AN EVALUATION OF THE MICHIGAN CIVIL SERVICE SYSTEM

A REPORT PRESENTED TO THE
CITIZENS REVIEW COMMITTEE ON CIVIL SERVICE

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CITIZENS RESEARCH COUNCIL OF MICHIGAN

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SECTION 5 OF ARTICLE 11 OF THE MICHIGAN CONSTITUTION

The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year.

The administration of the commission's power shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.

The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

State Police Troopers and Sergeants shall, through their elected representatives designated by 50% of such troopers and sergeants, have the right to bargain collectively with their employer concerning conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions which will be determined by competitive examination and performance on the basis of merit, efficiency and fitness; and they shall have the right 30 days after commencement of such bargaining to submit any unresolved disputes to binding arbitration for the resolution thereof the same as now provided by law for Public Police and Fire Departments.

No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases in rates of compensation authorized by the commission

may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit the increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

The appointing authorities may create or abolish positions for reasons of administrative efficiency without the approval of the commission. Positions shall not be created nor abolished except for administrative efficiency. Any employee considering himself to be aggrieved by the abolition or creation of a position shall have a right of appeal to the commission through established grievance procedures.

The civil service commission shall recommend to the governor and the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.

To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission. Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all moneys unexpended for that fiscal year.

The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law**.**

No payment for personal services shall be made or authorized until the provisions of this constitution pertaining to civil service have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observances compelled by injunctive or mandamus proceedings brought by any citizen of the state.

Introduction

The Michigan Civil Service Commission established in January of 1987 a twelve-member Citizens Review Committee on Civil Service to evaluate, on the fiftieth anniversary of the original Michigan civil service act of 1937, the present condition of the Michigan classified civil service, and to make recommendations where appropriate to improve and strengthen the system.

The charge given to the Citizens Review Committee on Civil Service directed its attention to the following issues:

1 Do Merit System functions in the vital areas of recruitment it, selection, classification, compensation, and retention serve the intended purpose of assuring standards of merits efficiency and fairness established by the Commission to protect public interest, and to provide access to state employment for all Michigan citizens on the basis of qualifications?

2. Is the State's Affirmative Action Program effective in assuring all citizens are represented in the state workforce?

3. Do the Civil Service programs facilitate and provide for effective management of personnel by operating departments of government?

4. Is the State's collective bargaining system and Employee Relations Policy operating effectively in the public interest, and do they properly balance the needs of the merit system with the needs of management and the employee organizations?

5. Is there effective coordination in the Personnel Management functions of the Governor/Office of the State Employer and the Civil Service Commission/ Department of Civil Service?

The Citizens Research Council of Michigan undertook an analysis of relevant issues on behalf of the Citizens Review Committee on Civil Service. That analysis follows, consisting of **Six** Chapters. **Chapter 1** defines the public interests that are intended to be furthered by the Michigan civil service system . **Chapter 2** examines the difficulty of fashioning governmental institutions which will act in the public interest. The chapter also examines the constitutional provisions which govern the civil service system, relevant case law, and rules and regulation of the Commission. **Chapter 3** examines matters of recruitment, selection and retention of personnel which underlie the merit system, and the classification structure. The chapter also examines the extent to which the classified civil service has been effective in furthering the state's goals of affirmative action. **Chapter 4** examines the management of the state personnel systems including an analysis of the classified executive service, performance appraisal, and personnel development (training). **Chapter 5** examines the classified civil service and collective bargaining, including an analysis of relevant legal issues with respect to the constitutionality of the present employment relations framework. **Chapter 6** analyzes the employment relations provisions of other selected states.

Chapter 1

Civil Service and the Public Interest

Part 1. On The Nature of a Spoils System

Before the creation of a civil service system for Michigan State government, personnel actions were governed by the dictates of a politically oriented spoils system. It is well to recall the tendencies inherent in such a system as a prelude to evaluating the performance of the merit system, which replaced it.

Excerpts From the Report of the Civil Service Study Commission Appointed by Governor Frank Fitzgerald in 1935

* * *

Michigan has recently undergone the somewhat unusual experience of first forsaking its longtime predominant political party and electing an entire administration of the opposite faith and then, two years later, swapping most of its new horses for those of the old stock. This rapid shifting of political power has been accompanied by an equally rapid change of personnel. Despite the fact that the past three years have been ones during which everyone who had a job did his best to hang on to its the average employee turnover in 19 departments studied was 18.1% for each of these years. Of the 11,807 employees who reported their service on the survey questionnaire, 4,583 or 40.8% have been appointed since January, 1935, and 6,654 or 59.2% since January, 1933 ….

It should be pointed out however that the evils of frequently changing the employees is not limited to the last two administrations…[T]en years ago the average percentage of turnover was 26% per year.

* * *

The employees appointed since January, 1935 comprise 41% of the total reporting. Most came into the service through the operation of a central patronage officer set up for the purpose of determining the political qualifications of those seeking jobs. Applicants were first sifted by the county committees of the successful political party and, if found to be deserving, were referred to the central office. There they were required to fill out simple application blanks to which were attached the endorsements of the county committees and other supporting data of a political nature. The heads of the state agencies informed the patronage office of the number and general nature of their vacant positions and the approved applicants were referred to them….

* * *

Two things about the central patronage system are quite evident. No person without standing in the successful party, regardless of how competent and how desirable for the state service, can even be considered by the patronage office for appointment; and the prime test of the applicants who are considered is the political one if able persons are appointed, it is only by reason of fortunate chance….

* * *

With certain meritorious but embryonic exceptions…, recruitment practices in the Michigan state government are of a wholly unsatisfactory nature. Measures are not taken to secure for the public the best personal services available. On the contrary, much is done to discourage and prevent able persons from obtaining positions. Political considerations are preeminent; nepotism is rampant. Administrators spend an extraordinary and valuable part of their time dealing with patronage problems and then are rewarded for their pains with incompetent employees who owe allegiance … to the political influence that obtained their jobs for them. Former Governor Comstock testified at one of our hearings that he had 'about three hours of irritating contacts with job hunters every day' …. No official, however high-minded, can change the rules of the political game. In the final analysis it is a system for which the citizens are principally to blame and which they alone can rectify.

* * *

As may be anticipated in any large organization without central direction of personnel matters, classification plans exist only in a few agencies of the Michigan state government. In these agencies such effort to classify positions and equalize pay has come from within the agency and has therefore been confined to the particular agency involved without reference to practices in other agencies. The state service is accordingly replete with position titles which have little or no relation to the work performed and with wide inequalities of pay….

The condition with regard to compensation is similarly chaotic. Generally the tendency is to set low rates so that the legislative appropriations can be made to provide as many jobs as possible, since the patronage system feeds on the number of jobs to be distributed and since it is usually necessary to accept the employees produced by the system with no opportunity to attract better personnel by offering higher wages. This tendency does not exist in the smaller offices, which have few jobs to distribute and whose heads have the human inclination to be as generous with their subordinates as possible….

* * *

[T]here are almost no personnel records in existence in the state government. No central records exist at all. Hence the difficulty of determining such simple things as the number and distribution of state employees, their origin, the location of their work, and their length of service….

* * *

Under the spoils system it is to be expected that employees who have received their jobs because of friendship with or usefulness to some party or politician should continue their political work even while holding a state job …. The spoils system presupposes the existence of government jobs to be filled with loyal party workers who can be counted on not to do the state job better than it can be done by others, but rather to do the party work or the candidate work when elections roll around. The state office buildings are nearly empty during political conventions, and state money has always been used — indirectly of course — to enable state employees to move about the state and keep political fences in repair….

A necessary corollary of the system of political appointment is the system of political assessments…. In Michigan one to two per cent has usually been the amount set, and state employees have had to contribute at the time of campaigns to show their loyalty and support….

