction---thereof---and~~ shall have authority to require the material used and the work of construction to be accomplished in accordance with regulations which the state engineer may establish. No work shall be deemed complete until the state engineer

Summary of Changes

(3) In (3) under existing law the State Engineer is to be guided by the "hazard classification" of the proposed dam and criteria which may be established by regulation pursuant to Article 87. The committee proposes to require that the engineer is to be guided by "dam, spillway and construction regulations which may be established pursuant to Article 87." The State Engineer is authorized to allow design standards to be less stringent than those that would be dictated by the probable maximum precipitation (see the discussion thereon on page 2 of the committee's report). Finally the reference to having the State Engineer act as consulting engineer is deleted.

Current Law

render his written decision regarding acceptance within sixty days of notification by the owner that construction has been completed.

(4) No alteration, modification, repair, or enlargement of a reservoir or dam which will affect the safety of the structure shall be made without prior written notice and approval in accordance with this section to the state engineer. The state engineer shall notify in writing every county and municipality downstream of the proposed reservoir or dam project which may be affected by or have an interest in the project. General maintenance and ordinary repairs not affecting safety shall be excluded from the terms of this subsection (4).

37-87-106. Fees collected by the state engineer. (1) The owner of a

Committee Proposal

furnishes to the owners of such structures a written statement of ~~the--work--of construction--and--the---full---completion thereof,--together-with-his~~ acceptance, of ~~the-same,~~ which statement shall specify the dimensions of such dam and capacity of such reservoir. The state engineer shall render his written decision regarding acceptance within sixty days of WRITTEN notification by the owner that construction has been completed.

(4) No alteration, modification, repair, or enlargement of a reservoir or dam which will affect the safety of the structure shall be made without prior written notice and approval in accordance with this section to the state engineer. The state engineer shall notify in writing every county and municipality downstream of the proposed reservoir or dam project which may be affected by or have an interest in the project. General maintenance, ~~and~~ ordinary repairs, OR EMERGENCY ACTIONS not ~~affecting~~ IMPAIRING safety shall be excluded from the terms of this subsection (4).

37-87-106. Cost of inspections and observation. (1) The ~~owner---of---~~a

Summary of Changes

Subsection (4) is essentially the same as existing law but language is added to clarify that emergency actions not impairing safety do not require prior notice to the state engineer.

37-87-106. In subsection (1) the language in the current law may be unclear. That is, by referencing the

reservoir specified in section 37-87-105 shall pay to the state engineer a fee not to exceed one hundred twenty-five dollars per day for each such inspection.

~~reservoir specified in section 37-87-105 OWNERS OF DAMS OR RESERVOIRS shall pay to the state engineer a fee EXPENSES INCURRED IN MAKING SAFETY INSPECTIONS, INCLUDING EXPENSES FOR ANY QUALIFIED PERSON APPOINTED BY HIM TO PERFORM INSPECTIONS OR CONSTRUCTION OBSERVATION, not to exceed one hundred twenty-five dollars per day for each such inspection DAY NECESSARILY EMPLOYED FOR SUCH PURPOSES. ANY ADDITIONAL COSTS OF INSPECTIONS PAID OUT OF STATE FUNDS ARE DEEMED NECESSARY TO INSURE PUBLIC SAFETY.~~

inspection fee to section 105 (above) concerning approval of reservoir plans it might be argued that the inspection fee was only for new reservoirs. The committee's revision attempts to clarify that the single \$125 fee is for all inspections. The last sentence makes a declaration that costs paid from the state's general fund are deemed necessary to insure public safety. Apparently, the \$125 fee is not intended to be adequate to fully cash fund the program.

Subsection (2) is deleted by the committee's bill because in section 37-80-110 (1) (e), C.R.S., the state engineer is empowered to charge \$2.00 for each \$1,000 or fraction thereof of the estimated cost of a project for the examination and filing of each set of plans required by law. The maximum amount that may be charged is \$200.

(2) Anyone who submits plans for a reservoir in compliance with section 37-87-105 shall pay to the state engineer a fee not to exceed two hundred dollars.

~~(2) Anyone who submits plans for a reservoir in compliance with section 37-87-105 shall pay to the state engineer a fee not to exceed two hundred dollars.~~

37-87-107. Amount of water to be stored. The state engineer shall annually determine the amount of water which is safe to impound in the several reservoirs within this state, and it is unlawful for the owners of any reservoir to store in said reservoir water in excess of the amount so determined by the state engineer to be safe.

37-87-107. Safety inspections. amount of water to be stored. DAM SAFETY INSPECTIONS SHALL BE MADE ON ALL DAMS WITHIN THE STATE BY QUALIFIED, EXPERIENCED PERSONNEL AS OFTEN AS THE STATE ENGINEER DEEMS NECESSARY OR APPROPRIATE SO THAT A DETERMINATION OF THE AMOUNT OF WATER WHICH IS SAFE TO IMPOUND IN THE RESERVOIR CAN BE MADE BY THE STATE ENGINEER. THE DAM SAFETY INSPECTIONS SHALL INCLUDE, BUT SHALL NOT BE LIMITED TO, REVIEW OF

the state engineer is required to annually determine the amount of water it is safe to impound in every jurisdictional reservoir in the state. Because some reservoirs may need to be inspected more than once annually while some small reservoirs may not need to be inspected more than once every two or even three years, the committee recommends that the annual requirement be deleted. Under the committee's amendment, reservoirs would be inspected as often as the state engineer deems necessary. Minimum requirements for inspection are established and the state engineer is authorized to consider inspection reports from other qualified persons.

PREVIOUS INSPECTIONS, REPORTS AND DRAWINGS, SITE INSPECTION OF THE DAM, SPILLWAYS, OUTLET FACILITIES, SEEPAGE CONTROL, AND MEASUREMENT SYSTEM, AND PERMANENT MONUMENT OR MONITORING INSTALLATIONS. BASED UPON INSPECTION REPORTS AND OTHER INFORMATION AFFECTING THE SAFETY OF EACH DAM, the state engineer shall annually determine the amount of water which is safe to impound in the ~~several reservoirs within this state, and~~ RESERVOIR. It is unlawful for the owners of any reservoir to store in said reservoir water in excess of the amount so determined by the state engineer to be safe.

37-87-108. Withdrawal of excess water. In the event of the owners of any such reservoir impounding water therein to a depth greater than that determined by the state engineer to be safe, it is the duty of the division engineer of the district wherein such reservoir is located to forthwith proceed to withdraw from said reservoir so much of the water as shall be in excess of the amount so determined by the state engineer to be safe, and shall close the inlets to the same to prevent

37-87-108. Withdrawal of excess water. ~~In--the-event-of~~ IF the owners of any such reservoir ~~impounding~~ IMPOUND water therein to a depth greater than that determined by the state engineer to be safe, it is the duty of the division engineer of the district wherein such reservoir is located to forthwith proceed to withdraw from said reservoir so much of the water as shall be in excess of the amount so determined by the state engineer to be safe, and THE DIVISION ENGINEER

37-87-108. The major change suggested in section 108 would make it clear that the state engineer can recover any cost his office incurs in rectifying a failure by the owner to comply with the engineer's order to withdraw water. Such costs are recoverable by a suit for civil damages.

Current Law

said reservoir from being refilled to an amount beyond what said state engineer has designated as being safe. In the event of the owners of said reservoir, or any other persons, interfering with the division engineer in the discharge of said duty, the said division engineer shall call to his aid such persons as he deems necessary, and employ such force as the circumstances demand to enable him to comply with the requirements of this section.

Committee Proposal

shall close the inlets to the same to prevent said reservoir from being refilled to an amount beyond what said state engineer has designated as being safe. ~~In the---event--of~~ IF the owners of said reservoir, or any other persons, ~~interfering~~ INTERFERE with the division engineer in the discharge of said duty, the said division engineer shall call to his aid such persons as he deems necessary and employ such force as the circumstances demand to enable him to comply with the requirements of this section. ANY COSTS INCURRED BY THE STATE ENGINEER IN RECTIFYING A FAILURE OF COMPLIANCE BY THE OWNER MAY BE RECOVERED IN A SUIT FOR CIVIL DAMAGES.

Summary of Changes

37-87-109. Complaint that reservoir is unsafe. Upon complaint being made to the state engineer by one or more persons residing or having property in such a

37-87-109. Section 37-87-109 is not amended.

location that their homes or property would be in danger of destruction or damage in the event of a flood occurring on account of the breaking of the embankment of any reservoir within the state, that said reservoir is in an unsafe condition, or that it is being filled with water to such an extent as to render it unsafe, it is the duty of the state engineer to forthwith examine said reservoir and determine the amount of water it is safe to impound therein. If, upon such examination, the state engineer finds that said reservoir is unsafe, or is being filled with water to such an extent as to render it unsafe, it is his duty to immediately cause said water to be drawn from said reservoir to such an extent as will, in his judgment, render the same safe. If water is then flowing into said reservoir, he shall cause it to be discontinued.

37-87-110. Engineer may use force.

The state engineer is authorized to use such force as is necessary to perform the duties required of him in section 37-87-109, and to have and exercise all of

37-87-110. Engineer may use force.

The state engineer is authorized to use such force as is necessary to perform the duties required of him in section 37-87-109 and to have and exercise all of

37-87-110. As provided above by the changes in section 37-87-108, the amendments proposed to this section also authorize the state engineer to recover any expenses incurred during enforcement actions.

Current Law

the powers conferred upon the division engineer by section 37-87-108. If, after any of such reservoirs have been examined by said state engineer, the owners thereof, or any other person, fills or attempts to fill them, or any of them, to a point in excess of the amount the state engineer has determined to be safe, then it is the duty of the division engineer of the district wherein such reservoir is located to proceed as directed by section 37-87-108.

-34-

37-87-111. Expense of examination.
The person calling upon the state engineer to perform the duty required of him by section 37-87-109 shall pay him in advance

Committee Proposal

the powers conferred upon the division engineer by section 37-87-108. If, after any of such reservoirs have been examined by said state engineer, the owners thereof, or any other person, fills or attempts to fill them, or any of them, to a point in excess of the amount the state engineer has determined to be safe, then it is the duty of the division engineer of the district wherein such reservoir is located to proceed as directed by section 37-87-108. ALL DIRECT, ACTUAL, AND NECESSARY EXPENSES INCURRED IN PERFORMING ANY ACTION AUTHORIZED BY THIS SECTION SHALL BE RECOVERABLE BY THE STATE ENGINEER FROM THE OWNER OF THE AFFECTED RESERVOIR AND IF NOT REIMBURSED MAY BE COLLECTED BY ACTION BROUGHT BY THE STATE ENGINEER IN THE DISTRICT COURT OF THE COUNTY IN WHICH THE RESERVOIR, OR PART THEREOF, IS LOCATED.

37-87-111. Expense of examination.
The person calling upon the state engineer to perform the duty required of him by section 37-87-109, IF THE REQUEST IS

Summary of Changes

37-87-111. Section 37-87-109 (above) directs the state engineer, upon complaint that a dam is unsafe, to inspect said reservoir. Current law allows the state engineer to recover the costs of such inspection. The amendment adds a provision that

Current Law

when requested or invoiced expenses, as provided in section 37-87-106, and mileage at the rate of ten cents per mile for each mile actually and necessarily traveled in going to and from said reservoir, and should the state engineer find upon examination that such reservoir is in an unsafe condition, the owners thereof shall be liable for all expenses incurred in such examination.

37-87-112. Appeal from decision of engineer. In the event of either party being dissatisfied with the decision of the state engineer, he may take an appeal to the district court of the county wherein said reservoir is located, and said court shall hear and determine the matter summarily at the earliest practicable time without written pleadings or the aid of a jury, subject to the right of either party to take an appeal as in other civil cases; except that the judgment of the state engineer shall control until final determination of the cause.

Committee Proposal

FRIVOLUOUS OR MADE IN BAD FAITH, shall pay him ~~in advance when requested or~~ ANY invoiced expenses, as provided in section 37-87-106, and mileage at the rate ~~of ten cents per mile~~ PREVAILING FOR STATE OFFICERS AND EMPLOYEES UNDER SECTION 24-9-104, C.R.S., for each mile actually and necessarily traveled in going to and from said reservoir, and, should the state engineer find upon examination that such reservoir is in an unsafe condition, the owners thereof shall be liable for all expenses incurred in such examination.

37-87-112. Review of action of state engineer. Any action of the state engineer under section 37-87-110 shall be subject to review in a de novo proceeding commenced by complaint of the owner in the district court in and for the county where the affected structure is located. When the state engineer has directed that certain measures shall be taken immediately for the protection of the public safety, any such judicial proceeding shall be accelerated on the court's calendar and determined immediately upon the conclusion of such

Summary of Changes

such costs are recoverable only if it is determined that the request was frivolous or made in bad faith. The amendment also changes the rate per mile which can be charged from ten cents to the mileage rate prevailing for state employees.

~~37-87-112.~~ This section is repealed and reenacted by the committee's bill. Under the committee's proposal, any action of the state engineer in which he forceably acts to withdraw water from a reservoir is subject to a de novo review in the district court in the county where the reservoir is located. If the state engineer has directed that measures must be taken immediately to protect public safety such proceedings are to be accelerated on the court's calendar and determined immediately. The action and judgment of the state engineer shall control until final determination by the court.

Current Law

Committee Proposal

Summary of Changes

proceeding. The judgment and action of the state engineer shall control until final determination of the cause.

37-87-113. Breakage of reservoir - damages. None of the provisions of sections 37-87-105 to 37-87-114 shall be construed as relieving the owners of any such reservoir from the payment of such damages as may be caused by the breaking of the embankments thereof, but, except as provided in section 37-87-104 (2), in the event of any such reservoir overflowing, or the embankments, dams, or outlets breaking or washing out, the owners thereof shall be liable for all damage occasioned thereby.

37-87-113. Section 37-87-113 is not amended.

37-87-114. Penalty - disposition of fines. Any reservoir company failing or refusing, after ten days' notice in writing has been given, to obey the directions of the state engineer as to the construction or filling of any reservoir shall be subject to a fine of not less than two hundred dollars for each offense, and each day's continuance after time of notice has expired shall be considered a

37-87-114. Penalty - disposition of fines. (1) Any ~~reservoir-company~~ OWNER OR OPERATOR failing or refusing, after ~~ten~~ ^{days} notice in writing has been given, to obey the directions of the state engineer as to the construction or ~~filling~~ OPERATION of any reservoir shall be subject to a fine of not less than ~~two~~ FIVE hundred dollars for each offense, and each day's continuance after time of

37-87-114. This section increases the fine for failure to obey the directions of the state engineer from \$200 to \$500 for each offense.

Subsection (2) sets forth procedures allowing the attorney general to proceed against an owner for refusing, after written notice, to obey the orders of the state engineer.

Current Law

separate offense. Such fines shall be recovered by civil action in the name of the people, by the district attorney, upon the complaint of the state engineer, in the county where the injury complained of occurred. The proceeds of all fines, after payment of costs and charges of the proceedings, shall be paid into the county treasury for the use of the general fund of the county.

Committee Proposal

notice has expired shall be considered a separate offense. Such fines shall be recovered by civil action in the name of the people by the district attorney, upon the complaint of the state engineer, in the DISTRICT COURT OF THE county where the injury complained of occurred. The proceeds of all fines, after payment of costs and charges of the proceedings, shall be paid into the county treasury for the use of the general fund of the county.

Summary of Changes

(2) UPON THE COMPLAINT OF THE STATE ENGINEER, THE ATTORNEY GENERAL IS AUTHORIZED TO COMMENCE PROCEEDINGS AGAINST ANY RESERVOIR OWNER FOR REFUSING, AFTER NOTICE IN WRITING HAS BEEN GIVEN, TO OBEY THE DIRECTIONS OF THE STATE ENGINEER AS TO THE CONSTRUCTION OR OPERATION OF ANY RESERVOIR TO SECURE COMPLIANCE WITH ANY SUCH DIRECTION IN THE DISTRICT COURT WHEREIN ANY PORTION OF SUCH RESERVOIR IS LOCATED PURSUANT TO THE COLORADO RULES OF CIVIL PROCEDURE; EXCEPT THAT, IF IT APPEARS TO THE COURT THAT THE PUBLIC SAFETY IS IN JEOPARDY AS THE RESULT OF A FAILURE TO OBEY THE DIRECTIONS OF THE

STATE ENGINEER, IT SHALL EXPEDITE THE PROCEEDINGS SO THAT DETERMINATIONS MAY BE MADE WITH RESPECT TO THE DIRECTIONS OF THE STATE ENGINEER COMMENCING NOT LATER THAN TWENTY DAYS FROM THE SERVICE OF THE COMPLAINT ON THE OWNER OR OPERATOR OF A RESERVOIR.

37-87-114.5. Applicability of provisions - exemptions. The provisions of sections 37-87-105 to 37-87-114 shall apply only to dams which are designed, constructed, operated, and maintained for the purpose of storing water. These provisions shall not apply to an obstruction in a canal used to raise or lower water therein, a levee, a railroad fill or structure, a road or highway fill or structure, or a mill tailings impoundment structure permitted under article 32 or 33 of title 34, C.R.S.

37-87-114.5. Section 114.5 is new. It makes it clear that the state engineer's jurisdiction under sections 37-87-105 to 37-87-114 apply only to dams which are intended to store water. Railroad fills, roads and highways, levees, and mill tailings ponds are not under the engineer's jurisdiction.

37-87-115 through 37-87-123. NOTE that these sections are not amended and are therefore not reproduced herein.

Current Law

Committee Proposal

Summary of Changes

37-87-124. Notice of intent to construct impoundment structure. Any person proposing to construct a reservoir for the purpose of storing water, other than a reservoir specified in section 37-87-105 (1) or a livestock water tank as described in section 35-49-103, C.R.S., shall submit notice thereof to the state engineer prior to the beginning of any construction. Such notice shall include the location of such proposed reservoir with reference to section, township, and range and the dimensions of the reservoir, the dam, and the spillway. If any reservoir is constructed without the notice required by this section, the state engineer may prohibit the storage of water in such reservoir or direct the withdrawal of water from such reservoir.

37-87-124. This section is new. It requires that anyone who proposes to construct a reservoir of any size for the purpose of storing water to notify the state engineer prior to beginning construction.

BILL 40

A BILL FOR AN ACT

1 CONCERNING THE RESTRICTION OF FACILITIES WITHIN RESERVOIRS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Makes it unlawful for any person, including any state or federal agency, quasi-municipal corporation, or political subdivision, to construct any permanent recreational or other facility within a reservoir below the high water level of the reservoir unless such facility would not be damaged by water or is necessary to the operation of the reservoir. Exempts existing facilities.

Directs the state engineer to order the removal of any facility in violation of such provision.

2 Be it enacted by the General Assembly of the State of Colorado:

3 SECTION 1. Article 87 of title 37, Colorado Revised
4 Statutes, as amended, is amended BY THE ADDITION OF A NEW
5 SECTION to read:

6 37-87-124. Restriction of facilities within reservoirs.

7 (1) The general assembly hereby declares that the prevention
8 of seasonal flooding which causes destruction of property and
9 crops, loss of livestock, and risk or loss of human life is

1 manifestly of greater concern and benefit to this state than
2 the availability of recreational facilities and other
3 facilities, not functionally related to the operation of the
4 reservoir, constructed below the high water level of a
5 reservoir.

6 (2) In order to achieve the purposes of subsection (1)
7 of this section, it is unlawful for any person, including any
8 state or federal agency, quasi-municipal corporation, or
9 political subdivision, to construct any permanent recreational
10 or other facility within a reservoir below the high water
11 level of the reservoir unless such facility would not be
12 damaged by high water or is necessary to the operation of the
13 reservoir. This subsection (2) shall not apply to facilities
14 completed before March 1, 1984, but shall apply to any
15 enlargement or remodeling of such facilities.

16 (3) The state engineer shall order the removal of any
17 facilities constructed, enlarged, or remodeled in violation of
18 this section. Such order may be appealed by the affected
19 person or enforced by the state engineer pursuant to article 4
20 of title 24, C.R.S.

21 SECTION 2. Safety clause. The general assembly hereby
22 finds, determines, and declares that this act is necessary
23 for the immediate preservation of the public peace, health,
24 and safety.

BILL 41

A BILL FOR AN ACT

1 CONCERNING LIABILITY OF THE FEDERAL GOVERNMENT FOR DAMAGE
2 CAUSED BY WATER ESCAPING FROM FEDERALLY-OWNED RESERVOIRS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Specifies that the word "owner" includes the federal government for purposes of the statutory section which makes reservoir owners liable for damages arising from leakage, overflow, or breaking of the embankments.

