

The Electronic

Advisor

SPECIAL BULLETIN



DPA

Information for Human Resources and Business Risk Professionals of the State Personnel System

EMERGENCY RULE ADOPTION

by Jeff Schutt, Director

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The staff of the Legislative Legal Services Committee recommended that several of the new rules that took effect July 1, 2005 – as well as one adopted in 2004 – not be extended. Because of this, DPA decided to adopt emergency rules on January 5, 2006 and January 13, 2006, to repeal or amend these rules.

The DHR Web site is current and reflects the following changes made to rules through emergency adoption:

- Senior Executive Service (SES) language in 2-11 (A) was amended to clarify that the State Personnel Director will review every position prior to its placement in SES, however, the SES process has not changed.
- 4-24 was amended to remove language regarding the handling of referrals for multiple vacancies; rule and statute still require that the person appointed to a vacant position be one of the top three on the eligible list.
- 4-31 (B), specifically approving successive temporary appointments exceeding 6 months if for different departments, was repealed.
- Language was repealed in 10-3 (F) and 10-5 regarding personal service agreements that contemplate elimination of permanent positions and the associated review process.
- The review process for personal service contracts that contemplate elimination of positions has been removed from the Appeal/Dispute form

A public rulemaking hearing to consider permanent rule changes will be held **March 8, 2006, in Denver at 1313 Sherman Street, Room 318, beginning at 9:00 a.m.** All interested persons are urged to attend and to submit written comments for the Director's consideration no later than the close of business on March 2.

How Should Agencies Proceed?

SES:

Departments wishing to propose position(s) to be included in SES simply need to follow the existing process of submitting a nomination request and current job description to DHR.

MULTIPLE REFERRAL

The current rule 4-24 calls for following the rule of three, and neither the State Personnel Director nor the State Personnel Board have adopted any rule extending this to multiple vacancies. If a referral for multiple vacancies was made prior to 4-24's amendment, the appointing authority may proceed with filling vacancies using that list, according to the rule in place at the time the referral process began. While there is no rule currently addressing multiple vacancies, the old rule of "number of vacancies plus 2" has not been reinstated by the action of either the Legal Services Committee or the State Personnel Director. During the interim, we recommend departments consider simultaneous or sequential announcements when more than one position in a class must be filled. If legislative and other scheduling commitments permit, Executive Director Jeff Wells is planning on attending the February 24 HR Directors' Forum to discuss possible alternatives for filling multiple vacancies.

TEMPORARY APPOINTMENTS

The duration of a temporary appointment has not changed. No position may be filled by a temporary appointment for more than six months in any 12-month period. Following the repeal of rule 4-31(B) there is no statute or rule providing direction one way or the other regarding whether a single individual may serve in multiple temporary appointments totaling more than six months in a 12-month period. Going forward, appointing authorities should use their sound discretion in determining under what circumstances they believe such appointments may be appropriate. Appointments made prior to the repeal of the rule were valid when made and may continue for the duration of the appointment, not to exceed six months, regardless of the employee's prior service in another department.

Note that this limitation does not apply where the prior state service did not involve a position covered by law governing the state personnel system. For example, a person employed within the last 12 months as temporary or permanent employee in an exempt position in the General Assembly, the Judicial Department, the Department of Law, or the Department of Higher Education, would not be restricted from filling a temporary position that is subject to state personnel system oversight.

PERSONAL SERVICES CONTRACTING

The repealed contracting rules were intended to enhance oversight and further limit the potential for unconstitutional adverse impacts on state employees. Repeal of the two contracting rules means that employees who believe a personal services contract results in the improper elimination of vacant positions must file a grievance with their department because they can no longer go quickly and directly to the State Personnel Director for review. The repeal has no impact on the discretion of appointing authorities to abolish vacant positions, reassign employees, or reorganize their respective business operations independent of any personal services contract. Further, the rule repeal does not mean that a personal services contract can never be part of the mix in a transfer or reorganization, especially if positions are not abolished.

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Nor do we believe a court would hold that reassigning employees and contracting out their previous duties is flatly unlawful without regard to the particular circumstances and the impact on the public policy behind the state personnel system. The General Assembly, in section 24-50-501, C.R.S., encourages departments to look for strategic opportunities for the use of contracts to enhance the cost-effectiveness of state functions without undermining the principles underlying the state personnel system. Thoughtful approaches using contractors and employees to achieve optimum cost-effectiveness, pursuant to which employees retain meaningful work and do not lose their jobs, appear consistent with legislative intent and the state constitution.

With or without a contract, however, employee reassignments must be meaningful and not a subterfuge to get rid of them. This is what the General Assembly intended by precluding direct or indirect separation of employees in section 24-50-503, C.R.S., but the principle applies regardless of contracting issues. Therefore, we recommend departments consult legal counsel prior to undertaking any action where part or all of an employee's duties may be contracted out and positions will be abolished. Departments should also consider ways of modifying duties and retraining employees to cost-effectively use contracting while avoiding the need for moving employees to new jobs and abolishing their positions.

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