* * *

There is little reason for the employees of the state government of Michigan to believe that they may win permanent promotion by any means. On the contrary, they are fairly certain that they will not be working for the state for any extended period. Meritorious employees have reason to be cynical … when they see around them less capable persons being elevated to better jobs because of irrelevant considerations….

* * *

Despite the necessity of constantly knowing something about the service of an employee, no formal system of individual service rating is in existence in the Michigan state government….

* * *

In the matter of training employees and keeping them up to the minute in the performance of their duties, we also find almost a complete absence of such activities in the state service…. The most casual inspection of the state's activities convinces one that much better service could be rendered with fewer but better trained employees….

* * *

So far as vacations, sick leaves and hours of work are concerned, no uniform regulations nor any uniform practice exist in the state service….

* * *

When it comes to the matter of dismissals we find that the system is neither fair to the employee nor good for the service. There is no opportunity for a hearings rarely the right to know the reasons for dismissal and no necessity of advance notice….

* * *

"PROPOSED CIVIL SERVICE BILL FOR THE STATE OF MICHIGAN"

* * *

Section 1. **Purpose of this Act.** The purpose of this Act is to guarantee to all citizens a fair and equal opportunity for public service; to establish conditions of service which will attract officers and employees of character and capacity and to increase the efficiency of the governmental departments and agencies by the improvement of methods of personnel administration.

* * *

Part II. Defining the Public Interest in a Personnel System for State Government

A. Introduction

Today, the Michigan Department of Civil Service administers a personnel system for a state government that hires up to 3,000 new employees each year, employs about 60,000 people, and spends 15 billion taxpayer dollars annually in carrying on programs that are voted by a representative legislative body and administered under the general supervision of an elected chief executive. Such an organization has a special obligation to operate in the public interest. A first duty of any review of civil service is to decide whether the public interest in a state personnel system has been well defined and forms the core of the Department's mission.

The Michigan civil service system was originally established by statute in 1937t in reaction to the excesses of a thoroughgoing spoils system. The act listed three purposes for a personnel management system in state government:

- to guarantee all citizens a fair and equal opportunity for public service;
- to establish conditions of service which will attract and retain officers and employees of character and capacity;
- to increase the efficiency of the governmental departments and agencies by the improvement of methods of personnel administration.

From the beginning, then, civil service in Michigan was intended to serve the people (by providing equal employment opportunity) and state employees (by providing adequate conditions of service), as well as the managerial aims of those running state government. These tenets have formed the basis of the system since. In 1980 the Civil Service Commission adopted six merit principles to further specify the mission of the Department.

Preventing the Reestablishment of Political Influence in the Civil Service. The original civil service law of 1937 was rendered ineffective in 1939 by a "ripper act" which removed most positions from the civil service system. To reverse this, the people in 1940 placed in the state

Constitution a civil service amendment embodying substantial independence from the political arms of state government. This development reinforced the principle that the state personnel system was intended to serve more than the aims of current management: in fact, it is fair to say that the first principle of Michigan's civil service is to prevent the reestablishment of political influence in the state classified service.

One of the six merit principles adopted by the Civil Service Commission provides that classified employees should be prohibited from using their positions to influence political nominations and elections, and should be protected from political coercion. Since 1941 Commission rules have prohibited authorization, collection, and payment of political assessments, and engagement in political activities during work hours. A recent staff report to the Commission points out that "[p]artisan activities may occur on work times but if so they are in clear violation." It is the first duty of the Commission to see that the classified service remains free of partisanship.

Guaranteeing Equal Opportunity Through Merit System Administration. To replace the prior spoils system, the constitutional amendment called for a merit system of personnel administration and prohibited personnel actions based on political and other illegitimate factors. Two of the merit principles adopted by the Commission respond to this mandate. One calls for recruitment of qualified individuals; competitive examination and selection based on job related skills, knowledge, and ability; and promotion based on ability and performance. The other calls for equal treatment in personnel actions regardless of race, sex, handicapping condition, or other extraneous factors. Merit selection and classification systems have been a key feature of Commission rules since the inception of the civil service system, and affirmative action initiatives to improve the representative nature of state employment have been promoted in the rules since 1971.

Improving Management Efficiency Through Personnel Administration. The constitutional provision calls for the Commission to regulate conditions of employment in the classified service, and one aspect of such regulation is the establishment of conditions that encourage a performance orientation in state agencies. Two of the merit principles focus on performance: one calls for employees to be given effective training opportunities and retained, corrected, or discharged on the basis of performance; the other calls for performance incentives in the compensation system. The Commission has delegated primary responsibility for entry-level and in-service training to state departments, retaining responsibility for certain skills and statewide issue training along with oversight of agency efforts. The Department of Civil Service recently has taken steps to reinvigorate an inadequate performance evaluation system. The compensation system established by Commission rules bases pay increases largely on longevity but does allow for performance factors to be considered.

Establishing Conditions Attractive to Employees of Character and Capacity. A primary reason that the state Constitution gave the Commission responsibility for setting compensation levels and regulating conditions of employment was to create the kind of working environment necessary for a career service. The intent was that the career service would provide continuity and competence in government even with political change in state administrations. The merit principles call for equitable compensation and for protection of employees from managerial abuses. The Commission has well-developed employee relations rules and has authorized col-

lective bargaining for much of the work force. Classified employees are generally well paid, and a career service has been built.

B. Maintaining Balance: The Key to the Civil Service Mission

The key to the civil service mission in Michigan is maintaining a balance among the public purposes just described. The term "neutral" is sometimes used to describe the civil service role in this state, but it is inappropriate because it implies passivity. The mission of civil service requires **active** pursuit of the legitimate interests of prospective employees **("to guarantee…** equal opportunity"), employees **("to establish** [attractive] conditions of service"), and management **("to increase…** efficiency") in the design and operation of a state personnel system — the role of architect and administrator rather than simply arbiter. In maintaining such a balance the Commission carries out the public interest as defined in this state.

It is inevitable that these interests at times will compete with one another. It is not intended that the civil service agency should represent solely the interests of the current state administration, or that of departments within state government, any more than that it should represent solely the interests of state employees, or of citizens who might want to work for the state or who simply pay state taxes.

Nevertheless it is understandable that at times state administrators may believe (for example) that the system favors employees in grievance matters and hamstrings efficiency with restrictive personnel practices, and that employee organizations may believe that civil service represents management while posturing as a neutral in collective bargaining. In fact, the true mission of civil service is to represent neither interest exclusively, and at times it may be to oppose the preferences of both — if, for example, state administrators and employee unions are agreed on measures that would be detrimental to the opportunities for all citizens to enter state employment. The people of Michigan gave permanence and independence to the civil service mission by placing it in the state Constitution, a decision reviewed by the 1961 Constitutional Convention and reconfirmed in the 1963 Constitution. The public continues in periodic opinion surveys to express satisfaction with the system and to feel that personnel actions would be more political without it, to the detriment of the quality of state services.

If the Michigan definition of the public interest in state personnel administration is appropriate, the true test of the validity of criticisms pointed at the civil service system is whether there exists a process for considering the interests of management, employees, and prospective employees, and whether those interests have in fact been considered with thoughtfulness and balance.

C. Conclusions

The Michigan civil service system operates under a broad definition of the public interest in state personnel management which calls for balancing the legitimate interests of prospective employees, the state work forces and the state administration. While the three basic aims of the Michigan civil service system are common to state personnel systems, the extent to which they are joined in a personnel agency given the authority and responsibility for balancing them is unique. Other states place more reliance on the elected, political arms of government to achieve some or

all of these aims. The risk in their approach is that some aspects of a spoils system will re-emerge in such an environment, and in fact Michigan's early experience with such an approach ended abruptly with the "ripper act." The progress made in state personnel administration over the last 50 years validates the soundness of the Michigan approach of placing a broad definition of the public interest under the purview of the civil service system.