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. 37-87-104 (3), Colorado Revised Statutes, as
5 amended, is amended to read:

6 37-87-104. Liability of owners for damage. (3) As used
7 in this section, the word "owner" does not include public
8 entities or public employees as defined in the "Colorado
9 Governmental Immunity Act", article 10 of title 24, C.R.S. THE
10 WORD "OWNER" DOES INCLUDE THE FEDERAL GOVERNMENT AND ANY

1 AGENCY OR INSTRUMENTALITY THEREOF.

2 SECTION 2. Safety clause. The general assembly hereby
3 finds, determines, and declares that this act is necessary
4 for the immediate preservation of the public peace, health,
5 and safety.

APPENDIX A

TOUR ITINERARY
Monday, August 15

Approximate
Elapsed Times

- 7:30 - 8:15 a.m. -- Capitol to Stanley Reservoir
- Route: I-25 to Boulder Turnpike; Boulder Turnpike to Sheridan Blvd; Sheridan Blvd to 88th Ave; 88th Ave. west to Kipling Blvd. and Stanley
- 8:15 - 8:30 a.m. -- Stanley Reservoir (Stop at the reservoir)
- 8:30 - 9:15 a.m. -- Stanley Reservoir to Boulder Reservoir
- Route: Kipling Blvd. east to Wadsworth Blvd; Wadsworth Blvd. north to Boulder Turnpike; Boulder Turnpike to the Boulder/Longmont diagonal (Colo 119); Boulder diagonal to Reservoir Road.
- 9:15 - 9:35 a.m. -- Boulder Reservoir to Left Hand Valley Reservoir. (Stop at Left Hand Valley)
- Route: Boulder Reservoir Road (County Road). North and west from Boulder Reservoir.
- 9:35 - 9:55 a.m. -- Left Hand Valley Reservoir to site of Gere Canyon Dam.
- Route: County Road west to Colo. 36; Colo 36 north to dam site. En route view several stock ponds and other small reservoirs
- 9:55 - 10:15 a.m. -- Gere Dam site to Coffin Top Dam site.

Route: Colo 36 to Lyons; west on Colo. 7 to dam site (approximately 1 mile).

10:15-10:25 a.m. -- Coffin Top site to McCall Reservoir (Longmont).

Route: Colo 7 east to Lyons and Colo 66; Colo. 66 east to site. (Drive around reservoir)

10:25-11:00 a.m. -- McCall Reservoir to Handy (Welch) Reservoir

Route: East to U.S. 287 - then north to one-half mile from Berthoud. Turn north on county roads to Handy (Welch). (Stop at the reservoir)

11:15-11:45 a.m. -- Welch to Fossil Creek Reservoir

Route: North then east on county roads to Campion; Campion east to I-25 (exit 255); I-25 north to exit 262 and Fossil Creek.

11:45-12:30 p.m. -- Fossil Creek to Loveland via Horseshoe and Boyd Reservoirs. (Lunch).

Route: West on County Roads to U.S. 34; west to the Dude Corral Restaurant and Lake Loveland.

12:30 - 2:00 p.m. -- Lunch -- Bureau of Reclamation slide show on Lawn Lake; City of Loveland review - Lake Loveland

2:00 - 3:00 p.m. -- Loveland Reservoir to Flatirons Reservoir and Bureau of Reclamation System Control Center. (Stop) Tour of Power Plant and Control Center.

Route: South on County Road to U.S. 34; west on U.S. 34 about 3 miles to Masonville Road; south on Masonville Road to Flatirons Road. Flatirons Road west to Reservoir and Control Center.

3:15 - 6:30 p.m. -- Flatirons Reservoir to Granby

Route: Reverse of entry to Flatirons to U.S. 34; U.S. 34 to Granby via Rocky Mt. National Park. En route view Olympus Dam (Lake Estes); Cascade Dam failure (Debris Fan) and Lawn Lake failure (debris fan).

Tuesday, August 16

Approximate
Elapsed Times

8:00 - 8:05 a.m. -- Granby to Windy Gap Dam and Pump Station.

Route: West on U.S. Hwy. 40 to Windy Gap.

8:10 - 8:35 a.m. -- Windy Gap to Williams Fork Dam.

Route: West on U.S. 40 to Parshall; south on Williams Fork Road; left on paved road; bear left and cross Colorado River, turn right on single-lane road to Williams Fork Dam headquarters. (Stop at dam).

8:50 - 9:50 a.m. -- Williams Fork Dam to AMAX's Henderson Mine Tailings Ponds. (mill).

Route: South on gravel road to Tailings Ponds and Mill site. Tour of area and mill.

9:50 - 10:50 a.m.

-- AMAX mill to Dillon

Route: South and west of mill site over UTE Pass to Colorado 9; south on Colo. 9 to Dillon; at Dillon turn east on U.S. 6 to Dillon Dam Headquarters.

10:50 - 12:00

-- Tour of Dillon Dam.

12:00 - 1:00 p.m.

-- Lunch at the Best Western Motel, Frisco.

1:00 - 1:40 p.m.

-- Dillon to Montgomery Reservoir

Route: I-70 west to Colo 9 then north up the Blue River to Montgomery Reservoir (south side of Hoosier Pass). En route view Goose Pasture Tarn.

1:40 - 2:15 p.m.

-- Montgomery Reservoir to Antero Reservoir - Stop

Route: Colo. 9 south to Junction with U.S. 24; west (right) on U.S. 24 to Antero Reservoir Road.

2:30 - 3:05 p.m.

-- Antero Reservoir to Spinney Mountain Dam. Stop at dam.

Route: Return to U.S. 24; east on U.S. 24 to Gravel Road; turn right; at junction bear left; at next junction turn right to junction with access road to dam.

3:20 - 4:25 p.m.

-- Spinney Mountain Dam to West Creek Lake. Stop at dam (Failure)

Route: Return to U.S. 24 east on U.S. 24 to Woodland Park; north (left) on Colo. 67 to West Creek Lake.

4:40 - 6:15 p.m.

-- West Creek Lake to State Capitol

Route: Colo 67 north to Pine Junction; north and east on U.S. 285 to Denver

APPENDIX B

Tour Participants

Committee and Staff

Sen. Bishop
Rep. Younglund
Sen. Sandoval
Sen. Soash
Rep. Bryan
Rep. Dambman
Rep. Davoren
Rep. Dyer
(not overnight)
Rep. Entz
Rep. Lucero
Rep. Underwood
Wally Pulliam (staff)
Larry Thompson (staff)

Other Legislators

Rep. Brown

Other State Officials

Jeris Danielson
Alan Pearson

Interested Persons

John Munn
Dick MacRavey (CWC)
Karen Reinertson (C.C.)
Dodie Gale (Sp. Dist)
Diane Rees (2nd day) (AMAX)
Ed Pokorney (DWB)
Karen Knutson (LWV)
Mary Anne Ivey (C. Contractors)

Resource People

Albert Sack and Ron Holley
Farmers Reservoir and Irrigation Co.

Jerry Trotter, Bob Brand & James Cinea
St. Vrain and Left Hand Water
Conservancy District

Larry Simpson and Greg Loffett
Northern Colorado Water Conservancy
District

Donald Mulligan, Supt. Water
Regulation and Treatment
Colorado Springs Dept. of Utilities

Bob Berling
Bureau of Reclamation
South Platte River Projects

Bill Tolle, Deputy Manager
John Dickel, Engineer,
Denver Water Department

APPENDIX C

SUMMARY OF DAM SAFETY PROGRAMS RESPONSES

STATE	REVIEWS & APPROVES PLANS	INSPECTS DURING CONSTRUCTION	ISSUES PERMIT TO IMPOUND	PERIODICALLY INSPECTS	REQUIRES REMEDIAL WORK	ADOPTS RULES & REGULATIONS	REQUIRES FEE OR BOND	REQUIRES EMERGENCY PREPAREDNESS PLAN
ALABAMA	NO	NO	NO	NO	NO	NO	NO	NO
ALASKA	YES	NO	NO	NO	YES C	YES	YES	NO
ARIZONA	YES	YES	YES	YES	YES	YES	YES	NO C
ARKANSAS	YES	YES	YES	YES	YES	YES	YES	NO
CALIFORNIA	YES	YES	YES	YES	YES	YES	YES	YES C
COLORADO	YES	YES	NO	YES	YES	YES	YES	NO
CONNECTICUT	YES	NO C	YES	NO	YES	NO C	NO	NO C
DELAWARE	NO	NO	NO	NO	NO	NO	NO	NO
FLORIDA	NO C	NO C	NO C	NO C	NO C	PENDING	NO	NO
GEORGIA	YES C	YES C	YES C	YES C	YES	YES	NO	YES
HAWAII	NO	NO	NO	NO	NO	NO	NO	NO
IDaho	YES	YES	YES	YES	YES	YES	YES C	YES
ILLINOIS	YES	YES	YES C	YES C	YES	YES	YES	NO
INDIANA	YES	NO	NO	YES	YES	NO	NO	NO
IOWA	YES	NO	YES C	YES C	YES	YES	YES C	NO
KANSAS	YES C	YES C	NO	NO	YES	NO	NO	YES C
KENTUCKY	YES	YES	YES	YES	YES	YES	NO	NO
LOUISIANA	YES	YES	YES	YES	YES	YES	NO	NO
MAINE	NO C	NO	NO C	NO C	NO	YES C	NO	NO
MARYLAND	YES	YES	NO C	YES	YES	YES	NO C	NO C
MASSACHUSETTS	YES	YES	YES	YES	YES	PENDING	NO	YES
MICHIGAN	YES	YES	NO	NO	NO	NO	YES	NO
MINNESOTA	YES	YES	YES	YES	YES	YES	NO	YES C
MISSISSIPPI	YES C	NO C	YES C	YES C	YES	YES	NO	NO C
MISSOURI	YES	YES	YES	YES	YES	YES C	NO	YES
MONTANA	NO	NO	NO	NO	NO	NO	NO	NO
NEBRASKA	YES	YES	YES C	YES	YES	YES	NO	YES C
NEVADA	YES	NO	YES	NO	YES	YES	NO	NO
NEW HAMPSHIRE	YES	YES	NO	YES	YES	YES	NO	YES
NEW JERSEY	YES	YES	YES	YES	YES	PENDING	NO	YES
NEW MEXICO	YES	YES	YES	YES	YES	YES C	YES	NO
NEW YORK	YES	NO	NO	YES	YES	NO	NO	YES
NORTH CAROLINA	YES	YES	YES	YES	YES	YES	NO	YES C
NORTH DAKOTA	YES	YES	YES	YES	YES	NO	NO	NO
OHIO	YES	YES	YES C	YES	YES	YES	YES	YES
OKLAHOMA	YES	NO	NO	NO	YES	YES	YES	NO
OREGON	YES	YES	NO C	YES	YES	YES	NO	NO
PENNSYLVANIA	YES	YES	YES C	YES	YES	YES	YES	YES
RHODE ISLAND	YES	YES	YES	YES	YES	NO C	YES	NO
SOUTH CAROLINA	YES	YES	YES	YES	YES	YES	NO	YES
SOUTH DAKOTA	NO	NO	NO	YES	YES	YES	NO	NO
TENNESSEE	YES	YES	YES	YES	YES	YES	YES	N/R
TEXAS	YES	YES	YES	YES	YES	YES	NO	NO
UTAH	YES	YES	YES	YES	YES	YES	NO	NO
VERMONT	YES	YES C	YES	YES C	YES	NO C	YES C	NO C
VIRGINIA	YES	NO C	YES C	YES C	YES	YES	NO	YES
WASHINGTON	YES	YES C	NO C	NO C	YES C	YES C	NO C	YES C
WEST VIRGINIA	YES	YES	NO	YES	YES	YES	YES	YES
WISCONSIN	YES	YES C	NO C	YES C	YES	YES	YES	YES
WYOMING	YES	YES	NO C	YES	YES	YES	YES	YES C

LEGISLATIVE COUNCIL
COMMITTEE ON THE PERSONNEL SYSTEM

Members of the Committee

Rep. James Robb,
Chairman
Sen. Claire Traylor,
Vice Chairman
Sen. James Brandon
Sen. Regis Groff
Sen. Barbara Holme
Sen. Ray Powers

Rep. Richard Castro*
Rep. George Chavez
Rep. Bob Martinez
Rep. Scott McInnis
Rep. Peter Minahan
Rep. Betty Neale
Rep. Arie Taylor
Rep. Mary Anne Tebedo

Council Staff

David Hite
Principal Analyst

Jim Hill
Research Associate

Doug Hock
Senior Research Assistant

Legislative
Drafting Staff

Pat Boyle
Senior Staff Attorney

John Berry
Staff Attorney

* Representative Richard Castro resigned in October, 1983 and was replaced by Representative George Chavez.

SUMMARY OF COMMITTEE FINDINGS AND RECOMMENDATIONS

This committee was created by Senate Joint Resolution No. 19 for the purpose of studying the state's personnel system, with a specific focus on the following:

- a) the constitutional and statutory roles of the State Personnel Board and the Department of Personnel;
- b) compensation, including, but not limited to, salary and fringe benefits and classification; and
- c) the conduct of, and techniques involved in, the development of the state's annual salary survey.

Although the personnel system has been examined on a nearly annual basis by committees of the legislature and special ad hoc task forces established by the governor, and an uncommonly large number of recommendations have resulted from these studies (and have often been implemented by the legislature or administrators of the system), the 1983 interim committee concluded that problems still exist within the state's personnel system.

Much of the criticism of the personnel system is the result of an inability by the state Department of Personnel and the State Personnel Board to provide the kinds of services that are needed and used by administrators and employees. Both improvements in statutory law and changes in the provisions of the constitution need to be made to make the personnel system more responsive to the needs of management.

As a result of its study, the committee recommends removal of nearly all of the language presently found in the constitution including the rule of three, the creation of the State Personnel Board and the Department of Personnel, the list of positions exempt from the personnel system, and the residency requirement for all appointees to the system.

The committee considered only those modifications to the statutes which would not conflict with the present language of the constitution. Statutory changes address the following areas: 1) a shift of responsibilities from the State Personnel Board to the personnel director, as a means of clarifying the roles of the two entities (pages 66-68); 2) modifications to the compensation and classification system (pages 68-71); and 3) a revision of the employee appeals process (pages 71-74).

BACKGROUND REPORT

A Short History of Legislative Concern with the Personnel System

The bench marks in the history of Colorado's personnel system are voter adoption of a constitutional amendment establishing a civil service system (1918), the approval of a veterans' preference provision (1944), and the up-dating of the system in recognition of the need for a more flexible administration while at the same time retaining the safeguards that were necessary to prevent the spoils system and protect essential employee rights (1970).

The 1970 constitutional amendment was part of a concerted effort to modernize the executive branch of state government. State government grew considerably during the 1950's and early 1960's but without an accompanying change in the structure and administrative practices of the executive branch that were necessary to deal with the pressures of growth. A significant step was finally taken in 1966 with the adoption of a constitutional amendment to realign the executive branch into no more than twenty departments. The amendment was meant to attain several objectives; primary among them were a reasonable span of control for the governor and placing executive branch authority under the control of the governor rather than in the hands of elected administrative officials.

One of the basic organizational principles not resolved in 1966 was recognition of a governor's cabinet. This issue, along with the modernization of the state personnel system was addressed, however, in 1970 with the adoption of two separate constitutional amendments. One amendment exempted department heads from the personnel system and the second gave constitutional recognition to a personnel department and a personnel board. The second amendment also detailed many component provisions of a new state personnel system.

Since 1970, there have been numerous studies (in excess of a dozen) of the personnel system conducted by legislative committees, staff agencies of the General Assembly, public interest organizations, and the executive branch. These studies contain large numbers of recommendations, many of which have been implemented through legislative or administrative processes. In addition, constitutional amendments dealing with the personnel system have been debated by the General Assembly. The parade of studies of the state personnel system continued during 1983.

1983 Study Activities

Three studies of the state personnel system were conducted in 1983; two by ad hoc groups established by the governor and a third, an interim legislative committee study initiated by the General Assembly.

Higher Education Task Force Report

In February, 1983, Governor Lamm appointed a higher education task force to examine the problem of "the dual personnel system (e.g., classified and non-classified) in the institutions of higher education" in Colorado, and "to develop some solutions that meet the many concerns of all those in the higher education community."

Dr. Robert Dickeson, task force chairman and president of the University of Northern Colorado, reported to the legislative interim committee that the group concluded no meaningful correction of the personnel system's problems could occur without changing the state's constitution. The task force found that Colorado's constitution is overly specific and prescriptive in regard to the personnel system and, as a result, recommended changes to the constitution, as well as modification to the statutes. These changes included:

- fully fund the annual salary survey results as well as allow geographical differences in prevailing rates;
- authorize higher education governing boards to establish salary rates for classified employees;
- authorize higher education institutions to furlough classified employees and contract for certain services; and
- allow higher education governing boards to define exempt personnel.

State Compensation Task Force Report

Governor Lamm also appointed a state personnel compensation task force to evaluate the existing compensation system for all state employees. The major findings of the task force as reported to the interim legislative study committee included:

- a "blurring of authority" exists between the State Personnel Board and the Department of Personnel. The board, an appellate body with legislative functions, intrudes into the administrative area delegated to the Department of Personnel by statute;
- the division between classified and exempt employees contains inherent compensation inequities; and
- employee appeals have become a major hurdle to the smooth operation of the personnel system.

The state compensation task force concluded that:

- the state's compensation plan needs to provide incentives for exceptional performance;

- compensation appeals should be limited to selection and definition of key classes, relationships to key classes, and survey methodology; and
- several changes should be made with regard to salary surveys. A "competitive" rather than a "prevailing" wage standard would provide greater flexibility in implementing the annual salary survey results. Geographic salary surveys would reflect more accurately labor market variations throughout Colorado. Major occupational pay plans should be established to maintain competitive salaries in widely divergent labor markets. Salary increases should be "across the board," based on the average salary increase within each geographic region and each occupational group as determined by the annual geographic salary survey.

Special Report to the Interim Committee

In June of 1983, the General Assembly hired Mr. William Levis, Colorado assistant attorney general, to assist the interim Committee on Personnel for a period of six months. In his function as an assistant attorney general, Mr. Levis argued cases for the Department of Personnel and the personnel board. This experience gave him a thorough knowledge of the constitutional and statutory provisions regarding personnel, the rules, appeals and problems.

Mr. Levis reported to the committee the results of his study in the following areas: other states' constitutional and statutory provisions on personnel; analyzing the needs of Colorado's personnel system and drafting revised constitutional and statutory language; reviewing the appeals processes and recommending ways to improve their efficiency and effectiveness for both employees and management; reviewing personnel board rules in conjunction with the interim committee's findings; and researching, reviewing and making recommendations to improve Colorado's salary survey process.

The findings and recommendations resulting from Mr. Levis' research are compiled in a report, "Modernizing the Colorado Personnel System." This report is on file in the offices of the Legislative Council. An outline of the report is found in Appendix A along with testimony given by Mr. Levis before a meeting of the interim committee.

Interim Committee Proceedings

The committee devoted significant time to discussing the findings and conclusions of the aforementioned task force reports and the work of the committee's special attorney. In addition, the committee received testimony from state administrators and officials as well as employee and veterans' organizations regarding compensation and classification, the constitutional and statutory roles of the State

Personnel Board and the Department of Personnel, the appeals process, and the veterans' preference provisions of the state constitution.

Interim Committee Findings,
Conclusions, and Recommendations

Findings -- A Need for Change

Testimony suggests considerable dissatisfaction with the personnel system. The state director of personnel is concerned with the State Personnel Board's exercise of authority. The personnel board is dissatisfied with the administrative leadership of the personnel system. Administrators of higher education institutions want more control over both classified and nonclassified employees. Employee organizations are concerned with the levels of funding for employee benefits and personnel services and the lack of credibility of the salary survey. Members of the General Assembly express little confidence in the salary survey findings because of the excessive number of appeals and are generally uncomfortable with the personnel board's exercise of its constitutional duties and the department's implementation of its statutory responsibilities. Employees are dissatisfied with salaries and other benefits.

None of the expressed concerns are new, however. Many of the concerns may be attributed to the effects of the state's fiscal picture and uncertainty over the future of a number of functions performed by state government. Documenting the extent of the problems is a difficult task. Case histories are often found to be of the "worst case" variety. The work load statistics which could be used by the Department of Personnel to support a reduction in the personnel board's duties are difficult to analyze and draw conclusions from; and much of the material offered by the Department of Personnel in support of its position to change the statute and constitution is vague, inconclusive and often argumentative. (Appendix B contains workload statistics from the personnel board and responses from the Department of Personnel to questions asked by the committee concerning the department's relationship with the personnel board and the department's desire to see changes in the statutes and constitution. Appendix C includes testimony of the personnel director before the interim committee.)