D. Recommendation

1. We recommend continuation of the broad definition of the public interest in state personnel administration that has characterized the mission of the Michigan civil service system throughout its first 50 years.

Chapter 2

Governance of the Civil Service Function

Part I. Designing Institutions to Promote the Public Interest

Creating governmental institutions that will act in the public interest consistently, over a long period of times is a task that has occupied many good minds from the very beginnings of this country, with no one yet having found a single perfect design. Nevertheless, the fundamental organizing principle is clear, and four models of organizational governance have been developed.

The organizing principle, as Section 1 of Article 1 of the Michigan Constitution puts it, is that "[a]ll political power is inherent in the people." Implicit in this prescription is the power of the people to arrange or rearrange governmental institutions to carry out their will, and to withhold from those institutions any powers they do not wish to delegate or to be exercised. The fundamental expression of the people's will lies in constitutional provisions specifying those structural arrangements considered most significant.

A. Four Models of Governance for Public Organizations

The four models of organizational governance that have been developed to carry out the principle that political power derives from the people include:

1. **The Checks and Balances Model**

This theory, attributable to James Madison, holds that the joining of governmental powers in one department or branch of government is inherently inimical to the public interest and that checks and balances among governmental institutions are necessary to oblige government to control itself. This theory has been applied in all states to the separation of legislative, executive, and judicial powers; but it also has been a guiding factor in the creation of internal checks within the three branches. In Michigan, the substantial independence granted the Civil Service Commission represents such a check on executive as well as legislative authority.

2. The Representation Model

This theory is attributable to Andrew Jackson and holds that public institutions should be headed by officeholders representative of and elected by the voters. Virtually every state has multiple elective officials within the executive branch of government. Unfortunately, this model is associated with the notion that "to the victor belongs the spoils" — the concept that not only top officials but also the rank-and-file of governmental agencies should change with election turnover. It was the excesses of a spoils system that led to creation of the civil service system in Michigan.

3. The Neutral Competence Model

This theory springs from a desire to take politics out of program administration and to foster competent management of governmental functions. The organizational pattern generally adopted is a multi-member citizen board appointed by the governor for long and overlapping terms of offices which board in turn appoints an administrator to direct the program for which it is

ultimately responsible. Such boards are common among the states for certain types of tasks, particularly those which involve quasi-legislative or quasi-judicial functions and call for specialized knowledge or complex judgments. This model is the basis for the organization of the Michigan Civil Service Commission, although other factors are present in the governance of the civil service system.

4. The Executive Leadership Model

Governmental coordination and problem-solving capacity are the major goals of what has come to be known as the "strong executive" model of state agency structure, which holds that executive and administrative agencies should be; combined in a limited number of departments headed by officials appointed by the governor and removable at his pleasure. First formulated clearly by Woodrow Wilson when governor of New Jerseys this, model also calls for a civil service system to protect career employees from the political influence that could result from an executive branch more closely controlled by electoral turnover. Many states, including Michigan, have moved toward this model in reorganizing the executive branch in recent years — although the existing organizational structure of the Michigan civil service system has largely been reconfirmed rather than remodeled in that reorganization.

B. The Development of Michigan's Civil Service Governance

The Michigan Civil Service Act of 1937 was adopted on the recommendation of a civil service study commission and stemmed from dissatisfaction with the operation of a spoils system that had led to high employee turnover, inefficiencies in governmental operations, and inequities in the treatment of employees. The model chosen for governance of civil service functions was neutral competence: the act created a three-member, bipartisan board appointed by the Governor with senatorial confirmation for six-year overlapping terms. The extent to which it was intended that politics be removed from the Commission's operations is indicated by the following passage from the study reports which recommended a four-member board with eight-year terms:

> The purpose [of the commission structure] was to find a means, if possible, that would entirely eliminate politics. With an odd numbered board of three or five members, it would be possible for a majority to be members of one party and thus in our Judgment open the door for the possible introduction of politics…
>
> In the Judgment of the present Study Commission by giving the power of veto to two out of the four members, it would make improbable if not impossible that any two of them would attempt to inject politics into civil service matters.

Even though their recommendation would have insulated the Civil Service Commission almost completely from the political arms of state government, the study commission wrote that it might have preferred a different organizational model had Michigan government been structured differently:

> Due to the present constitutional and administrative structure of the state government, the [study] commission has found it advisable to propose certain features of

> the plan which would probably be unnecessary if Michigan government were organized on a more integrated and logical basis.... With the executive power divided between several separately elected officials and in certain respects put into commission under the Administrative Boards it has not been considered satisfactory to tie up the Civil Service Department with the Governor. Where administrative reorganizations have taken place and the Governor has been made the sole responsible head of the state governments a different structural arrangement of the civil service agency has been possible....

Exactly why the institutional weakness of the governorship made it unsatisfactory to place the civil service agency under the governors direction was not made clear in the report, nor does the claim that the study commission would rather have followed the executive leadership model square with the measures recommended to insulate the Civil Service Commission from both gubernatorial and legislative influence. At any rate, the Commission was created by the Legislature on the neutral competence model — although it was not insulated as completely as the study recommended.

At its next session, the Legislature passed the "ripper" act which undid much of the statutory basis for the civil service system. The people took matters into their own hands, adopting in 1940 a constitutional basis for civil service and going even farther than the study commission to insulate the Civil Service Commission from the political arms of government. The amendment created a four-member, bipartisan commission appointed by the Governor for eight year overlapping terms without senatorial confirmation. The amendment was sufficiently detailed to eliminate the need for any statutory basis for the civil service system, allowed the Commission to adopt rules and regulations effectuating its authority, and provided for an automatic appropriation to cover its expenses.

Twenty-one years later, the Constitutional Convention of 1961 had the opportunity to review the people's Judgment in adopting a stringent neutral competence model and a constitutional basis for the Civil Service Commission. Those judgments were confirmed, with the institutional basis for the Commission remaining as it had been. The Convention specifically rejected a proposal for senatorial confirmation due to concern over the injection of political considerations into the Commission. This same Conventions it should be noted, adopted the executive leadership model as the principal basis for organization of the executive branch, substantially strengthening the role of the Governor. This makes all the more noteworthy its treatment of the civil service function: it indicates that the framers wanted to provide the institutional means for the Governor to carry out his policies and considered that this would be compatible with an independently governed merit system of personnel administration.

In reviewing civil service functions the 1961 Constitutional Convention made certain changes to accommodate the interests of the Governor, Legislature, and state departments. The number of positions exempt from classification in the Governor's office was increased from two to eight and the Civil Service

Commission was authorized to exempt up to three additional positions (a total of six) in each department. The Legislature was given the opportunity to reject by two-thirds vote the compen-

sation recommendations of the Civil Service Commission. Appointing authorities were authorized to create or abolish classified positions without Commission approval for reasons of administrative efficiency.

In additions the people approved a constitutional amendment in 1978 granting state police troopers and sergeants collective bargaining rights for pay and working conditions other than promotions.

The Civil Service Commission itself has taken several significant steps to accommodate the interests of employees and management, and to open the civil service system to more citizens. Perhaps the most significant is in the area of compensation and working conditions, wherein the Commission authorized collective bargaining in 1980. However, important accommodations have been made in the merit system area as well, including creation of a Classified Executive Service which opened over 400 executive positions to much more managerial control over pay and assignment, and liberalized qualification methods which have allowed many more individuals to be placed on employment lists and have facilitated increased hiring of minorities women, and handicapped persons.

In each area where the Civil Service Commission has either relaxed its standards or delegated functions to others, two questions might be raised:

> — Has the function been delegated or the standard relaxed because it is of little significance to the civil service values that should guide the Commission? If so, possibly even greater delegation or relaxation of standards should be considered. If not, however, an opposite consideration must be addressed:
>
> — Has the Commission retained sufficient control over the function to protect the values that are fundamental to its mission?

Part II. Source and Scope of Civil Service Commission Authority

A. Constitutional Provisions

The authority and responsibilities of the Civil Service Commission are set forth in Section 5 of Article 11 of the state Constitution. Section 5 consists of twelve paragraphs. (The actual text of Section 5 of Article 11 is restated on Page x.)

Paragraph One establishes the civil service system. The present Constitution added the descriptive term "classified" before the term "state civil service." The classified state civil service consists of all but two categories of positions in state government — excepted positions and exempt positions are excluded from the classified civil service system.

Excepted employees are removed from the classified civil service system by explicit constitutional direction. These positions are those filled by popular election; heads of principal departments; members of boards and commissions; employees of courts of record; employees of institutions of higher education; and armed services personnel of the state. The 1963 Constitution added to this list the principal executive officer of a board or commission heading a principal department. Prior to 1961, the Civil Service Commission had placed the chief administrative

officers of nine boards or commissions in the classified civil service, at the request of the agencies themselves. The Constitutional Convention intended to clarify that such positions were to be filled by "political appointment without tenure." 1 Official Record, Constitutional Convention 1961, at 638.

Exempt positions are removed from the classified civil service classification system by permissive constitutional language. The 1963 Constitution increased the number of exempt positions in the office of Governor from two to eight. The reason given for the increase was to eliminate the common practice of "permanent" provisional appointments. A restriction was imposed with respect to the two exempt positions provided each principal department that one of the two positions be policy making in nature.

There was also added the provision that three additional policy-making positions could be exempted per principal department by the Civil Service Commission. The constitutional language regarding exempt positions contemplated a reduction in the number of state departments from the 120 in existence at the time of the 1961 Constitutional Convention to not more than 20. This reduction in the number of principal departments was effected by a separate section of the present Constitution.

Paragraph Two establishes a non-salaried Civil Service Commission, consisting of four members, no more than two of whom may belong to the same political party. A civil service commissioner is appointed by the Governor to an eight year term. The Constitutional Convention specifically rejected a proposal that the Commission be appointed with the advice and consent of the senate, due to concern that such a requirement would inject political considerations into what was supposed to be a non-political Commission.

Paragraph Three establishes the classified position of state personnel director to administer the classified civil service. The state personnel director is responsible to and selected by the Commission after open competitive examination.

Paragraph Four requires the Commission to classify all positions in the classified civil service system according to the duties and responsibilities involved, to fix rates of compensation, to approve or disapprove monies for personal services, and to make "rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service." The language of the paragraph is essentially the same as that contained in paragraph three of the original civil service amendment.

Paragraph Five was added by constitutional amendment in 1978. The paragraph grants to state police troopers and sergeants the right to bargain collectively with the employer upon compensation, hours, working conditions, retirement, pensions and other aspects of employment. Excluded from the scope of bargaining are promotions, which are determined on the basis of performance and competitive examination.

The paragraph also provides for the submission to binding interest arbitration of any matter still unresolved thirty days after bargaining commenced. The type of arbitration contemplated by the amendment is that set forth in Public Act 312 of 1969 for municipal police and fire departments.

It was held by the Attorney General that the Civil Service Commission has responsibility to implement the collective bargaining aspects of paragraph five up to and until negotiations have proceeded for thirty days. (OAG, 1979-1980, No. 5499.) After thirty days, the Commission is divested of responsibility with respect to any matter submitted to the procedures detailed in Act 312. While paragraph five does not define the term "employer," the Attorney General concluded in January of 1979 that "employer" means the Governors designated representative. The conclusion was based on the employee relations policy adopted by the Commission in 1976. (OAG, 1979-1980, No. 5430.)

After the constitutional amendment was adopted, some state agency had to conduct the process by which an exclusive representative would be selected. Proponents of the amendment were apparently of the view that the process would be implemented and administered by the Michigan Employment Relations Commission, an agency within the state Department of Labor which administers the state's collective bargaining laws at the local level. The Governor informed the troopers association in December of 1978 that the certification process would be conducted not by the Employment Relations Commission, but by the Department of Civil Service.

This view was upheld by the Court of Appeals in **Michigan State Police Troopers Association et al** v **State of Michigan et al,** (dismissed by order, January 16, 1979). The troopers association sought a declaratory judgment with respect to the duties of the Governor, the Department of Labor, and the Employment Relations Commission and sought mandamus to compel the performance of such duties as were declared to exist. The court dismissed the action on grounds that the appropriate forum before which to proceed was the Civil Service Commission.

The action by the Court of Appeals was the basis of a ruling by the Attorney General in June of 1979. The Attorney General noted that the troopers and sergeants proposal had amended the section of the Constitution governing the classified civil service system. The proposal had contained no indication that it was to be administered by an agency other than the Civil Service Commission. The Attorney General also concluded that paragraph five altered only the **method** by which compensation and other incidents of employment are to be determined. Negotiations by troopers and sergeants must still comport with the same time frame as is observed for changes in compensation for other classified employees. (OAG, 1979-1980, No. 5499.)

Paragraph Six prohibits the appointment of anyone to or promotion of anyone within the classified civil service who has not been adjudged qualified by the Commission. The last sentence of paragraph six prohibits appointment, promotion or demotion for religious, racial or partisan considerations. The original civil service amendment prohibited only removals or demotions for partisan, racial or religious considerations, but by implication did not prohibit appointment or promotion for the same invidious reasons. The last sentence of paragraph six removed this ambiguity.

Paragraph Seven provides two aspects which were absent under the original civil service amendment: a time frame within which compensation is to be determined and to become effective, and a constitutionally recognized, indirect role for the Legislature in the pay setting process.

Recommendations for increases in rates of compensation, irrespective of the manner arrived at, must be transmitted to the Governor for inclusion in his executive budget. Such recommendations take effect at the start of the ensuing fiscal year, unless the Legislature by majority vote

specifies a different effective date. This latter requirement was added to prevent the practice engaged in by prior Civil Service Commissions of declaring pay increases after the budget had already been approved.

Paragraph seven also provides in part that recommendations as to pay may be rejected or reduced by a two-thirds majority vote of those elected to and serving in the Legislature within 60 calendar days of receipt of the budget. This language engendered intense debate at the Constitutional Convention because as originally proposed it allowed the Legislature to reject, reduce or "modify" rates of pay. The term "modify" was removed on third reading and the requirement was added that any legislative reductions apply uniformly to all classes of employees who would have been affected by the pay recommendations and that such legislative alterations not reduce compensation below that already in effect. Pay differentials already established by the Commission were not to be adjusted by the Legislature.

It was feared that allowing the Legislature to modify rates of pay would "bring the Legislature into a consideration of various pay differentials and the business of raising one group of civil servants, and lowering another group of civil servants, and get [the Legislature] into the whole complicated business of fixing pay rates and pay differentials." 2 Official Record, Constitutional Convention 1961, at 3189. The Constitutional Convention recognized that the Legislature played an indirect role in pay setting through the appropriations process. For example, the 1961 Legislature had struck from the executive budget a proposal for a three percent pay increase for state employees. "In this case, a number of agencies financed by general fund moneys had to cut back either in employees or through other economies to fill the gap." Id, at 639. The Convention was reluctant, however, to specifically make mention in Section 5 of Article 11 of a legislative role, out of concern with undermining the independence of the classified civil service system.

Paragraph Eight permits an appointing authority to create or abolish a position, **without** the approval of the Civil Service Commission, but solely for "reasons of administrative efficiency." The purpose of paragraph eight was to modify the result reached in **Kunzig** v **Liquor Control Commission,** (327 Mich 474; 1950).