Nevertheless, there was a common theme in the concern expressed to the committee: services are not being provided and, as a result, modification to the statute is necessary during the 1984 legislative session and fundamental changes to the constitution need to be considered by the legislature for approval by the electorate in the 1984 general election.

Amending the Constitution -- Findings and Conclusions

With reference to the constitution, the committee was informed that Colorado, along with forty-eight other states, bases its legal system on English common law. In theory, this means that Colorado's constitution should contain no more than basic principles of law with the statutes expanding upon those principles and implementation left to administrative agencies. Article XII, sections 13 through 15, which are the state's constitutional provisions regarding the personnel system, are much more detailed than those found in common law states that provide for a personnel system in their constitutions. As a result, attempts to address problems with the system by amending the statutes have often been limited or prevented by constitutional constraints. Senate Bill 308, 1981 session, was the latest comprehensive attempt to address problems within the personnel system but key provisions were ruled unconstitutional by the district court.

The committee found that the constitutional provision granting the personnel board what has been interpreted as exclusive rule-making authority is the language that has caused the greatest difficulty for those administering the personnel system. The common objection is that the constitution grants the board legislative and adjudicatory functions. Thus the board makes rules and interprets them through its authority to hold hearings, rather than allowing the personnel department to make rules and have the board interpret the rules. The personnel director, who is charged by the constitution with administration of the personnel system, emphasized at committee hearings that the constitutional authority and the board's exercise of this authority leads to constant clashes with the personnel department which makes management of the system very difficult.

Another area of confusion is found in the relationship between the personnel director and appointing authorities. While the constitution gives the personnel director administrative duties, it also provides that appointing authorities (those who hire, fire and supervise the activities of employees) execute the rules and statutes. This leads to confusion over the issue of responsibility for implementing the law.

Colorado's constitution contains a rule of three, only one other state -- Louisiana -- has a "selection of new employees provision" in its constitution. All other states provide for selection by law or rule. This provision binds appointing authorities to a rule of selecting among the top three candidates for a position when the trend among the states is toward allowing appointing authorities to select from a larger pool of applicants.

The committee found that a majority of the states do not list exempt positions in the constitution. Instead it is left to the legislative bodies to determine which employees are to be excluded from the state's personnel system. Concern was also reported to the committee over the constitutional restriction placed on the authority

of an executive director to appoint the employees in his department. Currently, executive directors are limited to appointments within their offices and division heads within their departments. In turn, division heads appoint the employees within the various divisions. It is argued that this provision limits the ability of the department head to fully control his department.

The committee determined that the current provision of the constitution which limits temporary appointments to not more than six months may be too restrictive. Testimony was presented that agencies need to hire temporary employees on a seasonal or intermittent basis for longer periods than six months.

Based on testimony received, the committee concluded that personnel provisions of the state constitution are too detailed and restrictive; thus changes in the constitution are necessary.

Approaches to Amending the Constitution

The committee considered three approaches to amending the constitution; veterans' preference, however, would remain unchanged. First, a brief, broad statement providing for a merit system with details of the system to be enacted by law was considered.

A second approach involved minimal constitutional changes. Under this concept, a clear distinction between administrative and appellate authority was made, with administrative and rule-making delegated to the department and appellate review affirmed as a responsibility of the board. Other changes included exempting personnel hearing officers from the personnel system, expanding the rule of three to a rule of ten, designating executive directors as the appointing authorities for all employees within respective departments, and extending temporary employment from six to nine months.

Major changes would be made in the third approach, including the removal of: current provisions listing exempted personnel, the authority of a political subdivision to contract with the state for personnel services, the rule of three, residency requirements, the right to appeal actions against an employee other than disciplinary actions, and the personnel board's rule-making authority. Under the third alternative executive directors would become the appointing authorities for their departments; temporary employment would be extended to one year; and all personnel board members would be appointed by the governor, with one member to be an employee representative.

The committee approved the first approach -- a short, general constitutional provision.

Recommendations for Constitutional Change

The constitutional changes recommended by the committee would affirm a basic constitutional commitment to the merit concept, but remove nearly all of the other current constitutional provisions including:

- a rule of three which provides an appointing authority (executive director of a department or a division head) a choice among the three applicants scoring highest on competitive examinations for a vacant position;
- a residency requirement for all appointees;
- identification of appointing authorities for the purpose of selecting new employees and making initial determinations in dismissal, suspension, and disciplinary proceedings;
- creation of the State Personnel Board and the Department of Personnel and duties assigned to the two entities including the personnel board's authority to promulgate rules governing the personnel system;
- a listing of positions that are exempt from the personnel system (e.g., the Public Utilities Commission, faculty members, legislative employees);
- disciplinary action procedures;
- a prohibition of temporary employment for longer than six months; and
- a provision for probationary periods of up to twelve months for employees initially appointed to state positions.

Subcommittee on veterans' preference. During the committee's deliberations a number of veterans' organizations expressed concern with the conclusion of the Higher Education Task Force report that veterans' preference points should be removed from section 15, article 12 of the constitution and placed in the statutes. This, the report concluded, would make legislative updates of the veterans' preference points more timely and less cumbersome.

Several other changes to the veterans' preference section of the constitution were suggested including:

- change the word "widow" to "surviving spouse" to allow both widows and widowers of veterans to receive five additional points on examinations grades;
- remove an outdated reference to survivors of the Spanish American War;

- remove outdated transition language which was necessary in 1971 to specify that section 15 was to be in full force on and after July 1; and
- include language which provided that the preference section would be subject to applicable federal law on the employment of veterans, including disabled veterans.

At no time during their proceedings did the committee consider removing the veterans' preference points from the constitution. However, to address the concerns of the veterans' groups, the committee chairman appointed a subcommittee to provide a forum for representatives of veterans' organizations to discuss these proposed changes. As a result of this meeting with veteran groups, the subcommittee unanimously recommended that the section addressing veterans' preference remain unchanged. The full membership of the interim committee endorses the recommendation.

Amending the Statutes -- Findings, Conclusions, and Recommendations

The committee decided to address statutory changes which would not conflict with the present provisions of the constitution. Specifically, proposed changes are designed to improve the management of the system; clarify the classification and compensation system; and revise the employee appeals process.

Clarification of Roles

Committee findings and conclusions. One of the objectives of the constitutional amendment which reorganized the state's personnel system was to remove those exercising quasi-judicial responsibilities from involvement in the day-to-day workings of personnel administration. It was believed that this objective could be attained by lodging policy-making and quasi-judicial authority with a part-time board while placing responsibility for administrative functions with a full-time, professional administrator with experience in personnel matters.

Testimony given during the 1983 interim committee meetings indicates that problems have developed with the implementation of the 1970 constitutional amendment. Conflict exists between the personnel board and the personnel director over their division of responsibilities. It was recalled that a special study committee created by executive order in 1980 had identified the issue as follows:

The constitution charges the personnel director with the responsibility for administering the state personnel system within the framework of the constitution, statutes and board rules. The personnel director, although probably possessing

rule-making authority 1/, has consistently relied upon the board to make all rules -- even for the detailed administration of the system. This has worked as an invitation for the board to be the operating head of the department. The board's rules permitting easy appeals from the personnel director's actions effectively withhold from him any final authority. Consequently, his decisions almost routinely are appealed to the board.

Other government systems have sometimes separated quasi-judicial from quasi-legislative functions and similar suggestions have been made in Colorado. The committee does not recommend a complete separation but instead seeks to focus and define the scope of board operations and reemphasize the personnel director's responsibility. It recognizes that, perhaps by necessity, the personnel board has assumed administrative responsibilities properly exercised by the personnel director. The personnel director has failed to exercise his authority to give direction to the system and operating agencies, too, have failed to respond positively. The power balance must be restored. The board should establish general standards for adherence to merit system principles and ensure fair treatment of individuals. The personnel director should provide professional management for the system, develop policies and rules relative to its operations, and serve as consultant to operating agency managers. He should actively solicit input from the operating agencies to ensure that the personnel system meets the needs of its customers. 2/

The issue of whether the exclusive rule-making authority of the personnel board has led to overinvolvement by the board in administrative matters or whether the personnel department and its executive director have failed to fully exercise their constitutional and statutory responsibilities was not entirely resolved by testimony to the interim committee. Without a change in the constitutional responsibilities of the board and the director, the committee found that the options for addressing the issue were limited.

The committee did conclude that some clarification of roles could be attained within the present constitutional constraints. The objective of any change would be to identify the personnel director's responsibility to see that the system is operated in accordance with merit principles and in response to the personnel service needs of state government.

1/ Any presumption that the personnel director is authorized by the constitution to promulgate rules has been negated by an October, 1981 district court decision. The decision is now on appeal to the Colorado Supreme Court.

2/ Report of the Executive Committee on Personnel Management in State Government, January 1, 1981.

Committee recommendations. The committee's recommendation makes the following changes:

- amends 24-50-101 by shifting responsibility for establishing "general criteria for adherence to the merit principle and for fair treatment" of employees from the personnel board to the personnel director, leaving the board broad appellate responsibility for providing "fair and timely resolution of cases before it".
- amends 24-50-101 by placing specific responsibility for establishing and administering an affirmative action program with the state personnel director;
- amends 24-50-103 (3) by more clearly placing responsibility for the state classification system with the state personnel director. The law now authorizes the state personnel director to establish a classification plan with the approval of the personnel board;
- strengthens the role of the director of personnel and limits the role of the board in the area of appeals of actions of the director, the personnel department, and appointing authorities. These recommendations are detailed later in this report.

Modifying Compensation and Classification Procedures

The establishment of compensation mechanisms is probably the most important task of a personnel system. Concerns with compensation and classification have traditionally been the most volatile issues confronting the management and funding of the state's personnel system.

Review of the current compensation and classification system. Under the current compensation system, employee wages reflect the amount paid for equivalent jobs in the state's front range labor market. Salary data is collected annually after survey classes are selected by Department of Personnel staff and approved by the department director and a salary advisory committee. The surveyed classes along with the survey methodology may be commented upon and appealed by employees. The surveyed classes are called key classes. They are well-known, commonly understood occupations which are found in reasonable numbers in the community surveyed. Such occupations provide a good reference point for establishing rates for related classes.

After the salary survey is conducted, pay rates are established using a statistical formula which matches pay ranges to the middle fifty percent of the salary rates found by the salary survey.

There are about 1,600 classes within the state personnel system. Many classes describe jobs held by one employee or a very few

employees. There is a seven step pay range for each of the nearly 1,600 classes. There is a five percent increase between each of the seven steps. Increases in an employee's pay are realized through five percent merit increases, salary survey results, promotions, and reclassifications. When employees reach step six through annual merit increases they are held in that step for five years then progress to the final step. Some eighty percent of all classified employees are in steps five, six, and seven. After reaching step seven, the only salary increases are those from the salary survey, promotions, and reclassifications.

Committee findings and conclusions. Several problems with the classification and compensation systems were identified during the interim. Representatives from the Department of Personnel expressed a concern that the provisions of law relating to the salary survey do not give them sufficient flexibility to administer an equitable plan. Among their concerns is that the law directs salaries be "comparable to" rather than "competitive with" salaries found for similar kinds of employment in the community. Compensation technicians maintain that the term "competitive" compensation is a more accurate, logical, and less mechanical approach to compensation setting. It would also allow for adjustments to special market factors such as recruitment and retention problems. The department as well as others appearing before the committee also supported the concept of geographic surveys and across-the-board salary adjustments for different categories of employees, and a need to compensate for the seven to nine month time lag between the conduct of the salary survey in the fall and its implementation the following July. Another provision of existing law which has an adverse impact upon implementation of the salary survey is the statutory ceiling on employee salaries at \$4,872 a month. The ceiling is now preventing some positions from being paid a competitive rate. This compression at the top of the pay plan may cause greater problems in the future.

In another area, the personnel director expressed concern over the lengthy appeals process afforded those affected by the salary survey or classification actions, and the need to establish a time frame for the disposition of appeals.

The committee found that another provision of law prevents the personnel director from adopting more than one pay plan. An ability to devise additional pay plans would allow the director to respond to a need for more than seven merit steps as a way of retaining competent employees in positions (trades and maintenance, for example) that afford limited upward mobility.

A number of those testifying before the committee expressed concern that the legislature did not fund occupational studies during the last four years. The department conducts occupational studies to assure proper titles, job descriptions and salary relationships within the classification system. Occupational studies often determine that a class should be upgraded to be consistent with the market. The committee found that lack of funding for occupational studies is

eroding the classification system and having a detrimental effect on the entire compensation system.

Finally, the administration of the employee benefit portion of the compensation package is not controlled by the Department of Personnel but by separate benefits boards. There is little coordination of fringe benefits which may lead each board to compete with the other for legislative appropriations.

As a result of the committee's findings, it was concluded that a number of statutory changes should be made to the compensation and classification processes.

Committee recommendations. The committee recommends a number of changes to existing law with regards to compensation and classification:

- Amend section 24-50-104 (4) and (5), C.R.S., to establish new deadlines for submission of classification, salary, and fringe benefit survey results to the governor and the General Assembly. The date for submission of findings to the governor is January 15 and to the legislature's Joint Budget Committee, February 1. A common time frame is necessary for a full evaluation of the fiscal impact by the governor and the legislature of classification changes and survey results. The change from the current March submission dates is necessary because of the constitutional provision that legislative sessions in even-numbered years not exceed 140 days.
- Amend section 24-50-104 (5) to provide flexibility in organizing, conducting, and implementing the salary survey. The amendment also adds language to insure that statistics gathered from business will remain confidential; provides for an adjustment to the salary survey results in recognition of the delay between the time data is gathered and the date of its implementation; and allows for contracting by the governor of an annual performance audit of the "design, methodology, procedures, and application of data" used in the salary survey.
- Amend section 24-50-104 (5) to mandate that the records of all classified positions be kept current and incorporated into the state personnel data system by January 1 of each year. This updating will assist the Department of Personnel and the General Assembly in assessing the costs of changes in the classification and compensation plans.
- Amend section 24-50-104 (6) to authorize the establishment of more than one pay plan. The amendment also removes the salary limitation placed on the monthly pay of classified employees.
- Amend other sections of the law dealing with responsibility for administration of the classification system and appeals to changes in the classification and compensation of state

employees. A discussion of these changes is found in other sections of this report.

Although statutory and constitutional changes are essential, the following observation made by the governor's 1983 State Personnel Compensation Task Force recognizes that legislated change will not solve the entire compensation issue.

Finally, trust and politics cannot be ignored in considering the barriers to achieving the ideal compensation system. Adversarial lines have been drawn which attempt to distinguish employees' interests from management's interest. An effort should be made to develop a common philosophy and to pursue better understanding and trust for the benefit of all concerned.

Revising the Appeals Process

Committee findings and conclusions. Prior to 1971, a three-member Civil Service Commission was in charge of the day-to-day operations of the personnel system. The commission was the system's administrative body as well as its policy-making and quasi-judicial body. With growth in the number of state employees and an accompanying need for better management; policy-making and quasi-judicial functions were separated from the administrative functions. The belief at the time was that the personnel board, even through part-time, could handle employee appeals in addition to other constitutional and statutory duties.

Testimony presented to the 1983 interim committee indicates that the current appeals process is producing adverse results. The statutes and personnel board rules combine to allow nearly any action affecting an employee to be appealed. Indeed, present personnel rules interpret the constitution and the statutes to allow eleven different kinds of appeals to be made: grievances, denial or harassment upon filing grievances, disciplinary actions, whistleblower, discrimination, layoffs, examinations, individual classifications, occupational studies, salary survey, and rule 8-1-1 which provides that any action of the personnel director may be appealed. It was reported that only Colorado allows appeals in all eleven areas. (A more detailed review of the appeal process and how it compares with the process in other states can be found in the report to the committee by Mr. William Levis.)

As a result, the appeals process is too long and costly, often repetitious, and supportive of frivolous appeals. The compensation and classification appeal processes are examples of how counterproductive the appeals mechanism can become. The entire compensation and classification plans may be challenged as well as individual allocations and reallocations to a class or pay grade. The

appeals mechanism allows an issue to go unresolved even at the time the proposed changes in the pay or classification plans are being considered by the governor and the legislature. It was reported to the committee that salary survey appeals from 1978 are still active. If employees were to win their compensation appeals in the courts, it is doubtful whether the legislature would compensate them.

The director of the Department of Personnel advanced several ideas to contend with an appeals process that she maintains is undermining the efficiency and credibility of the personnel system, as well as affording neither due process nor sensible government. The director suggested the following changes: a) removal of the rule-making function from the personnel board, where the writing of rules has permitted open appeals; b) allow the board to hire its own hearing officers; c) eliminate salary appeals; and d) provide that classification and other technical appeals be heard by panels of experts rather than a lay board.

The committee concluded that the appeal process should be redefined and simplified to permit the personnel system to function effectively and to ensure a more prompt resolution of controversies.

Committee recommendations. The committee recommends the following:

- Amend section 24-50-103 (6) which is now identified by employees as authorizing the appeal of any action of the personnel director. The personnel board has also recognized this subsection as providing grounds for broad employee appeal rights. The subsection allows the board to reverse the director if it finds his actions to be arbitrary, capricious, unreasonable, or contrary to rule or law. Finally, the subsection allows two members of the five member personnel board to overturn the personnel director's decisions. The amendment limits the kind of appeals that may be taken to the board to those actions identified as appealable in the law or constitution. In addition, the amendment provides that a majority of the board must decide to reverse or modify the director's action; and it eliminates "unreasonable" as one of the standards that can be used as grounds for board action in reversing an action of the personnel director. Adoption of the amendment should both reduce the number of appeals to the board and the number of reversals or modifications of the personnel director's actions.
- Amend section 24-50-103 (7) to allow the board to employ hearing officers. Currently the board draws from a pool of hearing officers in the Department of Administration. Adoption of this amendment should help speed the hearing process by making the hearing officers directly accountable to the board, rather than the head of the centralized hearing officers agency within another department.
- Amend section 24-50-103 (8) to require that a majority of the

personnel board vote to reverse or modify an appeal of an action of an appointing authority (a head of a department or division).

- Amend section 24-50-104 (3) which now provides that employees whose positions have been downgraded or held at the same level or feel that their job was not reallocated properly may appeal to the board. The amendment authorizes an appeal to the personnel director, not the personnel board. Adoption of this amendment will reduce the number of appeals to the board. The committee believes that the allocations of positions to classes is a technical administrative decision which should be made by the personnel director.
- Amend section 24-50-105 which now allows salary survey appeals to the personnel board on three occasions: 1) the selection of key classes to be surveyed; 2) the establishment of salary relationships of other classes to the key class; and 3) the survey results including the survey methodology. Presently the personnel director hears objections at each of these stages. The director's decision is appealable to the board. If appealed, a hearing officer acting for the board holds an evidentiary hearing and renders a decision which is appealable by the personnel director, an agency, or employee. The amendment provides for input in the design of the survey but does not permit appeal to the board. Adoption of this amendment will lighten the board's workload and eliminate the uncertainty that has been a part of the salary survey appeal procedure and tends to cloud implementation of the survey.
- Amend section 24-50-104 (4) which now provides an appeal procedure to revisions in the classification plan. The current procedure is much like that afforded those who appeal the salary survey. The amendment provides that only employees affected by a reclassification recommendation may submit comments to the director of personnel with the final decision in reclassification matters made by the governor.
- Amend section 24-50-123 which relates to the handling of grievances. Grievances involve any action which relates to working conditions or relationships, or agency policies, rules or regulations not directly appealable to the personnel director or the personnel board. Under some conditions, the board may now review the decisions of the appointing authorities. The amendment removes that board review authority, making the decision of the appointing authority final.
- Amend section 24-50-125 dealing with disciplinary proceedings -- those actions which affect the pay, status or tenure of an employee. Presently, when an employee challenges such an action he is entitled to a hearing in which an evidentiary record is developed, usually before a hearing officer with the hearing officer's decision becoming final if no appeal is taken to the board. The committee believes that the protections currently

afforded employees in this area should be retained but that the process could be streamlined by establishing deadlines for board hearings and a final board decision on an appeal. In addition, the amendment states that if an employee does not appear at a disciplinary hearing without good cause, his appeal can be deemed withdrawn.