In the **Kunzig** case, the state Supreme Court held that any alteration by a department or agency in the number or type of positions required advance approval by the Civil Service Commission. The Court also held that the department or agency bore the burden of proving that its actions were not the result of partisan, racial or religious considerations. The Convention sought to provide appointing authorities with more administrative flexibility. However, it was the intention that the power to create or abolish a position granted to an appointing authority by paragraph eight be exercised subject to the restrictions contained in paragraph six with respect to religious, racial or partisan considerations.

Paragraph Nine requires the Commission to recommend to the Governor and the Legislature rates of compensation for positions filled by appointment within the executive department and not a part of classified civil service.

Paragraph Ten — as did in part the fifth paragraph of the original civil service amendment — requires the Legislature to appropriate to the Commission for "the ensuing fiscal year a sum not

less than one percent of the aggregate payroll of the classified service for the preceding fiscal years as certified by the commission." The Commission is required to return any unexpended balance within six months after the conclusion of the fiscal year to which it related.

Paragraph Eleven requires the Commission to furnish at least annually to the Governor and the Legislature a report of expenditures and makes the Commission subject to an annual audit as provided by law. This provision was added to the present Constitution and the reason stated therefor was to prevent abuse in light of the privilege given the Commission of a mandatory appropriation.

Paragraph Twelve provides for compliance with the constitutional classified civil service provisions and permits any citizen of the state to enjoin a violation of or to compel compliance with the classified civil service provisions by bringing an action in the nature of injunction or mandamus. The language in substance is identical to that contained in the sixth paragraph of the original civil service amendment.

1. Constitutional Limitations on Commission Authority

The powers of the Civil Service Commission have been held by state courts to be plenary, when exercised within the constitutional orbit established by Section 5 of Article 11. **Plec** v **Liquor Control Commission,** (322 Mich 691; 1948); **Viculin** v **Department of Civil Services** (386 Mich 375; 1971). Section 5 itself, however, contains two basic limitations.

As already noted, an appointing authority may create or abolish positions, for the sole reason of administrative efficiency, without the approval of the Commission. Secondly, in 1978, the voters altered the **means** by which compensation and other incidents of employment are determined with respect to state police troopers and sergeants.

Thirdly, an implicit limitation is contained in Article 5 of the state Constitution. Section 1 of Article 5 vests the executive power in the Governor. Section 2 permits the Governor to organize the executive department into not more than twenty principal departments, subject to disapproval by the Legislature where the organization requires the force of law. Section 3 delineates the Governor's powers of appointment. Section 8 places the principal departments under the supervision of the Governor. These provisions of Article 5 clearly provide a role for the Governor in the management of the executive branch and the Commission so recognizes.

2. **Judicial Limitations**

Case law has also recognized certain limitations upon the reach of the Commission's authority. It was held by the state Supreme Court in **Council No. II, AFSCME** v **Civil Service Commission,** (408 Mich 385; 1980), that the Commission has no authority to regulate or prohibit the political activities of classified employees which occur before or after work hours.

Secondly, it has been held that even though employment in the classified civil service may be categorized as a privilege rather than a right, employment, once extended, may not be withdrawn except in a manner consistent with due process. While the Commission possesses plenary authority to adopt procedures for the resolution of grievances in the classified service, such

procedures must provide an aggrieved party with "an opportunity to be heard at a meaningful time and in a meaningful manner." **Viculin** v **Department of Civil Service,** (386 Mich 375, 387; 1971.) The actions of the Commission are subject to review by the courts, but the scope of review is limited by Section 28 of Article 6 of the state Constitution to "whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." Final determinations of the Commission are not subject to **de novo** review by the courts. (386 Mich at 392.)

Finally, it was held in the consolidated cases of **Civil Service Commission** v **Department of Labor** and **Matulevicz** v **Governor,** (424 Mich 571; 1986)0 that the Legislature could transfer functions to a board or commission which had previously been exercised by a classified civil service employee. In these cases, the Legislature created a board of magistrates and transferred to it the functions previously performed by workers' compensation hearings officers, who had been part of the classified civil service.

Plaintiffs sought to portray the transfer as a mere subterfuge by the Legislature to strip the hearings officers of their classified civil service status. It was noted in this regard that the "board" of magistrates was not required to act as a collective body, but rather could hear cases in an individual capacity.

The state Supreme Court concluded that the authority of the Commission to regulate all conditions of employment did not "preclude the Legislature from eliminating a position once it is classified within the civil service system." (424 Mich at 625). Furthermore, the majority reasoned that a group of individuals need not function collectively to be categorized as a board; the group need only possess importance and dignity on the one hand and independence, the former requirement apparently being supplied by virtue of gubernatorial appointment.

B. Matters of Procedure

1. The Nature of the Commissions Authority

The Commission possesses both quasi-judicial and quasi-legislative authority. **Viculin.** The former, regarding the resolution of grievances, is subject to narrow judicial review as noted above to ensure accordance with due process. The Commission's quasi-legislative authority takes on added importance in light of the fact that the Michigan civil service system has no statutory basis. The provisions of Section 5 of Article 11 are self-executing in that they do not require legislative enactment for implementation. In this senses the enunciated policies of the Commission constitute the "legislation" which governs the civil service system.

2. Rules and the Compensation Plan

The Commission's quasi-legislative authority is exercised through the formulation and adoption of rules. However, Commission rules are not subject to review by the Legislature through the administrative rules process to which other administrative agencies are subject. As the Court noted in **Viculin,** "[t]he legislature is consequently without power to regulate internal proce-

dures of the Civil Service Commission and this fact is recognized in Const 1963, art 4, sec 48[.]" (386 Mich at 393.) Section 48 empowers the Legislature to "enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." The Attorney General has also held that because of Section 48, the state's Open Meetings Act is inapplicable to Commission meetings which concern either the resolution of a classified employee dispute or an impending dispute.

In addition to rules, the Commission formulates policies, procedures and guidelines, but there is no clear distinction as to how they differ from a rule — or from each other — and this creates unnecessary confusion. For example the current employment relations policy and procedures, which govern conditions of employment, are published both separately and as a chapter in the larger Commission rule book. The provisions of the employment relations "policy and procedures" are referred to as "rules." The procedures which govern the employment relations board, a three-member body established by the Commission, may be found in both a separate manual of procedures and in various provisions throughout the employment relations policies and procedures.

The compensation paid to classified civil service employees is set forth in a salary schedule known as the compensation plan. This plan lists the titles of all job classifications, minimum and maximum rates of pay, and information regarding fringe benefits. The plan also contains provisions of "standards and procedures" governing the administration of the salary schedule and fringe benefits. These standards and procedures may also be found as a separate chapter in the Commission rule book. Logic would suggest that the pronouncements of the Commission, by whatever name they may be styled, should be codified and contained in one comprehensive document.

3. Preparation for and Conduct of Commission Meetings

In order for the Commission to discharge its obligations in the most efficient and effective manner, it must be well-informed about relevant matters. Because the Commissioners are non-salaried citizens they cannot be expected to expend inordinate amounts of time collecting the types of data which may be necessary to make informed decisions, nor can they afford to devote valuable time to unfocused discussions in their public meetings. Thus, staff must play a vital role with respect to presenting the Commission with information and the conduct of meetings must be structured to facilitate Commission deliberations.

Staff reports to the Commission are not in a consistent formats and could be better focused. Usually, there is a cover memorandum from the State Personnel Director transmitting a report to the Commission. The cover memo may transmit a staff report that has been submitted to the State Personnel Director or the cover memorandum may be a substantive memorandum discussing a policy matter accompanied by supporting materials. On occasion, materials from another state agency may be submitted to the Commission without any cover memorandum Sometimes, there is no recommendation made to the Commission. When there is a recommendation, there is no standard nomenclature. For examples the options might be to receives concurs approve and adopt. Each of these options would indicate a specific action by the Commission ands if defined in a staff document, would have common meanings for interested persons. Recommendations are not found in a consistent location such as at the end of the transmittal memorandum and are not identified as recommendations.

The Civil Service Commission has adopted the practice in recent years of meeting informally with its staff the evening before the formal public meeting, the stated purpose being to afford staff an opportunity to brief the Commission about relevant matters. While these informal meetings are not closed to the public, neither is any public notice of them given.

The Open Meetings Act, Public Act 267 of 1976 requires, with certain enumerated exceptions, that the public's business be conducted in public meetings. However, the state Constitution places explicit limits upon the authority of the Legislature to enact certain types of laws governing classified civil service employees. As has been noted, Section 48 of Article 4 of the state Constitution prohibits the Legislature from enacting dispute resolution procedures for classified civil service employees.

In light of the constitutional prohibition contained in Section 48 of Article 4 and the Commissions plenary authority over classified civil service personnel matters, the Attorney General was asked in March of 1977 to render an opinion on the extent to which the Open Meetings Act applied to the Commission. The Attorney General noted that in the case of **Viculin** v **Department of Civil Service,** the state Supreme Court had held in pertinent part that

> [t]he Civil Service Commission is a constitutional body possessing plenary power and may determine, consistent with due process, the procedures by which a state civil service employee may review his grievance. [Citation omitted]. The legislature is consequently without power to regulate the internal procedures of the civil service commission and this fact is recognized in Const 1963, art 4, sec 48. (OAGO 1977-1978, No. 5183 at 31.)

Viculin held, **inter alia,** that while the Commission had wide latitude to adopt employee grievance procedures, such procedures had to comport with constitutional requirements of due process.

The Attorney General further noted

> No statute may contradict a constitutional directive. **In re Opinion of the Justices,** 324 Mass 746; 85 NE2d 761 (1949); see also, 16 CJS, Constitutional Law, sec 1, 2, 3 and 71. Statutes must be construed whenever reasonably possible, in a manner which gives a statute validity and effectiveness. **Pigorsh** v **Fahner,** 386 Mich 508; 194 NW2d 373 (1972). Id.

Thus the Attorney General concluded that

> [a]s a result of the restriction imposed by Const 1963, art 4, sec 48, I am of the opinion that the [Open Meetings] Act does not apply to meetings of the Civil Service Commission in any case concerned with the resolution of classified employee disputes. This prohibition also applies to those activities of the Civil Service Commission involving a threat of impending disputes. Id.

The Attorney General's conclusion appears consistent with that of **Viculin** that a legislative enactment is violative of Section 48 of Article 4 of the state Constitution to the extent that the enactment seeks to regulate the dispute resolution procedures of classified civil service employ-

ees. It is of course doubtful that all of the matters which the Commission discusses at the informal meetings concern either the resolution of a classified employee dispute or an impending dispute and to the extent that such matters are not involved, the Open Meetings Act would appear to be fully applicable.

The effectiveness of the Commission depends in large part upon a perception that it operates in the public interest and it should take care in preparing for its meetings not to give the impression that important decisions are being made without opportunity for meaningful input from those affected. The practice until a few years ago was for staff to make presentations of significant reports to the Commission. Such presentations facilitate open discussion of public policy issue's elicit information and raise questions which should lead to a more comprehensive and exhaustive consideration of alternatives than happens when little or no public discussion occurs. Currently, there is little exploration of policy alternatives in a public setting.

Part III. Making Commission Governance Work

Civil service governance in Michigan is based on a relatively independent citizen commission with a mandate to uphold a broadly defined public interest in sound personnel administration. To make such a system function properly requires the appointment and dedicated service of able and thoughtful citizens as commissioners.

During the first thirty years of the Commission's existence, there were only twenty Commissioners. Although one Commissioner resigned after serving Just over a month, the average length of service was 6.5 years. Seven Commissioners served more than eight years each and four of those served for more than ten years. However, during the 1970s the Civil Service Commission began to experience substantial turnover. (See **Table 2.1.)** The average length of service decreased to 3.1 years. Only one of nine appointed in the 1970s served over three years, but there is no indication that a pattern of short tenure has developed.

Table 2.1

Decade During Which Appointed:	Number Of Commissioners Appointed:	Average Tenure (In Years):	Longest Tenure (In Years):
1940	5	7.7	11.0
1950	6	7.5	14.7
1960	9	5.5	10.7
1970	9	3.6	10.2
1980	4	3.1	7.2
Total	33	5.5	

Source: Department of Civil Service; CRC calculation. Average and longest tenures during 1980 are a function of the decade not being complete.

The people of Michigan entrusted the Governor with exclusive appointment power and are fortunate that successive Governors have continued to recruit and appoint able, thoughtful individuals over the fifty-year life of the civil service system. The people of Michigan also are fortunate that public-spirited citizens continue to be willing to devote their energies to the maintenance of sound personnel administration in Michigan state government.

C. Conclusions

The Michigan Civil Service Commission operates under a constitutional provision guaranteeing it substantial independence and authority, which is in keeping with its broad mandate to balance the interests of citizens.9 employees, and the state administration in the operation of a state personnel system. We conclude that the basic outlines of this institutional structure are sound, and that the Commission has shown evidence of thoughtfulness and balance in the accommodation of all the interests under its purview. With careful attention by future commissioners to their broad responsibility to promote the public interest in sound personnel administration, and by future Governors to insure the appointment of commissioners who will uphold this traditions. the Michigan civil service system should maintain its vitality under the current organizational form.

D. Recommendation

1. We recommend continuation of the organizational governance that has characterized the civil service system in Michigan throughout its first 50 years namely a small citizen board appointed by the Governor.

Chapter 3

Merit System Administration

Introduction

The terms "civil service" and "merit system" are often considered synonymous because the core of a civil service system consists of methods for classifying positions and selecting employees on the basis of job-related considerations. In the ideal, a system of selection and classification focused solely on job relatedness would create equal employment opportunity for all, based on merit, and provide the underpinning for sound management and fair treatment of employees. Traditional means of accomplishing these tasks, however, are in some respects arbitrary and cumbersome and can create barriers to equal opportunity. Efforts to overcome such shortcomings are necessary if administration of the merit system is to serve the public interest.

For more than three decades the Michigan merit system developed in the traditional fashion. Positions were classified by comparing them to other similar jobs rather than to any objective criteria and the number of classifications ballooned ultimately to well over two thousand. A separate exam and separate application were required for each class of positions, which resulted in delays. Departments selected employees from a list containing the names only of those who made the top three scores on an exam. Eventually large numbers of appointments came to be made provisionally, thus bypassing the restrictions but also the safeguards — of the merit system. This system had no method of addressing the under-representation of minority populations in the state work force, although in the late 1960s it was recognized officially that such a problem existed.

In the 1970s the Civil Service Commission moved to attack all of these problems. Affirmative action efforts to broaden representation in state employment began in 1971, and in 1975 were aided by creation of an interagency council under executive direction. Significant improvements in representation have been achieved. Work on a more objective classification system started in 1972 and led to halving of the number of classifications and reassessment of restrictive qualifications. In accordance with the recommendations of a 1985 comparable worth study, efforts are now in progress to reduce the number of broad occupational groups from eleven to five. The selection system was modernized and automated beginning in 1977 to incorporate a single application, more generic exams, broader choice among candidates for appointing authorities, and targeted recruiting based on analysis of the skills of applicants on file. Provisional appointments were eliminated by 1981.

The innovative steps taken by the Commission were recognized in 1986 with the receipt of the first annual International Personnel Management Association Award for Excellence to a public personnel agency. Visits made by the staff of this citizens review committee to California, Minnesota, New Jersey, New York, and Wisconsin also confirm that Michigan's merit system administration stands in the forefront of personnel practices among the states.