- Amend section 24-50-125 to provide for a new appeal procedure for alleged discriminatory or unfair employment practices. The state supreme court has ruled that without a specific statutory authorization, the personnel board, not the Civil Rights Commission, has jurisdiction over discrimination cases involving classified employees. The amendment authorizes the Civil Rights Division to investigate a complaint on behalf of the personnel board. If an individual is not satisfied with the finding of the Civil Rights Division investigation, he may appeal to the personnel board. An appeal procedure, with specific time frames, is established by the amendment.
- Amend section 24-50-125 to establish an appeal timetable for the handling of all appeals authorized by law or the constitution except discrimination appeals which may also be filed with the Civil Rights Division. The amendment states that an action of the personnel director, appointing authority, or agency must be found by the board to have been arbitrary or capricious to be reversed on appeal. If an action is found to be warranted, but against the rules of the personnel system, the action may be upheld but corrective or disciplinary procedures may be taken against the responsible person. The amendment also provides that a penalty may be imposed on an agency or an employee for an inexcusable delay in a hearing.
- Amend section 24-50-125 regarding recovery of costs of proceedings. Current law provides for the collection of costs incurred by an employee when it is found that the action was frivolous or otherwise groundless. The amendment extends to the state the right to recover costs from the employee.

RESOLUTION NO. 5

SUBMITTING TO THE REGISTERED ELECTORS OF THE STATE OF COLORADO AN AMENDMENT TO ARTICLE XII OF THE CONSTITUTION OF THE STATE OF COLORADO, PERMITTING APPOINTMENTS AND PROMOTIONS TO OFFICES AND EMPLOYMENTS IN THE STATE PERSONNEL SYSTEM TO BE MADE ACCORDING TO MERIT AND FITNESS, TO BE ASCERTAINED, AS FAR AS PRACTICABLE, BY COMPETITIVE TESTS OF COMPETENCE WITHOUT REGARD TO RACE, CREED, COLOR, RELIGION, SEX, NATIONAL ORIGIN OR ANCESTRY, HANDICAP, AGE, OR POLITICAL AFFILIATION, AND REPEALING THE PROVISIONS ESTABLISHING THE STATE PERSONNEL BOARD AND THE STATE DEPARTMENT OF PERSONNEL AND THE PROVISIONS DESCRIBING THE STATE PERSONNEL SYSTEM.

Resolution Summary

(Note: This summary applies to this resolution as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Amends section 13 of article XII of the state constitution to provide that competitive tests shall be used, as far as practicable, to ascertain the merit and fitness of appointments and promotions of employees in the personnel system. Provides that such appointments and promotions shall be without regard to race, color, creed, religion, sex, national origin or ancestry, handicap, age, or political affiliation.

Repeals from section 13 of article XII the following: A description of those state employees who comprise the state personnel system; the provision that the person appointed to any position under the state personnel system shall be one of the three persons with the highest ranking as determined by a competitive test of competence; the requirement that all appointees shall be residents of this state; the provision making the head of each principal department the appointing authority for the employees in his office; the provision establishing classes of employees; a description of offenses which will result in dismissal or suspension; the six-month temporary employment rule; and the twelve-month probationary employment rule.

Repeals section 14 of article XII of the state constitution which: Created the state personnel board; authorized such board to promulgate rules and conduct hearings; and established the department of personnel which had responsibility to administer the state personnel system.

Be It Resolved by the House of Representatives of the Fifty-fourth General Assembly of the State of Colorado, the Senate concurring herein:

SECTION 1. At the next general election for members of the general assembly, there shall be submitted to the registered electors of the state of Colorado, for their approval or rejection, the following amendment to the constitution of the state of Colorado, to wit:

TEXT

Section 13 of article XII of the constitution of the state of Colorado is amended to read:

Section 13. Personnel system of state - merit system. (1) Appointments and promotions to offices and employments in the personnel system of the state shall be made according to merit and fitness, to be ascertained, AS FAR AS PRACTICABLE, by competitive tests of competence without regard to race, creed, or color, RELIGION, SEX, NATIONAL ORIGIN OR ANCESTRY, HANDICAP, AGE, or political affiliation.

(2) ~~The--personnel--system--of--the--state--shall comprise--all--appointive--public--officers--and--employees of--the--state,--except--the--following:--Members--of--the public--utilities--commission,--the--industrial--commission of--Colorado,--the--state--board--of--land--commissioners,--the Colorado--tax--commission,--the--state--parole--board,--and the--state--personnel--board,--members--of--any--board--or commission--serving--without--compensation--except--for--per diem--allowances--provided--by--law--and--reimbursement--of~~

COMMENT

Religion, sex, national origin or ancestry, handicap, and age are added as characteristics that are not to be considered in determining merit and fitness for state employment. In addition "as far as practicable" recognizes the limitations of using competitive examinations to identify merit and fitness.

Subsection (2) details those positions excluded from the state personnel system. Among the positions are full time boards and commissions like the public utilities commission and the land board as well as part-time boards and commissions -- an estimated 135, faculty members and legislative and judicial employees.

TEXT

expenses;--the-employees-in-the-offices-of-the-governor
and--the--lieutenant--governor--whose---functions---are
confined-to-such-offices-and-whose-duties-are-concerned
only--with--the--administration--thereof;--appointees-to
fill-vacancies-in-elective-offices;--one-deputy-of--each
elective-officer-other-than-the-governor-and-lieutenant
governor--specified--in-section-1-of-article-IV-of-this
constitution;--officers--otherwise--specified--in--this
constitution;---faculty---members---of---educational
institutions--and--departments---not---reformatory---or
charitable---in---character;--and--such--administrators
thereof-as-may-be-exempt-by-law;--students--and--inmates
in--state--educational--or--other-institutions-employed
therein;--attorneys--at--law---serving---as---assistant
attorneys-general;--and-members;--officers;--and-employees
of--the--legislative--and--judicial--departments-of-the
state;--unless-otherwise-specifically-provided--in--this
constitution.

COMMENT

TEXT

{3} Officers--and--employees--within--the--judicial department, other than judges and justices, may be included within the personnel system of the state upon determination by the supreme court, sitting en banc, that such would be in the best interests of the state.

{4} Where authorized by law, any political subdivision of this state may contract with the state personnel board for personnel services.

{5} The person to be appointed to any position under the personnel system shall be one of the three persons ranking highest on the eligible list for such position, or such lesser number as qualify, as determined from competitive tests of competence, subject to limitations set forth in rules of the state personnel board applicable to multiple appointments from any such list.

{6} All appointees shall reside in the state, but applications need not be limited to residents of the

COMMENT

Subsection (3) provides that the state supreme court decides whether employees of the judicial branch are to be included in the state personnel system.

Subsection (4) authorizes political subdivisions to contract for services with the personnel board.

Subsection (5) gives an appointing authority (an executive director of a department or a division head) a choice among the three applicants scoring highest on an examination to fill a vacant position in the personnel system.

Subsection (6) requires that state employees be residents of the state but that in some cases applicants need not

TEXT

state--as--to--those--positions--found--by--the--state
personnel--board--to--require--special--education--or
training--or--special--professional--or--technical
qualifications--and--which--cannot--be--readily--filled--from
among--residents--of--this--state.

(7) The head of each principal department shall
be the appointing authority for the employees of his
office and for heads of divisions, within the personnel
system, ranking next below the head of such department.
Heads of such divisions shall be the appointing
authorities for all positions in the personnel system
within their respective divisions. Nothing in this
subsection shall be construed to affect the supreme
executive powers of the governor prescribed in section
2 of article IV of this constitution.

(8) Persons in the personnel system of the state
shall hold their respective positions during efficient
service or until reaching retirement age, as provided

COMMENT

be a resident in order to be considered
for a job with the state.

Subsection (7) identifies the twenty
executive department heads and
approximately 115 division heads as
appointing authorities for employees
within their organizations and as such
responsible for personnel actions
including initial determinations in
dismissal, suspension and disciplinary
proceedings against their employees.

Subsection (8) sets forth general merit
principles: employees who provide
efficient service shall hold their jobs
until retirement; employees with the
same duties are to be paid the same

TEXT

by-law,--They shall be graded and compensated according to standards of efficient service which shall be the same for all persons having like duties,--A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined,--Any action of the appointing authority taken under this subsection shall be subject to appeal to the state personnel board, with the right to be heard thereby in person or by counsel, or both.

(9) The state personnel director may authorize

COMMENT

salary; any action to dismiss, suspend or otherwise discipline an employee must be initiated through written charges; and disciplinary actions are appealable to the state personnel board.

Subsection (9) provides that the personnel director may authorize the

TEXT

the--temporary-employment-of-persons,-not-to-exceed-six
months,-during-which-time-an--eligible--list--shall--be
provided--for--permanent-positions,-No-other-temporary
or-emergency-employment-shall-be--permitted--under--the
personnel-system.

{10} The--state--personnel--board-shall-establish
probationary--periods---for---all---persons---initially
appointed,-but-not-to-exceed-twelve-months-for-any
class-or-position,-After-satisfactory-completion-of
any--such-period,-the-person-shall-be-certified-to-such
class-or-position--within--the--personnel--system,-but
unsatisfactory---performance---shall---be--grounds--for
dismissal--by--the--appointing--authority--during--such
period-without-right-of-appeal.

{11} Persons--certified--to-classes-and-positions
under--the--classified--civil--service--of--the--state
immediately--prior--to--July--1,-1971,-persons-having
served-for-six-months-or-more-as-provisional-or-acting

COMMENT

temporary employment of individuals for
no longer than six months.

Subsection (10) empowers the personnel
board to establish probationary periods,
not to exceed twelve months, for all new
state employees. Unsatisfactory
performance during the probationary
period is grounds for dismissal from
state employment; and such dismissal
cannot be appealed by the employee.

Subsection (11) is the language that was
necessary to protect state employees
that might have been adversely affected
when the new provisions of the current
constitution became effective in 1971.

TEXT

~~provisional--employees--in--such--positions--immediately
prior--to--such--date,--and--all--persons--having--served--six
months--or--more--in--positions--not--within--the--classified
civil--service--immediately--prior--to--such--date--but
included--in--the--personnel--system--by--this--section,--shall
be--certified--to--comparable--positions,--and--grades--and
classifications,--under--the--personnel--system,--and--shall
not--be--subject--to--probationary--periods--of--employment.
All--other--persons--in--positions--under--the--personnel
system--shall--be--subject--to--the--provisions--of--this
section--concerning--initial--appointment--on--or--after--such
date.~~

Section 14 of article XII of the constitution of the state of Colorado is repealed.

SECTION 2. Each elector voting at said election and desirous of voting for or against said amendment shall cast his vote as provided by law either "Yes" or "No" on the proposition: "An amendment to article XII

COMMENT

The state personnel board and the state department of personnel are now established under section 14. The section details the board's composition; the terms of office, qualifications and cause for removal of board members; and authority of the board, including the authority to adopt rules in specific areas.

The section recognizes the department as one of the principal departments within the executive branch and charges the

TEXT

of the constitution of the state of Colorado, permitting appointments and promotions to offices and employments in the state personnel system to be made according to merit and fitness, to be ascertained, as far as practicable, by competitive tests of competence without regard to race, creed, color, religion, sex, national origin or ancestry, handicap, age, or political affiliation, and repealing the provisions establishing the state personnel board and the state department of personnel and the provisions describing the state personnel system."

SECTION 3. The votes cast for the adoption or rejection of said amendment shall be canvassed and the result determined in the manner provided by law for the canvassing of votes for representatives in Congress, and if a majority of the electors voting on the question shall have voted "Yes", the said amendment shall become a part of the state constitution.

COMMENT

executive director of the department with the administration of the personnel system pursuant to the constitution, laws, and rules adopted by the personnel board.

Section 15, the veterans' preference section of the constitution, is not changed.

A BILL FOR AN ACT
CONCERNING THE STATE PERSONNEL SYSTEM.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Makes various changes in the statutes governing the personnel system, including the following: Shortens, streamlines, and otherwise clarifies the process for establishing salaries and job classifications, sets specific time limits on hearings of disciplinary appeals and other adverse actions, requires the state personnel director to establish and administer an affirmative action program, amends requirements for overturning decisions of the state personnel director and appointing authorities, eliminates appeals of results of the salary survey, provides disincentives for filing frivolous appeals, and clarifies the process for handling discrimination appeals.

TEXT

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 24-50-101 (3) (b) and (3) (c), Colorado Revised Statutes, 1982 Repl. Vol., are amended, and the said 24-50-101 (3) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

24-50-101. Short title - legislative declaration - terminology. (3) (b) It is the duty of the state personnel board ~~through its constitutional rule-making capacity, to establish general criteria for adherence to the merit principle and for fair treatment of individuals within the state personnel system. Furthermore, in its role as adjudicator, the state personnel board shall~~ TO provide fair and timely resolution of cases before it.

(c) IT IS THE DUTY OF THE STATE PERSONNEL DIRECTOR TO ESTABLISH THE GENERAL CRITERIA FOR

COMMENT

Section 1 amends the legislative declaration to the statutes that establish policy for the state personnel system.

Paragraphs (3) (b) and (c) summarize the duties of the personnel board and the personnel department. The amendment to paragraphs (3) (b) and (3) (c) would shift responsibility for establishing "general criteria for adherence to the merit principle and for fair treatment" of employees from the personnel board to the personnel director, leaving the board the broad appellate responsibility of providing "fair and timely resolution of cases before it."

Adoption of this amendment would assist in clarifying the roles of the department and the board.

TEXT

ADHERENCE TO THE MERIT PRINCIPLES AND FOR FAIR TREATMENT OF INDIVIDUALS WITHIN THE STATE PERSONNEL SYSTEM. It is the responsibility of the state personnel director to provide leadership in the areas of policy and operation of the state personnel system as well as to provide consultant services to executive branch agencies and institutions of higher education to further their professional management of human resources in state government. The state personnel director, pursuant to the "State Administrative Procedure Act", article 4 of this title, shall provide necessary directives and oversight for the management of the state personnel system and in the discharge of his constitutional duty to administer the state personnel system.

(e) The state personnel director shall establish and administer an affirmative action program, including annual documentation by appointing authorities listing methods of remedying, within a time period established

COMMENT

Paragraph (e) is new language which provides that the personnel director will establish and administer an affirmative action program.

Adoption of this amendment would give statutory recognition to affirmative action and give administrators the necessary flexibility to implement a program.

TEXT

by the director, the underutilization of persons covered by part 4 of article 34 of this title.

SECTION 2. 24-50-103 (5), (6), (7), and (8), Colorado Revised Statutes, 1982 Repl. Vol., are amended to read:

24-50-103. State personnel board. (5) Any member of the board may be removed by the governor for willful misconduct in office, FOR willful failure or inability to perform his duties, INCLUDING, BUT NOT LIMITED TO, FAILURE TO ATTEND THREE CONSECUTIVE REGULAR BOARD MEETINGS, FOR final conviction of a felony or of any other offense involving moral turpitude, or by reason of permanent disability interfering with the performance of his duties. Removal shall be subject to judicial review.

(6) An action of the state personnel director WHICH IS APPEALABLE TO THE BOARD PURSUANT TO THIS ARTICLE OR THE STATE CONSTITUTION may be reversed or

COMMENT

Section 2 of the bill contains amendments to the law dealing with powers and duties of the state personnel board.

The amendment to subsection (5) provides another condition for which the governor may remove from office a member of the personnel board: failure to attend three consecutive regular board meetings.

Adoption of this amendment would help assure greater participation by the five members of the board.

The amendment to subsection (6) seeks to control the kind of appeals made to the personnel board and the number of reversals or modifications to the actions of the personnel director. This is accomplished by a) limiting appeals to those specified in the constitution or statutes; b) requiring that a majority

TEXT

modified on appeal to the board only if AT LEAST THREE MEMBERS OF the board ~~finds~~ FIND the action to have been arbitrary, capricious, ~~unreasonable,~~ or contrary to rule or law. UNLESS OTHERWISE LIMITED BY THIS ARTICLE OR THE STATE CONSTITUTION, a decision of the board shall be subject to review pursuant to section 24-4-106.

(7) The board ~~shall-utilize~~ MAY EMPLOY hearing officers ~~pursuant--to--part--10--of--article--20--of--this--title--subject-to-appropriations-made-to-the-department--of--administration,~~ and SHALL employ such personnel as may be necessary for the performance of its duties, including an administrator who shall serve as secretary to the board with such duties as the board may assign. Funds for ~~this--purpose~~ THESE PURPOSES shall be appropriated by the general assembly.

(8) Members of the board shall be compensated at the rate of seventy-five dollars per day for each day in which they are actually engaged in the performance

COMMENT

of the five member board agree on a finding to reverse or modify an action of the personnel director; and c) limiting the board to a legally definable criterion which must be met for reversal or modification of actions of the personnel director.

Adoption of this amendment would reduce the number of appeals to the board; require that a majority of the board rather than a majority of a quorum agree to reverse the director's actions; and establish a more carefully drawn standard for changing the director's decisions.

Changes in subsection (7) would allow the board to hire its own hearing officers. The Department of Administration currently provides hearing officers to almost all agencies within the executive branch.

Adoption of this amendment, coupled with adequate funding, should provide swifter resolution of employee appeals.

The amendment to subsection (8) specifies that either the chairman or the vice-chairman of the personnel board be a member who has been appointed to the board by the governor. Three board members are

TEXT

of their duties plus reimbursement for actual and necessary expenses incurred in the performance of their duties. The board shall meet as often as necessary to conduct its business. The board shall elect a chairman and a vice-chairman, ONE OF WHOM SHALL BE A GUBERNATORIAL APPOINTEE, from among its members. and Meetings shall be called by the chairman or a majority of the board. All members of the board shall be given reasonable notice of all meetings, and three members of the board shall constitute a quorum for the transaction of business. THE AFFIRMATIVE VOTE OF AT LEAST THREE MEMBERS OF THE BOARD SHALL BE NECESSARY TO REVERSE OR MODIFY ANY APPEAL OF AN ACTION OF THE STATE PERSONNEL DIRECTOR OR APPOINTING AUTHORITY.

SECTION 3. 24-50-104 (2) (a), (3), (4), (5) (a), and (5) (b), Colorado Revised Statutes, 1982 Repl. Vol., as amended, are amended to read:

(2) Compensation policy. (a) It is the policy

COMMENT

appointed by the governor and two are elected by state employees.

This language requires that a majority of the board agree on an action to reverse or modify an appeal of an action of the personnel director or a department appointing authority.

Adoption of this amendment would avoid instances in which two of the five members of the board can reverse or modify an appeal.

Section 104 sets forth policy regarding the state's employee classification and compensation system. The amendment's major objectives are to 1) make the section more understandable; 2) place responsibility for the classification system with the personnel director subject, in some instances, to approval by the governor rather than the personnel board; 3) delete employee appeal of the salary survey

TEXT

of the state to encourage career service for officers and employees in the state personnel system. It is likewise the policy of the state, in recruiting and retaining competent personnel, to compensate such officers or employees with salaries, fringe benefits, including retirement benefits, working conditions, and hours of work comparable to those found by the state personnel director to prevail for comparable kinds of employment in typical places of public and private employment. ~~with--which---the---state---competes---in recruiting---personnel,---in--order--to--preserve--the integrity-of-the-merit--system--of--employment--and--to insure-that-employees-in-the-state-personnel-system-are graded---and--compensated--according--to--standards--of efficient-service,which-shall--be--the--same--for--all persons---having---like--duties,--the--state--personnel director,--with--the--approval--of--the--board,---shall establish--a--classification--plan-under-which-all-such employees-shall-be-placed.~~

COMMENT

process and results; and 4) authorize the establishment of more than one pay plan.

The stricken language in subsection (2) (a) places responsibility for establishment of a classification plan with the personnel director but with approval of the board. The amendment moves the stricken language to (3) (a) below but deletes the approval authority of the board.

TEXT

COMMENT

(3) Classification system principles. (a) ~~The classification--of--positions--shall--be--based--on--the principle--that--positions~~ THE STATE PERSONNEL DIRECTOR SHALL BE RESPONSIBLE FOR THE PREPARATION, MAINTENANCE, AND REVISION OF A CLASSIFICATION SYSTEM FOR ALL POSITIONS IN STATE GOVERNMENT NOT EXPRESSLY EXEMPTED IN THE CONSTITUTION OR LAWS OF THE STATE.

(b) THE CLASSIFICATION SYSTEM SHALL BE BASED ON SOUND, SYSTEMATIC OCCUPATIONAL ANALYSIS AND POSITION EVALUATION METHODS WHICH PROVIDE FOR CONSISTENT OCCUPATIONAL GROUPINGS OF CLASSES AND UNIFORM ALIGNMENT OF CLASSES AND SALARIES AMONG THE VARIOUS DEPARTMENTS, INSTITUTIONS AND AGENCIES.

(c) POSITIONS having comparable duties and responsibilities shall be grouped into classes subject to the same descriptive title, a definition of duties and responsibilities, and requirements for filling positions in the class.

~~(b)--The--allocation--of--individual--positions--to--a~~

Subsection (3) sets forth certain broad classification principles in a more orderly and clearer fashion than is found under current law. The new language in (3) (a) establishes responsibility for the state classification system with the state personnel director.

This language specifies basic principles of the classification system. It is the same language found in the existing 24-50-104 (3) (e).

The language in (b) regarding classification of

TEXT

~~class shall be based on a clear and distinct evaluation of duties and responsibilities assigned by proper authority. Subject to the rules of the board, each position shall be allocated to a class by the state personnel director after considering the recommendation of the appointing authority of the appropriate principal department or division.~~

{c}(d) Classes of positions shall be grouped and related to occupational levels of work which can be clearly distinguished and logically related to a compensation plan.

{d}(e) The pay grade, salary rate, or salary range for each occupational level of classes shall be such as to ~~reflect accurately and clearly~~ CONSIDER BOTH the relative level of difficulties and the differences in duties and responsibilities of each class and shall be ~~at~~ the current level of compensation of comparable employments in other places of public and private

COMMENT

individual positions is repealed here and relocated in (3) (f) below. The objective of this relocation is to separate general classification principles from provisions regarding individual positions.

TEXT

employment in appropriate competitive labor markets.

~~(e) The classification plan shall be based on sound, systematic occupational analysis and position evaluation methods which provide for consistent occupational groupings of classes and uniform alignment of classes and salaries among the various departments, institutions, and agencies.~~

(f) The state personnel director shall assign and may reassign classes of positions to grades, rates, or ranges in a pay plan, subject to the provisions of this part. ~~1~~ ALLOCATE INDIVIDUAL POSITIONS TO CLASSES BASED ON A CLEAR EVALUATION OF DUTIES AND RESPONSIBILITIES ASSIGNED BY THE APPOINTING AUTHORITIES.

(g) ANY EMPLOYEE DIRECTLY AFFECTED BY THE ALLOCATION OF A POSITION TO A CLASS MAY APPEAL SUCH ALLOCATION TO THE PERSONNEL DIRECTOR WITHIN TEN DAYS AFTER NOTICE OF THE ALLOCATION. THE PERSONNEL DIRECTOR SHALL HOLD A HEARING ON SUCH APPEAL WITHIN FORTY-FIVE DAYS AFTER APPEAL AND SHALL ISSUE HIS DECISION WITHIN

COMMENT

The language of paragraph (e) is similar to (3) (b) above and thus redundant.

The stricken language is deleted because it is found in (4) (b). The capitalized language has been moved from the stricken (3) (b) above.

Paragraph (g) establishes a new procedure for the handling of employee appeals to an allocation of a position to a class. The amendment provides that appeals be made to the personnel director. A hearing must be held within 45 days and a decision made within 45 days. Currently, employee appeals are made to the personnel board.

TEXT

FORTY-FIVE DAYS AFTER THE HEARING.

{g}(h) At the request of the appointing authority, the state personnel director may determine that the upward allocation of a position shall not be considered to create a new vacant position, and the movement of the incumbent employee with his position shall not be considered a promotion or appointment requiring new competitive tests of competence or invalidating the tests previously given for the position.

(4) Revision and maintenance of the classification system. (a) The state personnel director, SUBJECT TO THE APPROVAL OF THE GOVERNOR, shall revise the classification ~~plan~~ SYSTEM whenever conditions indicate that A change is necessary. Such revision may consist of the addition, abolition, consolidation, division, or amendment of existing classes, occupational groupings, and levels.

COMMENT

Adoption of amendments to subsection (3) will give the personnel director more authority over the classification system.

Subsection (4) deals with the administration of changes to the classification system. The amendments to (4) (a) provide for approval by the governor of revisions to the classification system.

TEXT

(b) At the same time the state personnel director revises the classification plan SYSTEM, he shall assign the class to an appropriate pay grade, salary rate, or salary range.

~~{e}--The--assignment--of--a--class--to--a--pay--grade, salary--rate,--or--salary--range--shall--be--effective--when approved---by--the--state--personnel--director,--unless otherwise--provided--by--law.~~

~~{d}~~(c) The state personnel director shall determine the classification relationships ~~between-key~~ AMONG classes ~~and--all--other--classes~~ and shall publish all such relationships annually. In addition, the state personnel director shall publish any subsequent changes in such relationships whenever they occur.

~~{e}~~ (d) (I) ANY EMPLOYEE DIRECTLY AFFECTED BY A RECOMMENDATION OF THE DEPARTMENT OF PERSONNEL MADE PURSUANT TO THIS SUBSECTION (4) MAY SUBMIT WRITTEN COMMENTS TO THE STATE PERSONNEL DIRECTOR FOR REVIEW WITHIN TEN DAYS AFTER THE DEPARTMENT OF PERSONNEL HAS

COMMENT

The amendment strikes (4) (c) because (4) (d) (I) below sets forth the procedure advanced in the bill.

The language of (d) (I) establishes a new procedure for the handling of employee objections to reclassifications recommended by the department to the director of personnel. The amendment allows affected employees to submit written comments to the personnel director. Currently employees may appeal a reclassification action to the personnel board. The director is required to forward his recommendation regarding reclassification actions to the governor by

TEXT

PUBLISHED THE RECOMMENDED CHANGES TO THE CLASSIFICATION SYSTEM. THE STATE PERSONNEL DIRECTOR SHALL REVIEW SUCH WRITTEN COMMENTS, WHICH MAY BE SUPPLEMENTED BY ORAL COMMENT, AT THE DISCRETION OF SAID DIRECTOR. THE DIRECTOR SHALL FORWARD THE FINAL RECOMMENDATIONS TO THE GOVERNOR WITHIN FORTY-FIVE DAYS AFTER RECEIPT OF SUCH COMMENTS BUT IN NO CASE LATER THAN JANUARY 15. THE GOVERNOR'S DECISION SHALL BE FINAL.

(II) Any assignments or reassignments of classes to pay grades, salary rates, salary ranges, or classification relationships required by the creation of new positions or any duly authorized reorganization or change in work method which have a fiscal impact shall be made effective, with the approval of the governor, on the ensuing July 1; except that, for the fiscal year beginning July 1, 1983, such action shall take place on February 1, 1984. In order for the fiscal impact of any such ~~occupational~~ CLASSIFICATION

COMMENT

January 15 of each year.

This amendment changes the date of submission of reclassification results to the General Assembly from March 15 to February 1.

Adoption of the amendments to subsection (4) will streamline the procedure for considering the fiscal impact of reclassification of employees.

TEXT

study to be included in the annual general appropriation bill, the results of such study shall be submitted to the general assembly no later than ~~March~~ ~~15~~ FEBRUARY 1 OF EACH YEAR. Each study shall contain a detailed fiscal impact calculation by agency and department. Other than as provided in section 24-50-109.5 or in paragraph ~~(e)~~ (g) of subsection (5) of this section, the only exception to the July 1 date regarding any assignment or reassignment of classes to pay grades, salary rates, or salary ranges, including those resulting from special salary surveys, shall be made in those urgent situations where personnel shortages will endanger the health, safety, or welfare of citizens of the state of Colorado and where special salary surveys conducted as a part of that occupational study indicate that such assignment or reassignment of classes is necessary to provide salaries comparable to those prevailing in comparable kinds of employment. In such urgent situations, upon approval of the governor

COMMENT

TEXT

and the state personnel director, such changes shall be effective on the first day of the month following such approval. THE GENERAL ASSEMBLY SHALL APPROPRIATE SUFFICIENT FUNDS TO IMPLEMENT THE PROVISIONS OF THIS SUBSECTION (4).

~~{II} Any person directly affected by an action of the state personnel director taken pursuant to this subsection (4) may petition the board for review of the state personnel director's action within fifteen working days after the state personnel director has published the classification plan. The board shall review such petition in summary fashion, without referring it to a hearing officer, and on the basis of written material which may be supplemented by oral argument, at the discretion of the board. The state personnel director's action may be overturned only if the board finds it to have been arbitrary, capricious, unreasonable, or contrary to rule or law. The board~~

COMMENT

This language is an attempt to commit the General Assembly to an adequate level of funding for reclassification efforts.

The current law, shown as stricken by the amendment, provides for an employee appeal to the personnel board of changes to the classification plan and appeal of the board's decision to the courts.

TEXT

~~shall--issue--a-written-decision-setting-forth-findings
of-fact-and-conclusions-of-law,--If-the-board-does--not
issue--such--decision-within-one-hundred-twenty-days-of
the-receipt-of-such-petition,--the-action-of--the--state
personnel-director-shall-be-final,--Any-decision-of-the
board--or--final-action-of-the-state-personnel-director
shall-be-subject-to-judicial-review-pursuant-to-section
24-4-106,--except-that-such-appeal-may-be--filed--within
forty-five-days-after-such-decision-or-final-action.~~

(5) Salary and fringe benefits surveys. (a) To determine comparable rates for salaries and fringe benefits prevailing in other places of public and private employment, the state personnel director shall annually conduct a salary and fringe benefit ~~survey~~ SURVEYS. In conducting the ~~survey~~ SURVEYS, the state personnel director shall select various key SURVEY classes ~~including,--as--applicable,--classes--at--the entrance,--journey,--supervisory,--and--management--levels of-occupational-series-within-the-classification--plan,~~

COMMENT

Subsection (5) sets forth policy regarding the organization, conduct and implementation of the annual salary and fringe benefit surveys.

The amendment to (5) (a) deletes from the statute some of the details found in the current law regarding the conduct of the salary survey.

The purpose of the amendment to (5) (a) is to grant the department greater flexibility than it now has in conducting the salary survey.

TEXT

to be used in establishing prevailing rates for all classes and employees in the state personnel system.

~~The state personnel director shall determine the salary differentials between key classes and all other classes and shall publish such salary differentials and any subsequent changes whenever they occur.~~

(b) (I) In order to establish confidence in the salary and fringe benefits ~~survey~~ SURVEYS, the state personnel director shall meet and confer in good faith with management and employee representatives of the state AND A COMPENSATION ADVISORY COMMITTEE APPOINTED BY SAID DIRECTOR AND WITH THE BOARD for the design and methodology of the ~~survey~~ SURVEYS. THE MANAGEMENT AND EMPLOYEE REPRESENTATIVES, THE COMMITTEE, AND THE BOARD SHALL SERVE TO ADVISE THE DIRECTOR IN THE VARIOUS PHASES AND ELEMENTS OF THE SALARY AND FRINGE BENEFITS SURVEYS. The state personnel director shall develop and publish a statement of policy and a manual of

COMMENT

The amendment to subsection (5) (b) (I) provides that the personnel director meet with a compensation advisory group appointed by the director and with the personnel board to receive guidance prior to conducting the salary and fringe benefit survey. The law already requires the director to meet with management and employee representatives regarding the surveys. Adoption of this language would recognize an advisory group created several years ago.

Adoption of this amendment will strengthen the role of management, employee representatives and the advisory committee in carefully constructing a survey. Such a procedure became more important with the repeal of the right of employees to appeal the results of the salary and fringe benefit surveys provided under current law in 24-50-104 (5) (c) (II).

TEXT

procedures detailing OUTLINING the methodology used in the selection and description of the key SURVEY classes to be used in the survey SURVEYS, the selection of the survey sample SAMPLES, and the system used in the collection, tabulation, analysis, and application of the survey data. The survey SURVEYS shall include a fair sample of public and private employments in what AS DETERMINED BY the state personnel director.

determines to be the competitive labor market area for various key classes including areas of the state which are outside the Denver metropolitan area. The state personnel director may use the results of other appropriate surveys conducted by public or private agencies and may contract with any qualified person PERSONS to conduct the survey SURVEYS. Any contract CONTRACTS to conduct the survey SURVEYS shall be governed by the "Procurement Code", articles 101 to 112 of this title, and shall contain such terms and conditions as shall enable the state personnel director

COMMENT

The current law was regarded as unclear as to what constitutes "areas of the state which are outside of the Denver metropolitan area". The language has therefore been removed.

Adoption of this amendment would give the department the flexibility needed to conduct salary and fringe benefit surveys which accurately reflect comparable rates prevailing in places of public and private employment.

TEXT

COMMENT

to retain reasonable supervision and control over the conduct of the ~~survey~~ SURVEYS.

(II) IF THE STATE PERSONNEL DIRECTOR FINDS THAT SALARY OR FRINGE BENEFIT STATISTICS HAVE BEEN FURNISHED TO THE DEPARTMENT OF PERSONNEL ON A CONFIDENTIAL BASIS, SUCH STATISTICS AND THEIR SOURCES SHALL NOT BE REVEALED TO THE PUBLIC, NOR SHALL THEY BE ADMISSIBLE AS EVIDENCE IN ANY ACTION OR PROCEEDING CONCERNING SALARY OR FRINGE BENEFITS SURVEYS.

SECTION 4. 24-50-104 (5) (c), (5) (d), (5) (e), and (5) (f), Colorado Revised Statutes, 1982 Repl. Vol., as amended, are REPEALED AND REENACTED, WITH AMENDMENTS, to read:

24-50-104. Classification and compensation.
(5) Salary and fringe benefits surveys. (c) The state personnel director shall employ survey methods and techniques similar to and consistent with those used in other public and private sector surveys.

The language in (b) (II) provides that the specific source of data on salaries and benefits are not to be revealed. The language was adopted in response to concerns of surveyed employers that they be guaranteed that data be confidential.

The language of Section 4 establishes the general procedure to be followed by the personnel director in collecting salary and fringe benefit data and presenting the results to the governor, and the responsibility of the governor to assure the credibility of the surveys.

The language of (5) (c) directs the use of commonly acceptable methods and techniques in gathering salary and fringe benefit data. This provision is similar to existing law.

TEXT

(d) The state personnel director shall recommend to the governor salary adjustments by pay plans developed in accordance with subsection (6) of this section. The recommended salary adjustments shall take into consideration the delay between the determination of the salary adjustments and their implementation. The adjustments for purposes of accommodating the delay shall be based on sound econometric forecasting models selected by the director.

(e) The governor shall contract for an annual performance audit of the design, methodology, procedures, and application of data regarding the annual salary and fringe benefits surveys. Such contract shall be subject to the provisions of the "Procurement Code", articles 101 to 112 of this title.

(f) The salary survey data shall be presented on the basis of recommended grades for all classes effective on the ensuing July 1. The fringe benefits survey data shall be presented on the basis of a

COMMENT

This new language in (5) (d) allows the personnel director to adjust the findings of the salary and fringe benefit surveys to reflect economic conditions occurring between the conduct of the surveys and the implementation date.

Adoption of this amendment would give the personnel director the flexibility to address the potential for changes in salaries during the eight months that pass between the collection of data and the date employees realize the salary and fringe benefit changes.

Paragraph (e) initiates a new procedure, the conduct of an annual performance audit of the design, methodology, procedures and application of data concerning the salary and fringe benefit surveys.

Adoption of this procedure may offer assurance that the survey recommendations have been reviewed by an independent source.

Paragraph (f) is a rewrite of the current law found in (5) (d). The language of the amendment does omit the following sentence found in the current law:

In comparing the average percentage costs for fringe benefits for state employment, job security, survey time lag, and other unique

TEXT

percentage of the employer's actual payroll costs computed in the following manner: The sum of the total number of working hours per year granted for such benefits as sick leave, holidays, and vacation shall be divided by the total hours required in the normal work year by these employers. Other benefits, such as insurance and hospitalization premiums and retirement payments, which cannot be identified in terms of hours per year shall be reported in dollar amounts or percentages or reported in such other ways as can be identified.

SECTION 5. 24-50-104 (5), 1982 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW PARAGRAPH to read:

24-50-104. Classification and compensation.
(5) Salary and fringe benefits surveys. (g) (I) The state personnel director shall, by January 15 of each year, submit to the governor the final salary and

COMMENT

factors found in state employment shall be considered.

Section 5 details the dates for submission of the salary and fringe benefit survey results to the General Assembly and the treatment of the data by the legislature.

Subparagraph (5) (g) (I) is a rewriting of the current law found in 24-50-104 (5) (e) (I) and (f) with three changes: a) the date for submission of the survey results to the governor is moved from March 1 to January 15; b) the date for the governor to send the survey results and their estimated fiscal impact to the JBC is moved from March 15 to February 1; and c) new language provides that changes in fringe benefits will

TEXT

fringe benefit recommendations for the ensuing fiscal year, which report shall be published and shall include a detailed explanation of the methodology and conduct of the surveys. Such report shall also include the average percentage salary survey increase for all employee classes as computed annually by the state personnel director. No later than the February 1 next following, the governor shall transmit the state personnel director's report and the estimated costs for salary and fringe benefit adjustments to the joint budget committee of the general assembly for inclusion as separate items in the general appropriation bill, including with such transmittal the salary adjustments of all proposed reassignments of classes to pay grades, salary rates, or salary ranges as submitted by the state personnel director pursuant to subparagraph (II) of paragraph (d) of subsection (4) of this section, which reassignments shall take effect at the start of the ensuing fiscal year unless otherwise ordered by the

COMMENT

not take effect until enacted by the General Assembly. Adoption of this amendment will allow the legislature the necessary time to consider the fiscal impact of salary increases on the state budget. The change can be attributed in part to the new 140 day limit on legislative sessions in even-numbered years.

governor acting pursuant to section 24-50-109.5. No changes in fringe benefits which are granted by statute shall take effect until enacted by the general assembly.

(II) To facilitate the reporting of estimated costs required of the state personnel director pursuant to subparagraph (I) of this paragraph (g), the records of all classified positions in the state personnel system shall be current and included in the state personnel data system by January 1 of each year, beginning in 1985.

(III) Notwithstanding the provisions of subparagraph (I) of this paragraph (g), the general assembly may specify in the general appropriation bill the amount of the average percentage salary survey increase for all employee classes for the fiscal year. In the event that such amount is different from the average percentage salary survey increase included in

Subparagraph (II) directs that all records of classified positions be current. Adoption of this amendment would assist the personnel department with collection of current data.

Subparagraph (III) was adopted during the 1983 legislative session to allow the General Assembly to alter the amount of the average percentage salary survey increase for employees contained in the salary and fringe benefit surveys. The only change made by the amendment is the deletion of language which specifies that there will be no salary reductions for employees during the 1983-84 fiscal year. The subparagraph is repealed at the end of the 1984-85 fiscal year.

TEXT

the report of the state personnel director, the state personnel director shall adjust the proposed reassignments of classes to pay grades, salary rates, or salary ranges so that the resulting average percentage salary survey increase for all employee classes as computed annually equals the amount specified in the general appropriation bill. In the event that the amount specified in the general appropriation bill is less than the average percentage salary survey increase included in the report of the state personnel director, the state personnel director may, as an alternative to adjusting the proposed reassignments of classes to pay grades, salary rates, or salary ranges, postpone the effective date of such reassignments up to the last calendar month of the fiscal year so that the average percentage salary survey increase for all employee classes as computed for the fiscal year equals the amount specified in the general appropriation bill. This subparagraph (III)

COMMENT

shall apply only to the general appropriation bills, and amendments thereto, for the fiscal years beginning July 1, 1983, and July 1, 1984, and this subparagraph (III) shall be repealed, effective July 1, 1985.

SECTION 6. 24-50-104 (6), Colorado Revised Statutes, 1982 Repl. Vol., as amended, is amended to read:

24-50-104. Classification and compensation.

(6) Pay plans. There shall be established by the state personnel director a pay plan PLANS for employees in the state personnel system. ~~except that the maximum monthly salary for any such employee shall not exceed four thousand eight hundred seventy two dollars.~~ Such plan PLANS shall be designed in order to implement the ~~policy~~ POLICIES of the state as set forth in ~~subsection~~ (2) SUBSECTIONS (2) AND (3) of this section. The state personnel director shall assign and may reassign classes of positions to such plan PLANS, subject to the

The primary issue addressed in Section 6 is the statutory ceiling on employee salaries.

Amendments in subsection (6) allow the personnel director to establish more than one pay plan, and delete the \$4,872 a month limit on salaries paid state employees.

Adoption of this amendment would give the personnel director the necessary flexibility to adopt, if necessary, pay plans for the several diverse categories of jobs within the state personnel system. Currently, with the exception of teachers, all employee salaries are contained within a single pay grid.

TEXT

provisions of this article.

SECTION 7. 24-50-112 (3), Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

24-50-112. Examinations - when held - standards - eligible list. (3) (a) The board shall provide by rule, considering the recommendations of the state personnel director, the conditions under which applications will be accepted, the procedures by which tests will be held, the frequency with which candidates may compete in the same examination, and the standards by which candidates shall be deemed qualified. The state personnel director shall establish procedures governing the examination process, which shall be uniformly used by the principal departments.