Problems remain in merit system administration; they would be inevitable in any system remodeled so thoroughly and so recently. In general the modifications have increased accessibility to state employment and managerial discretion over selection and classification decisions. It is

essential to insure that this more-open personnel system retains a merit basis as required by the Constitution. This Chapter consists of three parts which focus on recruitment and selection, classification, and affirmative action.

Part I. Recruitment and Selection

A. Background

Recruitment and selection are basic ingredients in any personnel system. Section 5 of Article 11 of the Michigan Constitution gives the Civil Service Commission responsibility for recruitment and selection. This constitutional responsibility has been implemented through the promulgation of chapter 30 the selection rule, in the Commission's rules.

Although there were minor modifications in the selection and recruitment process between 1941 and 1978, the process remained essentially unchanged. With the existence of narrowly defined classes, many individual exams (one for each class) were developed. Persons interested in state employment were required to file an application specifically for each exam, and there was a separation between open competitive and promotional exams. Individuals could expect a long wait, in most instances, prior to being able to take an exam, since the cycle for giving examinations often was three years or more. Procedures for evaluating applications and grading examinations were slow, since practically everything was done by hand. Once an exam was graded, a short employment list was certified to the department seeking to fill a position. The "rule of three" applied. This gave the appointing agency very few people from whom to choose in making an appointment. Because of the slowness with which the wheels turned in the cycle of application - examination - appointment, many departments simply filled vacancies by means of provisional appointments, with such persons retaining the positions until a test was given and an employment list certified. In many cases this meant that a person whose qualifications had in no way been tested could hold a position for a period of years. In order to be certified, a provisional employee had to score within certifiable range on an appropriate examination.

An August 1, 1977 Selection Process Study Report served as the catalyst for a number of changes. There were a number of reasons that led to the decision to review the selection system in 1977. First the volume of selection had risen significantly. In 1941, 338 examinations were administered to approximately 25,000 applicants. By 1960, 900 examinations were given to 46,000 applicants and there were 31,400 classified positions. In 1970, there were 73,200 applicants, 46,300 classified positions and over 1,000 examinations administered. By the time of the 1977 study, there were 173,000 applicants competing in 1,462 examinations; the number of classified positions was 60,779.

In additions the selection system essentially was unchanged since 1940, and it was believed that it was time to review existing methods and procedures. There also was a belief that the existing system did not facilitate affirmative action which had become a public policy goal of the Civil Service Commission and elected officials. Appeals by applicants of decisions made by Bureau of Selection staff had increased significantly. This was seen as evidence of increasing dissatisfaction and frustration with the system. The basic selection process was complex and confusing to applicants. Multiple applications had to be filed when an applicant applied for more than one

job classification. There also continued to be a significant number of provisional appointments, which violate pure merit system principles. At the time the study was undertaken, approximately 20 percent of all appointments were provisional.

Major recommendations of the study included the following:

1. Greater attention should be given to job analysis in order to improve selection processes such as oral appraisals, selection interviews, promotional potential ratings and evaluation of education and experience.
2. The Department of Civil Service should be the focal point for the administration and coordination of the statewide recruitment program.
3. The number of individuals appointed to civil service positions prior to taking and passing a civil service exam (provisional appointments) should be reduced.
4. An automated applicant information system (skills file) should be developed to allow an individual to make one application for employment.
5. Manpower planning should be developed to forecast the personnel needs of state government.

Efforts turned to developing a system that would operationalize the recommendations and answer the criticisms of the existing system. Selection staff devoted the next several years to these endeavors. Revisions in procedures for job analysis were given priority because it was believed this was key to improving the selection system. Some aspects of a comprehensive testing program had not received adequate emphasis over the years. Subject matter experts had been used to develop or review written test materials. Attention was now turned to using position descriptions and input from employees and supervisors to identify job elements for testing. When there was a need to include an evaluation of experience and education requirements supervisors of employees in a job classification were asked to define types of experience or education that would be expected to make a significant difference in job performance.

Using this technical staff work, fundamental changes were made in the examination process. To reduce the number of times a person must submit an application, broad based examinations were developed which could be used to test for a variety of similar knowledge and skills. By taking and passing one examinations an applicant now has the opportunity to be considered for a variety of positions. For example, one examination instrument might be used to test for account clerks, bookkeeping clerks and general clerks. Prior to these efforts there were about 350 separate examinations, which have been reduced to approximately 65.

At the same time, the Commission moved to modify the composition of employment lists. For many years, the rule of three had governed the number of names certified to an agency when filling a vacancy. The candidates with the top three scores on an examination were certified to a department. There were concerns that efforts to increase employment of protected group members were inhibited by the rule of three, because protected group members often were clustered in the middle range of passing scores.

In 1972, the Commission adopted two policies to deal with this issue. The first was a procedure

known as expanded certification which allowed the supplementation of an employment list that did not contain adequate representation of protected groups with the names of protected group members from farther down the employment register. A more basic change was the replacement of the rule of three with a procedure known as the rule of reliability under which a statistical analysis relating to the reliability of a test instrument served as the basis for determining the in-range scores for certification. The number of scores included depended on the reliability of a test instrument. For one examination, the in-range scores might be 97 percent to 100 percents for another the range might be 91 percent to 100 percent.

At the time the 1977 selection report was undertaken, there were additional concerns relating to the employment lists provided departments. Although the rule of reliability was an improvement over the rule of three, there continued to be a clamor for more flexibility in consideration and appointment of candidates. A second concern was a belief that test instruments were not precise enough to identify successful Job performance using a narrow band of in-range scores. There also was a desire to reduce the use of expanded certification to reach protected group members, because state officials wanted to avoid the appearance of violating merit selection principles while increasing the representation of protected groups.

In 1979, these concerns led to the establishment of a broad band certification approach which remains in use today. A department desiring to fill a vacant position is provided a list of candidates falling in the top band, normally the top ten scores. Usually agencies have a long list of names from which to select, and there is less need to use expanded certification. Later discussion in this section points out new problems relating to the length of the list and quality of candidates on the employment lists.

The recruitment strategy that has evolved primarily revolves around efforts to facilitate the processing of employment applications rather than the development of a plan to attract qualified individuals to state government. The Department of Civil Service's role, primarily, is to assist the departments with their recruitment efforts. The Department of Civil Service provides technical assistance such as reviewing recruitment letters and proposed advertising materials. Once candidates are identified, the Department of Civil Service will facilitate the testing of applicants. A more active role has been played by Civil Service in the state's effort to attract protected group members to state employment, and it also participates in the recruitment for generic classes that are located in several departments.

Immediate attention **was** given to the elimination of provisional appointments in the classified service. Several steps were taken to reduce the number of provisional appointments. This was possible because of improvements made in the selection process. No provisional appointments were authorized for those classes included in a continuous examination program, under which examinations remain open all the time. In those situations where no adequate employment list existed, examinations were scheduled and scored quickly.

If a provisional appointment was necessary, the personal approval of the state personnel director was required. Any provisional, appointed had to be scheduled for an examination within one year of their appointment date. No provisional appointment was authorized for more than one year. In 1976-77, there were 2,l96 provisional appointments. By 1979-80, there were only 148 provisional appointments, and there were none thereafter.

Priority was given to the development of a skills file. Development started in 1979, and the file was operational in 1980 on a limited basis. The purpose of the skills file is to permit one application to be submitted for all types of state employment. The automated system compares data from an application with qualification requirements for a specific job. Applicants are responsible for updating their files. At the present time, there are approximately 188,000 names in the skills file. If an individual has no activity within an 18 month periods the applicant is dropped from the file. State employees are continued in the file as long as they remain in state employment.