(b) APPLICANTS SHALL NOT BE REJECTED SOLELY BECAUSE THEY DO NOT HAVE THE EDUCATION REQUIRED IN THE CLASS SPECIFICATIONS EXCEPT WHERE EDUCATION IS A PREREQUISITE FOR A PROFESSION OR IS MANDATED BY FEDERAL LAW. WHERE EDUCATION IS NOT A PREREQUISITE OR A

COMMENT

Section 7 contains amendments to provide that an applicant will not be rejected because he lacks the specific educational requirement set in a job specification. Experience is to be considered as well.

See explanation above.

TEXT

FEDERAL MANDATE, APPLICANTS' EXPERIENCE SHALL BE CONSIDERED.

SECTION 8. 24-50-115 (6), Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

24-50-115. Employment lists - classifications - appointments - probationary periods. (6) The board shall establish probationary periods for all persons initially appointed, promoted, or transferred into a different position at their request or who are in a position reallocated to a higher pay grade, but not to exceed twelve months for any class or position. After satisfactory completion of any such period, as demonstrated by satisfactory or above average performance evaluations, the person shall be certified to such class or position within the state personnel system, but unsatisfactory performance shall be grounds for dismissal by the appointing authority during such period without right of appeal. ANY EMPLOYEE WHO IS

COMMENT

The amendment in section 8 specifies that an employee who is promoted to a new position but is dismissed from that new position because of unsatisfactory performance may go back to his old position.

TEXT

CERTIFIED TO A CLASS OR POSITION AND WHO IS PROMOTED TO A DIFFERENT CLASS OR POSITION AND WHO IS DISMISSED FOR UNSATISFACTORY PERFORMANCE DURING THE PROBATIONARY PERIOD FOR SUCH CLASS OR POSITION SHALL BE REINSTATED IN HIS FORMER CERTIFIED CLASS OR POSITION.

SECTION 9. 24-50-123, Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

24-50-123. Grievances - review. The board shall, by rule, adopt a uniform grievance procedure to be used by all principal departments and agencies for employees in the state personnel system. The grievance procedure shall provide an orderly system of review for all ~~grievances~~ EMPLOYEE OR APPLICANT APPEALS, except those arising under section 24-50-125. The decision of the appointing authority shall be final. ~~except-that-the board--may--review--the--decision--of--the---appointing authority--and,--upon--such--review,--shall--uphold-the decision-unless-the-board-finds-that-the--decision--was made-arbitrarily-or-capriciously.~~

COMMENT

Most of the remaining sections of the bill deal with changes to the appeals procedure currently in the statutes. Section 9 addresses the procedure for hearing an employee grievance.

Current law directs the personnel board to adopt a uniform grievance procedure for all appeals except those dealing with discipline and actions which adversely affect an employee's pay. Under such a procedure the personnel board can now review the decision of an appointing authority (a department's executive director or a division director). The amendment removes the review authority and provides that the decision of the appointing authority is to be final.

Adoption of this amendment would reduce the number of appeals going to the personnel board.

TEXT

SECTION 10. 24-50-124 (1), Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

24-50-124. Reduction of employees. (1) When certified employees are separated from state service due to lack of work, lack of funds, or reorganization, they shall be separated or demoted according to procedures established by ~~the state personnel director~~ RULE. Such procedure shall require that consideration be given to performance evaluations of the employees and seniority within the total state service. Such employees shall have retention rights throughout the principal department in which they are employed unless the head of the department requests, and the board approves, in advance, limitation of retention rights to major divisions, institutions, or colleges within the principal department.

SECTION 11. 24-50-125 (4) and (5), Colorado Revised Statutes, 1982 Repl. Vol., as amended, are amended, and the said 24-50-125 is further amended BY

COMMENT

Currently, the separation of certified employees from state service is handled by board rule and not the personnel director. The amendment reflects that current practice.

Section 125 of the law deals with appeals to dismissals, suspensions, other disciplinary actions and actions which adversely affect an employee's pay. It specifies that a disciplined employee be notified of the action within 5 days and that within 10 days after

TEXT

THE ADDITION OF A NEW SUBSECTION, to read:

24-50-125. Disciplinary proceedings - hearings - procedure. (4) At such hearing, WHICH SHALL BE HELD WITHIN FORTY-FIVE DAYS OF RECEIPT OF THE EMPLOYEE'S PETITION, the employee shall be entitled to representation of his own choosing at his own expense. The board shall cause a verbatim record of the proceedings to be taken and shall maintain such record. At the conclusion of such hearing, but not later than ~~thirty~~ FORTY-FIVE days after the conclusion of such hearing, the board shall make public written findings of fact and conclusions of law affirming, modifying, or reversing the action of the appointing authority, and the appointing authority shall thereupon promptly execute the findings of the board.

(5) In addition, the board shall ~~grant~~ HOLD a

COMMENT

receipt of notification the employee may petition the personnel board for a hearing. Current law does not, however, specify when the board must hear an appeal. The proposed changes shown in amendments to subsections below address this issue and other concerns over the hearing process for disciplinary actions and those actions which adversely affect an individual's pay.

The new language in subsection (4) directs that a hearing on a petitioner's appeal be held within 45 days after receipt of the appeal by the personnel board.

The change from 30 to 45 days is made to make all time limits for decisions consistent.

This new language provides the same 45 day limit

TEXT

hearing WITHIN FORTY-FIVE DAYS OF THE APPEAL, upon request by the employee or his representative, ~~to~~ FOR any certified employee in the state personnel system who protests any action taken which adversely affects the employee's current base pay as defined by board rule, status, or tenure. A probationary employee shall be entitled to all the same rights to a hearing as a certified employee; except that he shall not have the right to a hearing to review his dismissal for unsatisfactory performance while a probationary employee. THIS SUBSECTION (5) SHALL NOT APPLY TO APPEALS BROUGHT PURSUANT TO SECTION 24-50-104.

(7) Failure, without good cause, of an employee or his representative to appear at a hearing shall be deemed a withdrawal of his appeal, and the action of the appointing authority shall be final.

SECTION 12. Article 50 of title 24, Colorado Revised Statutes, 1982 Repl. Vol., as amended, is

COMMENT

for board action on an appeal regarding matters affecting an employee's pay.

This reference is to an appeal to the personnel director regarding an allocation of a position to a class pursuant to 104 (3) (g), wherein there is no right to appeal to the board.

This new language provides that if an employee does not appear without good cause at a disciplinary hearing, his appeal is withdrawn.

Adoption of this amendment will assist in streamlining the appeals process.

The language contained in section 12 is entirely new. It provides a time frame for the handling of discrimination and unfair employment practice appeals by the personnel board.

TEXT

amended BY THE ADDITION OF THE FOLLOWING NEW SECTIONS
to read:

24-50-125.3. Discrimination appeals. An applicant or employee who alleges discriminatory or unfair employment practices, as defined in part 4 of article 34 of this title, in the state personnel system may appeal within ten days of the alleged practice by filing a complaint in writing with the board or the Colorado civil rights division in the department of regulatory agencies, which shall investigate such complaint on behalf of the board pursuant to the procedures and time limits set forth in section 24-34-306. In an appeal involving the civil rights division, the state personnel board shall contract with a third party to investigate the complaint. If, after said civil rights division or third party has found no probable cause or has attempted after a finding of probable cause to resolve the complaint by conference, conciliation, and persuasion, the applicant or employee

COMMENT

Under the proposed section 125.3 an individual alleging discriminatory or unfair employment practices would be required to file a complaint within 10 days to the personnel board or the civil rights division. If the civil rights division acts on the issue but does not resolve the matter to the satisfaction of the individual, he is given 10 days to appeal to the personnel board.

remains dissatisfied, such person shall have ten days from the date he is notified of the civil rights division's or third party's action in which to appeal to the board. The board may set the complaint for hearing or adopt the findings of the civil rights division or third party as its own. If the complaint is set for hearing, it shall be subject to the same time limits as other appeals heard by the board.

24-50-125.4. Appeal procedures. (1) Except for discrimination appeals which may also be filed with the Colorado civil rights division in the department of regulatory agencies, all appeals from actions of the state personnel director, appointing authorities, and agencies which are specifically appealable under the state constitution or this article shall be filed with the board within ten days of the such action. All such appeals shall allege with particularity the specific acts being appealed and the reasons for the appeal.

This new language in 125.4 (1) provides that, except for appeals to the civil rights division, all appeals authorized by law or the constitution must be filed with the personnel board within 10 days after the aggrieved action.

TEXT

(2) If the board is required or decides to hold a hearing, it shall give written notice of the time and place for the hearing to the employee or applicant and the agency involved at least five days before the date set for the hearing, and such hearing shall commence not later than forty-five calendar days after submission of the appeal to the board. The hearing date may be continued only once for good cause for no longer than forty-five days with the approval of the board.

(3) The board or a hearing officer for the board shall issue its written decision within forty-five calendar days after the conclusion of the hearing and the submission of briefs. Any party may appeal the decision of the board to the court of appeals within forty-five days in accordance with section 24-4-106 (11). On appeal to the court, the board's findings of fact, if supported by substantial evidence, shall be conclusive.

COMMENT

Subsection (2) provides that notices of the board's hearing date shall be made at least 5 days prior to the hearing. A hearing must be conducted no later than 45 days after submission of the appeal to the board.

Decisions of the board or hearing officer are to be issued within 45 days after the hearing with a 45 day limit on filing of appeals to the court of appeals. Appeals no longer would be filed with the district court.

TEXT

(4) If a hearing officer conducts a hearing on behalf of the board, any party who seeks to modify the initial decision must file an appeal with the board within thirty days of the initial decision pursuant to section 24-4-105 (14). Within sixty days after the record is designated in accordance with section 24-4-105 (15) (a), the board shall certify the record. The board shall conduct its review in accordance with section 24-4-105 (15) (b) and issue its final decision within ninety days after the record has been certified.

(5) In all appeals, including disciplinary appeals, the board shall uphold the action of the state personnel director, the appointing authority, or the agency unless the action is found to be arbitrary or capricious. If the board finds that the action of the state personnel director, the appointing authority, or the agency was warranted although the rules of the state personnel system were not complied with in taking such action, the board shall uphold the action but also

COMMENT

Aggrieved parties must file with the board within 30 days if they wish to modify the initial decision of a hearing officer.

Time limits are imposed on the board concerning certification and review of the appeal.

Under (5), an action of the appointing authority or agency must be found arbitrary or capricious to be reversed by the board on appeal. If an action is found to be warranted, but against the rules of the system, the action may be upheld but corrective or disciplinary action taken against the responsible person.

TEXT

shall order that the person or persons responsible for not following the rules receive appropriate and equitable corrective or disciplinary action.

(6) If an applicant or employee is responsible for any inexcusable delay in conducting the hearing or in the issuance of a decision, that person shall not receive back pay or any other award for the period of delay. If an agency or an appointing authority is responsible for a similar inexcusable delay in the proceedings, an applicant or an employee, if successful on appeal, shall have his costs, including attorney fees, paid for by the agency or the appointing authority.

(7) The board, the employee or applicant, and the agency or appointing authority are necessary parties in any appeal to the court of appeals, although the board need not file responsive pleadings unless it so desires. If the board does not file such pleadings, it

COMMENT

The language in (6) addresses the issue of delays in conducting hearings. It imposes a penalty on an applicant or employee for causing an inexcusable delay in conducting a hearing.

A penalty is also imposed on the agency or appointing authority if they are responsible for similar inexcusable delays in proceedings.

TEXT

shall be represented by the appellee.

SECTION 13. 24-50-125.5 (1), Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

24-50-125.5. Recovery for improper personnel action. (1) Upon final resolution of any proceeding related to the provisions of ~~section--24-50-109-or 24-50-125--or--related--to--an--action--based--upon--an allegation-of-discrimination-against-an-employee,-which results-in-the-determination-that-the-employee-involved has-the-right-to-be-restored-to-his-classified-position and--to--receive--any--unpaid-salary-and,-further,-that~~ THIS ARTICLE, IF IT IS FOUND THAT the personnel action from which the proceeding arose OR THE APPEAL OF SUCH ACTION was instituted frivolously, in bad faith, maliciously, OR as a means of harassment or WAS otherwise groundless, THE EMPLOYEE BRINGING THE APPEAL OR the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee OR AGENCY

COMMENT

The amendment in section 13 deals with the recovery of costs of proceedings. Current law allows an employee to collect costs incurred when a ruling favors the employee and it is found that the action was frivolous or otherwise groundless. The proposed language extends to the state the right to recover costs from the employee.

TEXT

against whom such APPEAL OR personnel action was taken, ~~in-defending-against-such-action,~~ including the cost of any transcript together with interest at the legal rate. Reimbursement of such attorney fees and other costs shall be made by the EMPLOYEE OR THE department, agency, board, or commission ~~forthwith~~ upon presentation by the employee OR AGENCY of a statement of the attorney fees and other costs incurred which has been approved by the board, and any such claim approved by the board AGAINST AN AGENCY shall be a charge on moneys appropriated to the department, agency, board, or commission. Each department, agency, board, or commission shall report to the joint budget committee each year concerning the number of claims made and the amount of moneys paid by the department, AGENCY, BOARD, OR COMMISSION under this section during the previous fiscal year.

SECTION 14. 13-30-104, Colorado Revised Statutes,

COMMENT

The amendment to section 14 makes a necessary internal reference change in the law.

TEXT

COMMENT

as amended, is amended to read:

13-30-104. Judicial compensation adjustment.

Effective for a six-month period commencing January 1, 1982, the compensation of justices and judges in effect on the preceding December 30, except as provided in section 13-30-103 (1) (i), shall be adjusted according to the average percentage salary increase determined by the state personnel director and contained in the report submitted pursuant to section 24-50-104 (5) ~~(e)~~ (g), C.R.S.

SECTION 15. Effective date. This act shall take effect July 1, 1984.

SECTION 16. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

The effective date of the bill is July 1, 1984.

MODERNIZING THE COLORADO PERSONNEL SYSTEM

A Report by William Levis, Attorney at Law

OUTLINE

- I. History of the Personnel System in Colorado.
 - A. 1907 Codification.
 - B. 1918 Constitutional Amendment creating Civil Service Commission.
 - C. 1944 Constitutional Amendment guaranteeing veterans preference.
 - D. 1970 Constitutional Amendment creating Personnel Board and Department and revising veterans preference.
 - E. Post 1970 Statutory Changes.
 - 1. 1971-1973 interim committees and legislation.
 - 2. 1980 Dines Committee and State Auditor's reports.
 - 3. 1981 Legislation -- S.B. 308 and litigation.
 - 4. 1983 Legislation -- H.B. 1187.
- II. Comparison of Present System in Colorado with those in other states.
- III. 1983 recommendations for changes and reasons for recommendations as the result of hearings by Interim Committee on Personnel.

Appendices --

Proposed constitutional and statutory changes

Summary of constitutional and statutory powers of Personnel Board and Department

Summary of constitutional and statutory appeals procedures

Summary of Personnel Board rules on appeals procedures

Summary chart by states of constitutional and statutory personnel powers

Charts and graphs on constitutional and statutory personnel provisions, board composition and powers, director appointment and powers, rulemaking, appeals and collective bargaining, compensation and classification, selection, probationary periods, layoffs, exempt employees, temporary appointments and veterans preference.

**PRESENTATION ON THE POWERS OF THE PERSONNEL BOARD AND DEPARTMENT OF PERSONNEL
AND POSSIBLE CONSTITUTIONAL AND STATUTORY CHANGES -- BY WILLIAM LEVIS, ATTORNEY
AT LAW, BEFORE THE INTERIM COMMITTEE ON PERSONNEL ON OCTOBER 12, 1983.**

Mr. Chairman, members of the Interim Committee, and Ladies and Gentlemen. My name is William Levis. I am an Assistant Attorney General on leave from the Department of Law to explore possible changes in Colorado's constitutionally-created personnel system. In my legal capacity, I have represented both the Personnel Board and Department and both complainants and appointing authorities before the Board. Based on that experience and my research the last three months of civil service systems in other states, I am formulating several conclusions and recommendations as to how I think Colorado's personnel system can be improved to better serve employees, appointing authorities and, most important, the residents of this State.

In conducting my research, I have prepared comparison charts and documents, some of which have been provided to you today. I also have summarized the specific constitutional and statutory powers of both the Personnel Board and Department. These summaries are being provided for your review along with a discussion on appeal rights that I had prepared for your September meeting. Instead of reading that presentation today, I request that the Committee members review that paper at your convenience. This afternoon, I will highlight what I feel are areas on which the Interim Committee may wish to focus in proposing changes in the state personnel system.

Unlike in most states, Colorado's civil service system is a creature of our Constitution. The only state that has as detailed a constitutional personnel system as ours is Louisiana, which last amended its personnel provision in 1974.

Unlike any other state in the country, Louisiana bases its legal system on the Napoleonic Code, French civil law. Just about anything of importance is found in its constitution.

Colorado along with the other 48 states bases its legal system on English common law. In theory, this means that state constitutions, as the U.S. Constitution, should contain basic, fundamental principles. State and federal statutes flesh out these principles in some detail while fine tuning is left to administrative agencies. Visually, this theory of lawmaking should look like a pyramid. The constitution is the narrow top; the statutes are the larger midsection; and agency rules are the great base.

Under French civil law, the pyramid turns into a square with constitutional provisions as detailed as the laws underneath them. Even though Colorado is a common law state, our personnel system more resembles a square than a pyramid. Article XII, sections 13 through 15, which are this state's constitutional personnel provisions, are as detailed as those in Louisiana and much more detailed than those found in any common law state. In fact, most states, including those immediately adjacent to Colorado, do not have constitutional personnel systems. Even in those states that do, including California, Michigan and New York, the provisions are much more general than those found here.

In theory, constitutions are supposed to contain time honored propositions. In actuality, the personnel sections in Colorado contain specific provisions which need to change over time. It took over 50 years to change the rule of one for hiring to the rule of three in Colorado. Although this State's personnel system may have been a model when it was last revised in 1970, 13 years have passed. During this time, the General Assembly has attempted to modernize the system but still under those constitutional constraints.

The Legislature tried to place responsibility for all civil rights investigation and determinations in the State Civil Rights Commission. The Colorado Supreme Court found, however, that the Personnel Board had exclusive jurisdiction over civil service employee complaints because the Board is constitutionally created and the Commission is only statutory. As a result, the Board, which has limited civil rights expertise, has had to enter into a contract with the Civil Rights Commission to investigate civil rights complaints involving personnel employees.

At the same time, the Federal Equal Employment Opportunity Commission has taken away funds from the Commission to investigate such cases, because it has no statutory authority to do so, but has refused to fund the Board's investigations. It seems that EEOC will only fund one state agency to investigate civil rights cases although two or more agencies have jurisdiction. This leaves the Board and Commission in a catch-22 situation. It also costs Colorado money because the General Assembly now has to fund investigations which were previously subsidized by the Federal government.

In 1981, the State Legislature passed Senate Bill 308 which was a comprehensive attempt to modernize Colorado's personnel system. Unfortunately, several key provisions have been ruled unconstitutional. Almost immediately after passage, CAPE filed a lawsuit in Denver District Court alleging that much contained in S.B. 308 was illegal. The issue was not whether the changes were good or bad; the only issue was whether they were constitutional. Judge Gilbert Alexander declared much of S.B. 308 unconstitutional in October 1981. The State appealed to the Supreme Court and arguments were heard this May. It apparently will not be until 1984, at the earliest, that the High Court will issue its decision. Although it is expected that the Supreme Court will overturn part of Judge Alexander's decision, it appears that some of S.B. 308 will be thrown out as unconstitutional.

Specifically, it is anticipated the Supreme Court will uphold Judge Alexander's ruling that it was unconstitutional to give the Personnel Director even limited rulemaking authority. Article XII, §14(3), apparently reserves rulemaking exclusively to the Personnel Board. In California, the state constitution also grants its personnel board rulemaking, but not exclusive power as in this State. As a result, the California legislature has been able to transfer rulemaking in certain areas to its personnel department. The overwhelming majority of states do not even mention rulemaking in their constitutions and most do not even have a constitutional personnel provision.

The difficulty with giving the Personnel Board exclusive rulemaking authority is that it grants the Board two of the three governmental functions: legislating and adjudicating. The Board not only makes the rules; it also interprets them through its power to hold hearings. In many states, personnel departments now make the rules and the Boards interpret them.

I earlier mentioned that there are three functions of government. The third is executing the laws. The General Assembly legislates; the Governor executes; and the Courts adjudicate. Administrative agencies also perform these three functions. Generally, administrative boards and commissions legislate through rulemaking and adjudicate through hearings. Administrative divisions or departments execute the rules and statutes.

The personnel system is unique in that there are three actors who handle the three tasks. Unfortunately, one participant, the Department of Personnel, does not have a clear role, creating not only confusion but also inefficient use of resources. The Constitution gives rulemaking and hearing authority to the Board. While it also gives the Personnel Director administrative duties, it mandates that appointing authorities, and not the Department of Personnel, execute the rules and statutes. It is appointing authorities who hire and fire

and supervise employees. As a result, the Department of Personnel has no clear role. It neither legislates, executes nor adjudicates. This system should be changed for the betterment of state government. As S.B. 308 has demonstrated however, this can only be accomplished by constitutional change.

The Constitution contains other provisions that should either be updated or removed to make Colorado once again one of the leaders in personnel management. Outside of Colorado, only Louisiana has a selection rule, also the rule of three, in its constitution. All other states either provide for selection by statute or by rule. In addition, the trend is toward allowing appointing authorities to select from a larger group of applicants - up to 10 or 10 percent of the qualified applicants. This is done because studies show that it is nearly impossible to differentiate among highly qualified applicants, especially when the applicant pool is large, something that is prevalent in this era of higher unemployment.

The vast majority of states also do not list exempted personnel employees in their constitutions. Instead, it is left up to the Legislature to determine which employees will be excluded from civil service requirements. In most states, executive directors are permitted to hire their own confidential secretary and at least one deputy. It is something that should be explored in Colorado. As far as university staffs are concerned, most states, as Colorado, limit exemptions to faculty members.

Although executive directors are responsible for the workings of their departments, their authority to control their staffs is limited under the constitutional personnel provisions. Executive directors are appointing authorities only for their immediate staffs and division directors. Division directors are the constitutional appointing authorities for their subordinates. If executive directors are ultimately responsible for their departments, should they not also be appointing authorities for their departments?

The next provision in the Constitution limits when an employer can take disciplinary action and provides that the Board shall conduct a hearing. By including the reasons for disciplinary action in the Constitution, they are frozen. The Legislature should consider expanding the definitions or allowing the General Assembly to list other reasons for disciplinary action. In several states, over 20 reasons for disciplinary action are listed by statute.

Temporary appointment is another area in the Constitution that should be explored. The Higher Education Taskforce Report noted that six months is extremely limiting. Judge Alexander found that any attempts to expand the definition, including defining it as 1040 hours in 12 calendar months, is unconstitutional. Many agencies need to hire temporary employees on a seasonal or intermittent basis. Some of these time periods last longer than six months. Flexibility in this provision should be considered.

Article XII, section 14, pertains to the division of labor between the Personnel Board and Department. The section creates the Board and Department and delineates their duties. The five member board is made up of three gubernatorial appointees and two employee elected representatives, all of whom serve staggered five year terms. Colorado is the only state that has a personnel board so structured. Several other states also have employees or their representative on the board but none allow employee representatives the power they have in Colorado.

In addition to empowering the Board to promulgate all personnel rules, section 14 also makes the Personnel Director administrator of the system. Judge Alexander relied on that provision to declare those sections of S.B. 308 unconstitutional which sought to delegate personnel responsibility to executive directors and college presidents. Since appointing authorities already have hiring and firing authority under the Constitution, the Committee may wish to

explore more clearly delineating the division of authority between the Personnel Director and appointing authorities. As recommended previously, it might be best to give the Personnel Director rulemaking authority and appointing authorities day to day executive power.

Probably the longest and possibly the most confusing constitutional provision is section 15 concerning veterans' preference. No other state, including Louisiana, has such a lengthy and convoluted section. In other states that have constitutionally mandated veterans preference, there is a simple statement recognizing the right and possibly how many preference points veterans will receive on tests.

In Colorado, there is a definitional section explaining how veterans qualify for the preference and the lengthy explanations as to how it can be used in hiring and layoffs. It was this section that Judge Alexander relied on in finding that the consideration of performance in addition to seniority in determining layoff rights was unconstitutional. This section also does not take into account Federal programs created after the 1970 constitutional amendment, granting preference to disabled Vietnam veterans over disabled veterans and veterans.

Other states have handled these programs by amending their veterans provisions and stating that where a conflict in personnel policies occurs federal standards control. Unfortunately, Colorado's veterans preference is cast in stone. It does not allow for differentiation among disabled veterans; it also does not permit federal standards to control, not even in this area of veterans affairs, which in most respects is a federally created and funded program.

Amending the constitution to make it more flexible would do much to allow personnel management to change with the times. There are possible statutory alterations, however, that can also help to modernize the personnel system in

Colorado. Several of these can be made without necessarily amending the Constitution.

As stated earlier, the General Assembly attempted in 1981 to add flexibility to the personnel system. The Legislature gave the Personnel Director some rulemaking authority and executive directors and college presidents more direct responsibility for running the civil service system. Although these changes were passed two years ago, many of them have not gone into effect because of the SB 308 litigation.

The only way to prevent similar problems in 1984 would be to amend the Constitution. Still, there are other areas of the statute that can be clarified with support from CAPE and AFSCME. These include revision of the classification and compensation systems and streamlining appeals. I will discuss these and other areas of the statute which are susceptible to modification without constitutional challenge.

I have already noted that Colorado's five member board is unique in its composition and duties. It is, in a sense, a board made up of two classes of constituents: employees and managers. The Governor appoints three members; the employees elect two. Presently, there is no provision in the statute for removing members who miss the Board's meetings without an excuse. This has led to situations where only three members of the Board consistently attended meetings for up to six months. Since Board members serve five year terms and make decisions which directly affect over 26,000 personnel employees, it is recommended that the statute be amended to allow the removal of members for cause who miss three consecutive meetings without an excuse. Board members should be committed to their task. If they are not, they should be removed for cause. This would result not only in a more committed board, but also one where more than a minimum of two members could overturn a decision of an appointing authority or the Personnel Director.

As it stands, two of the five Board members, 40 percent of the total body, can overturn a decision, when only three members attend a meeting because three is a quorum. This has meant that on occasion the two employee representatives have been in a position to overturn decisions of appointing authorities and the Personnel Director. Indirectly, this means that employees are in the position of being able to overturn the decision of their supervisors.

Only in Colorado can personnel employees be in a position where their representatives can control the Personnel Board. In no other state, even those with employee representatives, is this possible. Since there are two classes of representation on the Board, should it not take a majority of the whole Board or at least a quorum of four to overturn appointing authorities or the Personnel Director?

Otherwise, you have a situation where, for whatever reason, a minority of the Board can run the personnel system. Because of this problem, several other states require either a majority of the Board to overturn the Director or only have a three member board which requires an absolute majority to reverse the Director. In still other states, there is no personnel board to reverse the Director.

This is not a case of representative democracy where those who care to vote carry the day even though they may be a minority of the electorate. Voters are not entrusted with running the personnel system. Eligible voters are given the choice of not only deciding between candidates but also whether to vote at all. Personnel Board members, on the other hand, have been entrusted either by the Governor or certified employees to review appeals and pass rules which affect all personnel employees. If Board members refuse to carry out that task, they should be removed.

In the interim, appointing authorities and the Personnel Director should not be penalized because only a minority of the Board votes to overturn their decisions. Those decisions should only be subject to reversal if a majority of the Board so rules. The Director and appointing authorities have the responsibility for their decisions; so too should the entire Personnel Board. To do otherwise creates a double standard.

In 1976, the General Assembly centralized State hearing officer services in the Department of Administration. Prior to that time, the Personnel Board employed its own hearing officers, either as personnel employees or under contract. Since the centralization, the Personnel Board has lost effective control over the hearing officers who supposedly work for it. In the last four years alone, eight different hearing officers have filled the two hearing officer slots allocated to the Board. The Board has had little or no say about whom is assigned to it. Since the officers do not work for it, the Board does not give its hearing officers performance evaluations. It does not participate in reviewing the quality of their work.

Presently, the Personnel Board has approximately a two year backlog of 150 cases to be heard. In 1983, the Legislature attempted to eliminate this backlog by mandating that disciplinary decisions be issued within 30 days of hearing. As the Board administrator testified in September, the hearing officers have failed to comply with the 30 day requirement in all cases heard since May 16, 1983. Since the Board does not supervise hearing officers, it has no control in getting decisions issued as required by statute.

There are two other reasons why the present hearing officer setup is not beneficial. First, as personnel employees, there is an inherent bias in hearing officers reviewing appointing authority disciplinary decisions. As has happened in the past, the hearing officers themselves may be in a similar situation to

that of the employee some day. There has to be tendency on the part of hearing officers, therefore, to make disciplinary actions as difficult as possible to sustain.

There is an even more fundamental reason for removing hearing officers from the Department of Administration and the personnel system. Under the present setup, the hearing officers can and have sued the Personnel Board, the very agency for which they supposedly are hearing cases. The hearing officers, including those representing the Board, have sued both the Board and the Personnel Department because the 1983 salary survey recommended decreases for them. How can these same hearing officers be impartial when they are suing the very agencies they are representing and whose cases are before them?

A shortterm solution would be to remove personnel hearing officers from the Department of Administration and place them directly under the Personnel Board, either as personnel employees or contract employees. The longterm remedy would be to make them exempt employees under the Constitution.

The hearing officer dilemma relates directly and indirectly to two other areas in which the Interim Committee should consider statutory changes. Those concern classification and compensation, and appeal rights and time limits. Presently, Colorado has what in comparison to other states is the most confusing classification and compensation system that I have found. No other states permit the convoluted appeals that Colorado does when classification and compensation plans are changed.

In other jurisdictions including those without collective bargaining, employees have the right to challenge their individual allocation and reallocation to a class or pay grade. They do not, however, have the right as in Colorado to challenge the overall compensation and classification plans all the way to district court. If there are appeals, those are before the Director

or the Personnel Board before the plans are forwarded to the Governor and the Legislature.

Only in Colorado do appeals go to the Personnel Board at the same time both the Governor and Legislature are considering their adoption. Only in this state is there such a bifurcated system. Such a system not only leads to unnecessary confusion but also to expense. Salary survey appeals from 1978 are still active although the Legislature long ago appropriated money for that fiscal year. Even if those employees were eventually to win their compensation appeals, it would take a special appropriation from the Legislature to compensate them. In the past, the Legislature has not made such appropriations, so the lengthy and costly process is meaningless.

In other states that have classification and compensation appeals, all such appeals are heard by the Director or the Board and finalized before the recommendations are forwarded to the Governor and the Legislature. No provisions are made by statute, unlike in Colorado, for appeals to District Court. In fact since the decision of the Director and Board are just recommendations to the Governor and the Legislature, there is nothing to appeal to court. Even in those states where the Director's and Board's recommendations are binding on the Legislature no appeals are provided.

It is recommended that a similar law be enacted in Colorado in place of the confusing legislation we presently have. The Director should propose classification and compensation plans which should be summarily reviewed by the Board or by some independent and impartial outside group appointed by the Governor and/or Legislature. The Director's recommendations should only be overturned if they are arbitrary or capricious and not just because someone feels they may be unreasonable. Once finalized, those recommendations, including occupational studies which the Colorado General Assembly has chosen

not to fund the last few years, should be forwarded to the Legislature for adoption as proposed. There should be no appeals and all actions of the Director and Board would have to be completed before the proposals were forwarded to the Legislature in sufficient time for it to act.

In no other state could I find compensation and classification plans forwarded to the Legislature as late as March 15th as in Colorado. In many states, the plans are forwarded to the Governor and General Assembly the previous Fall for their review. Because of the lag time in adoption, cost of living increases are built in based on increases during the previous four quarters. A similar plan could be enacted in Colorado.

These suggested changes are attempts to make the system more workable in Colorado. They would not negate the rights of employees. If anything, they would broaden them because employees would have a chance to appeal methodology, key classes and relationships before the survey is finalized. The statute presently requires that all appeals take place after the survey not only is completed but has been forwarded to the Governor. This is like locking the barn door after all of the animals have escaped. It also has resulted in lengthy and costly litigation which is to no one's advantage.

Another prime area of concern is individual employee appeals. As in other states, Colorado provides certified employees with the right to appeal disciplinary actions, although not all states allow appeals of suspensions. The problems are that the process takes too long and the reasons for disciplinary action are not clearly defined. In addition, just about anything can be appealed and there is no disincentive to employees not to file frivolous appeals.

The Legislature attempted to streamline appeals by requiring the disciplinary decisions be issued in 30 days of hearing. As discussed earlier and in my appeals paper, hearing officers have ignored this requirement and the time limit does not apply to other cases heard by the Board including non-disciplinary adverse actions. Other states have remedied this situation by not only putting the hearing officers under the Board but by setting up strict time limits for holding hearings and issuing decisions. For example, hearings could be commenced within 45 days and decisions issued no later than 45 days thereafter. That is a total of three months compared with the two year backlog in Colorado.

Part of the backlog is caused by the fact that the Legislature allows employees to appeal non-disciplinary adverse actions and any action of the Director. In most other states, non-disciplinary adverse actions are grievable with either a discretionary appeal to the Board, mediation or binding arbitration. In no other state could I find that every action of the Director was appealable. It is recommended that non-disciplinary adverse actions be grievable and that only certain actions of the Director, such as allocation and reallocation, be appealable to the Board. The Director should be empowered to review exam appeals and those actions should not be appealable to the Board. This would simplify the number of actions that are appealable and streamline the time it takes to hear disciplinary cases, the prime responsibility of the Board.

In addition to eliminating many of the appeals from the Director, the Legislature should also consider amending the standard for reviewing the Director's action. In no other state is it possible to overturn the Director just because her action was considered unreasonable. This is a nebulous

standard which obviously means different things to different people. I concur with Personnel Board member Ric Kethcart's recommendation that the Board's review authority be limited to instances in which the action of the Director was arbitrary and capricious. Those words have definite meaning in the law, unlike unreasonable.

One other area of appeals should be considered by this committee. That is the area of frivolous appeals. Only one percent of state employees appeal actions to the Board. Several employees have appealed numerous times even though there is no basis for their actions. They hold up appointments and cost agencies large amounts of money in lost wages and time. The present statute recognizes the right to appeal as an absolute right. No costs are assessed to employees if their appeal is frivolous. A statute does allow such costs to be assessed against appointing authorities for defending a frivolous action. Should not the statute be amended to treat employees and appointing authorities equally?

One other issue involving appointing authorities should be mentioned for the committee's consideration. Both the Board and hearing officers reinstate personnel employees who have not been afforded a proper pre-discipline meeting before they are terminated, demoted or suspended, even though there was a proper basis for the ultimate action. Instead of rewarding an employee who should have been disciplined, should not the appointing authority be reprimanded in some way for not following the rules?

The Interim Committee should consider at least one other statutory change. Judge Alexander held in the 308 suit that employees could serve only one probationary period. It is apparent from the questions asked by the Supreme Court justices during the May arguments that employees can serve new probationary periods when they are promoted, at least to a new class series. Most states, as Colorado attempted in 1981, provide for a new probationary

period when an employee is promoted. They also provide, however, that an employee who is not certified in the higher class be placed back in the class to which he or she was previously certified. This should be considered in Colorado.

I have attempted today to highlight areas in the Constitution and statutes in which changes appear desirable. They are not the only areas in which change may be needed. In fact, a different approach may be desirable. A complete overhaul of the system is one alternative. It is just requested that these suggestions be considered by the Committee. I thank you for your time and would welcome any questions.

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COLORADO STATE PERSONNEL BOARD

WORKLOAD STATISTICS	75-76	76-77	77-78	78-79	79-80	80-81	81-82	82-83
NUMBER OF CASES FILED WITH THE BOARD:								
Discipline [termination, suspension, demotion, fine] and Pay, Status, Tenure [layoff, "forced" resignations, administrative suspensions, leave without pay, and downward classification actions]						129	167	150
Classification						30	26	18
Examination						38	32	33
General (Rule 8-1-1)						6	7	1
Grievance						31	29	28
Other (Miscellaneous)						213	57	86
TOTAL						447	315	316
* Salary Survey							3325	3786
**Discrimination Charges Filed	15	65	59	42	22	26	26	64
Discrimination Charges Processed	15	30	36	47	28	23		

*In FY 81-82, 3,325 salary survey appeals were consolidated into one case; 7 days of hearing. In FY 82-83, 3,786 salary survey appeals were consolidated into one case; 6 days of review, no formal hearing. These appeals are counted as one case under the "Other" category.

**The discrimination charges are included in the number of total Board cases established. For example, a discrimination charge on a termination case is counted in the total number of discipline and pay, status, tenure cases processed.

PRELIMINARY EXAMINATIONS: Review of appeals on examinations; classifications; termination of probationary employees; denial of leave; failure to appoint from eligible, promotion, or reinstatement lists. Preliminary examinations are show cause hearings; the Board has discretion to grant or deny full hearings on these cases.

Cases scheduled for preliminary examination			180	130	109	95	97	82
Settlements/Closures/Withdrawals			33	17	30	34	49	12
Preliminary examinations conducted	67	170	147	113	79	61	48	70
Settlements/Closures/Withdrawals						11	6	26
Hearing officer recommendations considered by the Board						50	42	44
Board Granted Hearing, based on cause shown to merit a full hearing						16	20	22
Board Denied Hearing, based on no justification for a full hearing						34	22	22

WORKLOAD STATISTICS	75-76	76-77	77-78	78-79	79-80	80-81	81-82	82-83
FORMAL HEARINGS: Discipline, Class Specifications, Grievances, and Pay, Status, Tenure actions, and those cases granted hearings by the Board after preliminary examination								
Grants of hearing after preliminary exam. Referred Directly to Formal Hearing as a matter of right by statute or rules (discipline, pay, grievances, etc.)					16 211	16 293	20 150	22 135
Total cases referred during current year	75	129	140	155	227	309	170	157
Carryover of hearings from previous year			13	17	35	68	43	65
Total scheduled for formal hearings	75	129	153	172	262	377	213	222
Settlements/Closures/Withdrawals		29	44	37	138	261	78	52
Hearings Conducted		87	92	100	56	73	70	84
Backlog of Hearings as of June 30		13	17	35	68	43	65	86
Appeals of Hearing Officer Decisions			37	29	21	16	16	13

SUMMARY OF CASES PROCESSED:								
Cases Filed with State Personnel Board						447	315	316
Carryover of hearings from previous year						68	43	65
Total Cases to be Processed						515	358	381
Closures without hearing or prelim. exam.						59	68	99
Closures during preliminary examination process						79	77	60
Closures during formal hearing process						261	78	52
Total Closures/Settlements/Withdrawals, or denial of hearing by Board*						399	223	211
Total Hearings Conducted						73	70	84
Total Backlog of Cases						43	65	86
Total Cases Processed						515	357	381

*Closures including cases denied for untimely filing or lack of jurisdiction, Board denial of hearing after preliminary examination, withdrawal of appeal by employee, withdrawal of action taken by agency, mutual settlements between parties, etc.

Number of Board Meetings		46	44	46	40	25	26	21
Residency Waivers Requested			32	30	31	30	16	18
Residency Waivers Granted			28	29	29	28	13	16
Rules Hearings			6	5	2	2	10	5
Hearings on appeals of hearing officer decisions	8	16	19	26	30	16	8	18
Transcripts on appeals of hearing officer decisions				18	10	10	3	6
Backlog of Board Hearings								8

The Department of Personnel's Responses to Questions Concerning its Relationship to the Personnel Board and its Desire to Advance Changes in Constitutional and Statutory Provisions Governing the State Personnel System.

Question #1: How has the Board limited or prevented the Director from exercising his authority to give direction to the personnel system?

Department's Response: The Board has become involved in the day to day administration of the personnel system by promulgating rules which specify management procedures and providing excessive and open ended appeal rights. Management decisions cannot be finalized until the appeals process is terminated, often at the judicial level. Some examples of excessive interference in the management of the personnel system through the Board's rule-making authority are:

1-5 Discrimination Rules. The process expressed in the rules is very convoluted and complex. It is the Department's position that if there is an allegation of discrimination, it should be routed very simply to the Civil Rights Division for findings of probable cause or no probable cause. The Board does not agree with this approach and has incorporated discrimination appeals within the grievance process, an excessively time-consuming and duplicative process. We believe discrimination appeals would be handled more rapidly and effectively if the procedures for handling were left to the Director.

1-6 Implementation of Affirmative Action. We feel that the present affirmative action rules are designed solely to divert the blame for the ineffectiveness of affirmative action from the Board to the Department. The rules require various reports from the Department, but do not deal with enforcement. It is our belief that the Department needs to spend its time making affirmative action work instead of reporting to the Board on its activities such as outreach, test validation, etc. Reports to the Board take time, but do not produce results.

Rule 3-7-2 (c). Requires mandatory "save pay" on downward reallocations. The statute permits managers to implement "save pay" for employees, but does not require it, thereby giving managers the flexibility to make an administrative decision according to the circumstances surrounding each case. The Board's rule imposes a procedure that should be a management decision.

Rule 4-2-1. The rules specify exact filing times for posting job announcements. These are clearly management procedures that should be flexible to meet varying situations. For example, in a hard-to-fill job in which an appointing authority expects a few applicants, he or she may want to extend the filing period. On the other hand, if the appointing authority expects hundreds of applicants, he or she may want to limit the filing period. The Board should not be mandating procedures which should meet differing needs.

Rule 5-2-1. Requires both appointing authorities to approve an employee's transfer from one unit to another. If one appointing authority refuses, the employee cannot transfer. This is an administrative matter to be determined by the employee and the appointing authorities, not a lay board.

Rule 5-6-1 (A). Requires 10 days notice of requisition prior to appointment. Again, the Board is using its rule-making authority to mandate an administrative procedure. This is unnecessary and an infringement of the Department's authority to manage the personnel system.

Rule 5-6-12. Lists time limits for eligible applicants on open-competitive employment lists to respond to a job offer. Such requirements are administrative and should be flexible to meet varying situations. The personnel system is very complex and cannot be managed by a set of lengthy, inflexible rules which determine how every process and procedure should be implemented.

Rule 8-1-1, 8-1-2. Provides the right to appeal to the Director and then to the Board on anything. This is an open-ended appeal right that eliminates a manager's ability to manage effectively because all decisions and actions can be appealed. The result is a system subject to uncertainties and endless delay.

a. Who drafts rule changes for board review?

The Board, the Department, the personnel administrators, individual employees and employee organizations all draft proposed rules changes for board review.

b. How often does the board reverse decisions of the director and on what topics?

The Personnel Board should respond to this question.

c. Should all rule making authority be removed from the board and given to the department?

Yes.

d. Isn't the confusion of powers between the department and the board really a conflict of opinions?

No. If the separation of power between the Department and Board was clearly delineated, the Board and the Department would not be suing each other in District Court on issues such as the 1983 salary survey and occupational studies.

e. Would the grant of rule-making authority to the department create an imbalance by granting the department legislative and administrative authority?

- e. Would the grant of rule-making authority to the department create an imbalance by granting the department legislative and administrative authority?

The adoption and administration of rules and procedures are management functions. These should establish guidelines for the fair and effective functioning of the system. The Board should act as the quasi-judicial body, hearing appeals on the administration of the system. This was the intent of creating separate management (Department) and appellate (Board) bodies when the current constitutional provision eliminated the Civil Service Commission. Currently the Board is both adopting rules and hearing appeals on the implementation of these rules.

Question #2. What evidence do we have that the rule of five or seven or ten will expand opportunities for women and minorities?

Department's Response:

Summary of Protected Class Members
Referrable Under Rules of 3, 5, and 10
Positions Filled in FY 1982-83

	<u>Number of Eligible Lists</u>	<u>Protected Males</u>	<u>Protected Females</u>	<u>Undefined*</u>	<u>Veterans</u>
Top 3	169**	22	104	35	22
Top 5	41	29	140	31	28
Top 10	13	16	66	22	21

Of the 172 eligible lists analyzed, 41 eligible lists were established which had five or more eligible candidates and 13 eligible lists were established which had 10 or more eligible candidates. Departmental promotional examinations often result in establishing a Q-list (qualified list) which contains the names of three or fewer eligible applicants. Q-lists are established only when three or fewer applicants are qualified for the position through the initial job screening process. Q-lists were used to fill 51.7 percent of all state jobs in FY 1982-83. The department is analyzing the use of Q-lists to determine if Q-lists produce an adverse impact on the hiring of protected classes.

* Undefined refers to all job applicants who elected not to complete the sex and ethnicity section of the application. Completion of this section is not mandatory.

** Three eligible lists contained no names. This occurs when no applications are received or when none of the applicants meets the required qualifications for the position.

Question #3. The department proposes the creation of impartial panels of experts to handle highly technical appeals. What are these areas and what is the workload now?

Department's Response: The Department is seeking to resolve salary, classification, and examination appeals by establishing impartial panels or creating a fair arbitration process which will resolve appeals in a timely manner by using persons who have technical expertise in these areas rather than a lay board.

Question #4. The department reports that one reason for the unhappiness among employees with the compensation system is the knowledge that someone else's salary increase is greater than one's own, and suggest that the solution is across-the-board increases. What evidence is there to support this claim?

Department's Response: The large volume of appeals on the results of the salary survey indicates the degree of unhappiness felt by employees. Employees, themselves, often recommend across-the-board increases in the interest of fairness. Both the Compensation and Higher Education Task Forces proposed this option to eliminate the perception of unfairness and the "roller coaster" effect of the current process. Most private sector and many public sector employers pay across-the-board increases. Several years ago, a Department of Personnel analysis of salary increases over a 10 year period showed that if a 5% across-the-board increase had been given each year, salaries would have been at about the same place as they were under the current process.

- a. How many occupational studies have not been funded by the General Assembly?

Including those that most likely will not be recommended for implementation on 2/1/84, a total of thirteen (13) studies have not been implemented since 7/1/81.

- b. Wouldn't asking the General Assembly to fully fund occupational studies become a budgetary issue in light of the state's revenues and the 7% limit?

Yes. Occupational studies can have both positive and negative budget impacts. The future impact of making up unfunded occupational studies will be enormous.

Question #5. You support making the executive director the appointing authority for all employees within his department. How will this improve the personnel system?

Department's Response: The responsibility for managing his or her department is assigned to the executive director. In order to be fully accountable, the director must be responsible for hiring the most qualified people. If the executive director has the appointing authority, he or she can assure that affirmative action goals are met

and that appointees meet the needs of the department.

- a. What effect does such a proposal have upon a director's span of control?

Hiring is a critical management role that affects the success or failure of a program. The director, who is accountable for that success or failure, needs the ability to achieve a successful outcome.

- b. The directors now serve as appointing authorities over the division directors. How does that proposal strengthen the executive director's position?

The director needs the constitutional or statutory authority to direct the personnel functions of his or her department. This proposal would do that.

Question #6. You stated that obtaining a waiver on the residency requirement is very time-consuming. Can you provide documentation on this matter?

Department's Response: Please see the attached documentation which was submitted by the Health Sciences Center to the Personnel Board requesting an out-of-state residency waiver for UCHSC Staff Nurse A, B, C, UCHSC Nurse Specialist, A, B, UCHSC Nurse Practitioner A, B, UCHSC Assistant Nursing Unit Administrator, UCHSC Nursing Unit Administrator I, II, UCHSC Staff Development Instructor I, II and UCHSC Clinical Coordinator.

(Documentation submitted by the department consisted of a waiver of residency request from the Health Sciences Center and materials which show the various recruitment efforts such as out of state and in-state advertising, personal contacts, both in-state and out-of-state, and state announcements. This material is on file in the committee staff offices.)

Question #7. On the issue of hearing officers -- aren't most of the delays and time consuming hearing procedures attributable to the hearing officers and not the board?

Department's Response: Yes. The Board and Department agree that hearing officers would be held more accountable if they worked for the Board.

Question #8. Concerning the governor's request that each major department hold in reserve a percentage of their overall budget -- how much was taken from the Personnel Board's budget for hearing officers? What kind of effect will this have on the ability to hold hearings for the remainder of fiscal year 1983-84?

Department's Response: The Legislature cut the Hearing Officer line time by \$20,000 in S.B. 432 due to a projected workload decrease

in the number of hearings scheduled in FY 1983-84 and based on the FY 1982-83 actual expenditures. The Department and Board are working with the Department of Administration to expedite the appeals process and reduce the backlog which currently exists.

APPENDIX C

TESTIMONY OF

GAIL S. SCHOETTLER, EXECUTIVE DIRECTOR

COLORADO DEPARTMENT OF PERSONNEL

OCTOBER 12, 1983

I appreciate the opportunity to discuss personnel issues with you. Based on my record tenure of 9 months as personnel director, I have a number of impressions and concerns about the system.

As many of you know, I have considerable management experience in both business and government. Consequently, I think I have a good background against which to assess the competence of my staff. I have an excellent staff. They are very capable technicians and strong managers who continue to care about the system and to perform well despite the endless criticism they receive. I am proud to be their executive director.

The Department of Personnel oversees the personnel system for 26,000 state employees. We establish the classification and compensation plans used throughout. We also develop and administer exams, handle numerous appeals, maintain the computerized personnel data system, and provide full personnel services to those agencies that are not decentralized. The Department is charged with approving all training in the state and with organizing such all-encompassing programs as supervisory training and career development. We audit decentralized agencies, interpret rules, establish affirmative action plans, and approve personal service contracts. Above all, we deal with employees, managers, legislators, and citizens, all of whom have very different perceptions of how the civil service system should function. This is a difficult balancing act which my staff handles with professionalism and courtesy.

There are three major problem areas in the system that I'd like to discuss. These are:

- a. the management of the personnel system
- b. appeals
- c. employee compensation

While they all overlap, I'll discuss them separately.

Management of the System

Under the current constitutional provision on personnel, the management of the system is confused. The Personnel Board is authorized to adopt rules and hear disciplinary appeals. The Personnel Department is responsible for administering the system. There are constant clashes between these two sets of responsibilities which make managing the system very difficult.

Although the constitution only gives the Board the authority to hear disciplinary appeals, by statute and its own rules, the Board has taken on additional appellate authority. Rule 8-1-1, for example, grants anyone, whether an employee or not, the right to appeal anything at virtually any time. As a result, there are infinite grounds for appeal, but no disincentives. When any decision or action can be appealed by anyone at any time, managers become reluctant to make decisions - or they look at deferability rather than rationality as a basis for their decisions.

Appeals, many of which are frivolous, can hold up important actions for years. For example, an exam appeal, which most of us would consider frivolous, has forced the Director of the Division of Wildlife to hold his assistant director's position open for nearly two years. In the Department of Labor and Employment, an employee organization - but not an applicant or an employee - appealed the job qualifications for the deputy director established by the executive director. Only later did the organization find an employee to serve as the appellant. We can't run the state effectively under rules that permit

such conditions. Neither employees nor managers can be sure of their responsibilities, decisions, or working conditions.

After the Dines Committee issued its report calling for major statutory and rules revisions, the Department established task forces of employers and supervisors to consider and draft rules revisions. This was no small task since the Board rules are over 120 pages long. The task forces completed their work almost 2 years ago, but the Board has not yet begun hearings on their proposed changes. I believe that the rules of the personnel system need to be maintained and updated systematically, as a regular part of the administrative process. In addition, I think they need to be clear and brief enough for all employees to know and understand.

The responsibility for adopting rules is, in my opinion, a management function. For the personnel system to operate effectively and fairly, I think the management and appellate functions should be separate. The Personnel Board, which is a lay board that meets once or twice a month, should be the appellate body, guaranteeing due process and fairness to all employees. The Personnel Department, which is charged with managing the personnel system, should perform all the management functions, including the adoption of rules. This clear division of authority would end the confusion inherent in the existing system and would place the accountability for overseeing the daily operation of the system where it belongs - with the Personnel Department. Right now questions and decisions are bounced back and forth between the Board and the Department until everyone is frustrated and angry. For example, several days ago an attorney called me about an appeal he had attempted to file almost 18 months ago. His letter went to the Department, then to the Board, back to the Department, and back to the Board from whom he had heard nothing since February 6, 1983. I think we owe our employees and our citizens a better system than this.

The statutes currently allow appeals of decisions or actions deemed to be arbitrary, capricious, or unreasonable. The standards for arbitrary and capricious are tightly and clearly delineated in case law. Nevertheless, I do not think the hearing officers and Personnel Board meet this standard in many of their decisions. In reaching their decision on this year's salary survey, for example, the Board determined that the results were unreasonable because they didn't like them. At no time did they look at the data, even though we offered to make it available to them. I believe they had no sound basis for reaching their decision that the survey results were arbitrary, capricious, and unreasonable. We have the data to back up our recommendations.

Defining unreasonable is much more difficult and, in fact, hasn't really been done legally. If I don't like your decision, I think it is unreasonable. Under this loose standard, any action can be appealed, often frivolously - and many are. I urge you to consider repealing the fuzzy standard of "unreasonable." "Arbitrary" and "capricious" are appropriate and fair measures of actions.

In a separate management area, I would recommend that the committee consider changing the rule of 3, contained in the constitution, to the rule of 10. I believe that this would expand opportunities for women and minorities to enter state service, particularly in professional classes, and would offer appointing authorities a broader choice of qualified candidates. Although tests do help to screen out unqualified applicants, they do not necessarily identify the best 3 candidates, in my opinion.

The seniority system also deserves some study. I believe that performance should be considered in lay-offs and bumping as well as seniority. We now have a very good performance appraisal system, developed with the assistance of employee task forces, that makes evaluations very objective. While no system will eliminate subjectivity entirely, I believe the risk is worth taking because

we will retain a better work force. The seniority system is detrimental to women and minorities because they tend to have been the last hired, and, therefore, the first fired, particularly in the professional and management jobs.

Appeals

You have already heard a number of people testify on the appeals process. Everyone seems to agree appeals are a major problem that undermine the efficiency and credibility of the system. Hearings drag on endlessly, costing the state large amounts of money in both time lost from work and actual expenses. Some cases have already cost the state over \$35,000 and they still haven't been resolved. Decisions often are issued years after the appeal was filed. This isn't due process - much less sensible government.

I see Personnel Board members with stacks of papers sometimes a foot high at Board meetings. Under the current rules and statutes, we have grievances, administrative hearings, preliminary Board hearings, hearing officer hearings, and more Board hearings. An appeals process should be aimed at resolving disputes at the lowest possible level so that everyone involved can move on to other activities. It should encourage rapid resolution of disagreements. Because our appeals process invites continuing the appeal through convoluted and time consuming steps, we often resolve minor as well as major disputes in court. Even if it is resolved before it goes to court, the heavy load of appeals before the board and the dragged out hearing process delay decisions interminably and unfairly. Employees who are not represented by an employee organization effectively lose their appeal rights because they cannot afford such costly processes. For an employee who has been fired, it does little good to find out five years later that he or she was terminated fairly or unfairly.

That is five years of potentially lost or lowered income and anguish, not to mention the potentially large fiscal impact on the state.

There are many parts to this complex problem. I'd like to offer some specific solutions for your consideration.

1. Rules

A large portion of the appeals problem is contained in the rules, which permit wide-open appeals and endless procedures. Many disputes should be handled through an administrative review process, utilizing impartial panels of experts who understand the issues and can make decisions fairly and quickly. Again, I believe that rule-making belongs with the Personnel Department which is responsible for making the system work.

2. Hearing Officers

The appendix of the Higher Education Task Force report contains examples of some of the "horror stories" of the appeals mess. Hearing officers contribute significantly to the problem by recommending frivolous cases for full hearings, allowing both sides to delay hearings, holding unnecessarily lengthy hearings where the same evidence is repeated over and over, and issuing decisions many months after the hearing, despite statutory time limits.

Because the officers are, themselves, part of the personnel system, they are making decisions on issues which directly affect their own working conditions and salaries. In my opinion, this is an inherent conflict of interest. I believe hearing officers assigned to personnel cases should be exempt from the personnel system in order to assure their impartiality. This would require a constitutional amendment.

Secondly, the personnel hearing officers should work directly for the Personnel Board. Under the existing cash funding system, there is no disincentive to holding long hearings or to writing overly lengthy decisions. If the hearing officers worked for the Board, on salaries, the Board could establish their performance standards and ensure more timely actions. I have discussed these recommendations with Robert Turner, Executive Director of the Department of Administration, and with members of the Personnel Board, all of whom agree with them.

3. Salary Appeals

Colorado is the only state that permits such a salary appeal process. Rarely are salary appeals based on methodology - almost all are based on results. If employees are unhappy with their salary adjustments, particularly compared to another class or the average increase, they'll appeal. It's not the way the survey is conducted; it's the results generated.

The large increase in the number of appeals reflects two changes. CAPE decided several years ago to appeal most key classes and actively solicited appellants (an example is in the handout on salary appeals). In addition, many appeals are via petitions. Every name is counted as an appeal rather than the issue appealed by all the signatories.

This doesn't mean we have a minimal problem - we have an awful problem, made worse by the timing of the appeals. Several possible solutions merit your attention:

- a. Eliminate appeals on the results of the survey. Permit appeals on the methodology, within strict time limits, only before the data collection begins. These appeals, I believe, should be to an impartial board of

experts drawn from outside the personnel system (i.e. from the City and County of Denver, Mountain States Employers Council, etc.). The lay Personnel Board has neither the expertise nor the time to resolve the highly technical questions. Once the methodology appeals have been resolved and the survey is underway, no further appeals should be allowed.

- b. Provide for an outside audit of the survey results. This has occurred twice before, with the Personnel Department's recommendations sustained both times. An outside audit would make the results more credible and would catch errors if any were made. The 1980 audit cost the state \$3,500, much less than the cost of all the salary appeals.

4. Classification and Other Technical Appeals

Highly technical appeals, like those of classifications and exams, should be heard by an impartial panel of experts. For a lay Board and hearing officers to decide these appeals without adequate expertise ensures an overly time-consuming process and often questionable results. Currently, an individual classification appeal goes to the Department where it is heard by an impartial panel. After a review by the Director, it can be appealed to the Personnel Board. The Board refers the appeal to a hearing officer who holds a preliminary hearing, which is not required by statute. Back to the Board it goes for a decision on whether a full hearing should be held. The hearing officer schedules a full hearing (one recent hearing lasted ten days), after which the hearing officer's decision can be appealed to the Board. Except for the first stage, no one with classification expertise is making a judgement. You can imagine how long all this takes.

Due process and fairness would be far better served by requiring one timely hearing before an impartial panel of experts. We would get prompt, valid decisions.

5. Disciplinary Appeals

The Personnel Board should hear all disciplinary appeals. If the technical appeals and administrative functions were delegated to the Personnel Department, the Board would be able to resolve disciplinary actions in a timely manner, something that doesn't happen now.

Employee Compensation

No one is happy with the current system. Legislators think salary increases are too high; employees think they are too low; the Department and the Board wrestle with the appeals. The Compensation Task Force made a number of excellent recommendations, which I will only highlight.

1. The appeal process needs to be revamped. I've already discussed that.
2. Salary increases should be across the board instead of specific to key classes. One clear reason for all the unhappiness is the knowledge that someone else's salary increase is greater than one's own. I think the perception of fairness would be far greater if all employees received the same percentage increase.

The Task force recommended several major occupational groupings, within which salary increases would be across the board. I recommend that the Personnel Department undertake a study of this proposal promptly if the Legislature decides to adopt the concept of equal percentage increases.

3. If we go to across the board increases it is essential that we implement and fully fund occupational studies. These studies enable us to keep job descriptions, relationships, and salaries in line with the marketplace. They maintain the classification system in which we have a \$10,000,000 investment.

One might assume that once positions are properly classified they will remain properly classified. As a matter of fact, however, classification becomes outmoded very rapidly. There are always changes in programs, technology, organizations, work assignments, laws and rules. These changes affect the classification plan. For these reasons we need cyclic occupational studies to keep up with changes in the marketplace and in our own jobs.

Not only do regularly scheduled occupational studies keep the State in compliance with constitutional and statutory requirements, they also avoid the enormous costs associated with allowing the system to deteriorate to a point where the entire system must be updated at one time. This generally would occur after three to five years of system neglect.

Additionally, outdated classes in the system tend to cause improper classifications of individual positions because managers cannot hire or retain qualified people at current salaries. Consequently, they try to find some other class that has the required salary level, whether or not that class is appropriate for the duties assigned.

4. The task force recommended that funding a competitive compensation plan be mandatory. I endorse that recommendation. We must be able to hire and keep the best possible employees and that requires our being competitive with the marketplace.

5. We are sadly behind the community in fringe benefits. I believe we should implement a 5-year plan to reach parity. I also urge you to consider combining benefits, other than PERA, under one board so that planning can be coordinated.

There are a number of other areas that need change. The appointing authorities, for example, are division heads rather than executive directors, even though the executive directors are responsible for their departments' effectiveness. We've all heard enough about the residency requirement. Getting a waiver, even when clearly needed, is very time-consuming but may be necessary in order to hire the most qualified person for a job. Many of these issues are covered in the two task force reports. I hope you will consider them.

Thank you very much for your time. I'd be happy to answer your questions.