Because only a small staff is available to work on the skills file at present, a rough sorting of people's experience usually occurs initially, with a finer credential review often done later. Since every test covers a number of titles, a large number of persons in the skills file may have to be notified for some exams (the total reached 60,000 for a clerical examination). Due to this volume, some effort is being made at present through pre-test refinement and screening to limit testing to those who do qualify for at least one job title.

Staff within the Department of Civil Service appreciate that certain problems exist in the evaluation and testing area. It is recognized that the skills file as presently administered is huge, and that the actual job applications, which are physically retained, take up a great deal of space. Job relatedness of examinations is constantly under study, and there is some feeling that less testing on a general basis and greater development of specific Job related tests could be of value.

Manpower planning continues to be a subject that has not received serious and consistent attention on a statewide basis. One of the responsibilities of the selection liaison staff is to obtain from departments their manpower needs. This system depends on the sophistication of individual departments and no central coordination is provided. The examination schedule, however, does reflect the short range hiring needs of departments. In evaluating employment needs of state governments the Selection Bureau tries to look down the road a number of months. Such an effort is undertaken in conjunction with the departments, with special attention being paid to those agencies which are in the throes of swift expansion (an example would be the Department of Corrections, faced with the need of quickly staffing many new facilities). Having determined need, the Bureau projects an examination schedule for some months in the future.

Thus, the Department of Civil Service has made significant progress in implementing the recommendations of the 1977 study in three of the five areas.

Recruitment and manpower planning are the two areas where substantial progress has not been made.

A significant event occurred subsequent to the 1977 study that affected the selection activities of the state. This was the economic downturn that plagued Michigan beginning in the 1979-80 fiscal year and intensified during the early 1980's, which resulted in large layoffs in the state government work force. The statewide reduction in force layoff total for 1978-79 was 109, but increased to 3,340 in 1980-81 and to 3,570 in 1981-82 before beginning a decline to 117 in 1985-86.

The selection focus of the Department of Civil Service changed from selection of employees from outside the state work force to placing the state employees on layoff in other state jobs. For examples the number of new career hires in 1979-80 was 6,843. In 1980-81, the number dropped to 1,740 and to 1,010 in 1981-82. Primarily because of expansion in the prison systems

the number of new hires had increased to 3,725 by 1985-86, but this was only 54 percent of the 1979-80 total. During these years, priority was given to laid off workers who qualified for other state jobs. Layoff registers were established and state agencies were required to use these employment lists before considering candidates from other lists. Workshops were conducted relating to job seeking skills to assist laid off state employees in obtaining jobs with other employers.

This has been a successful endeavor for the Commission. For the period 1980-81 through 1985-86, there were 10,303 layoffs of which 8,769 or over 85 percent were reduction in force layoffs. (The balance of 1,534 were seasonal layoffs.) Of the 10,303 layoffs, 7,889 or 77 percent have been returned to the state work force.

Table 3.1 provides workload data showing the trend in several selection activities for the period 1976-77 through 1986-87. As one would expects there was a great deal of activity in the latter years of the previous decade as state employment continued to grow. This pattern was reversed in 1980-81 as Michigan experienced economic problems. There were fewer applications, fewer applicants examined, and fewer appointments for the last seven fiscal years as compared with the previous four years. The problem of provisional appointments has been eliminated.

Table 3.1

General Selection Data

	Applications	Applicants Examined	Total Appointments	Provisional Appointment	Average Number of Classified Employees
1976-77	165,519	84,646	175,296	2,196	60,395
1977-78	215,983	95,067	21,046	1,537	64,456
1978-79	166,472	75,054	23,451	1,124	685,105
1979-80	155,975	68,710	23,340	148	69,906
1980-81	48,046	35,365	11,572	0	67,246
1981-82	44,527	49,329	8,404	0	62,087
1982-83	57,040	20,509	8,231	0	59,511
1983-84	51,389	49,036	8,092	0	58,320
1984-85	78,578	46,461	6,082	0	58,283
1985-86	69,302	84,636	4,887	0	59,759
1986-87	79,080	62,162	6,548	0	61,386

Source: Department of Civil Service

For the period 1976-77 through 1979-80, appointments included new hires (both open competitive and provisional), promotions, transfers, reinstatements, non-career and return from layoff. Beginning in 1980-81, promotional appointments and transfers were dropped from the definition.

B. Discussion

Basic improvements have been made in the selection process in the last ten years. State departments have a larger pool of candidates to select from under the broad band approach than was available under the rule of three. This in turn has facilitated meeting affirmative action goals. The adoption of a skills file has made it easier for persons seeking state employment to be tested for jobs in state government. It no longer is necessary for a job applicant to submit an application for each position of interest.

There is some unfinished business and there are new issues to be addressed.

Recruitment. Recruitment has two basic aspects. One can be referred to as passive recruitment, and involves informing the public that examinations for a Variety of state positions are being given and applications for such examinations are being accepted. This approach normally is carried on by sending out notices of state employment opportunities to the Michigan Employment Security Commission, to public offices for posting on bulletin boards, and to colleges and universities. This procedure is used when a large volume of applicants is expected. Examples would include examinations for clerical maintenance and college entry positions.

A more active form of recruiting occurs in certain fields where shortages of applicants for specific positions exist, and an employment list is either non-existent or inadequate. In such cases, an effort is made to identify persons with essential skills, arrange meetings with them, explain the career opportunities which exist in state government, and explain the selection process to them. Activities include advertising in national newspapers and professional Journals, attending professional meetings and conferences, and meeting with leaders in a specific field or discipline. To the extent there are problems in recruitment, they exist in the area of recruiting to fill positions where the demand exceeds the supply.

The Commission had not promulgated a rule relating to recruitment until 1981. The existing rule simply indicates: "Where shortages are identified, targeted recruitment will be undertaken." There is no indication of the responsibilities of the Department of Civil Service and the operating departments in this area. It would be helpful if the Commission were to promulgate a rule or policy that would clarify the responsibility and role of the Department of Civil Service and the operating departments.

Employment Lists. As a result of the changes in the selection system of the last decade, state agencies generally no longer have only a few candidates to select from when filling vacancies. Broad based examinations have resulted in employment lists being available for almost all positions. As was pointed out earlier, this has resulted in the elimination of provisional appointments.

Ironically, one of the criticisms now heard is that appointing authorities are forced to consider an excessive number of persons on employment lists, and that many of these are marginally qualified for the opening, or are not seriously interested in the vacancy. Consider the techniques used to fill a vacant position from an employment list of 100 or more names:

- Notify a sample of those on the list to solicit applications; resample if the response is inadequate or unrepresentative, or supplement the list through the

expanded certification procedures;

- Review the credentials of respondents to select invitees for interviews, insuring adequate representation;
- Interview those whose credentials appear most promising;
- For appointments at the highest levels, submit documentation for affirmative action approval;
- Select an individual from the interviewees.

Under earlier civil service procedures, a department would simply receive a list of certified names with the top three scores, interview, and select.

The Department of Civil Service is aware of the problem of long employment lists, and is dealing with the problem. Efforts are underway to define more precisely qualifications for positions, thus limiting the number of persons who might qualify for consideration. A standard error of measurement approach is under consideration, which should result in a list being submitted to a department that contains only the names of persons whose scores ranged within a relatively narrow bandwidth, while retaining the ability to refer a representative candidate pool.

Layoff Lists. Another issue that has developed is that the current selection system was developed in a growth environment. State employment was growing and a more responsive system of recruitment testing and appointment was necessary. Soon after the new system was in the process of being implemented, state revenues fell as a result of an economic downturn. Even after an economic recovery set in, a policy of downsizing the state work force continued. As a consequence of these two events there are fewer new hires in state government. However, the state operates a selection system that is premised on hiring patterns that existed ten years ago.

New problems developed for the selection system. The major one was dealing with the establishment of layoff lists and the recall of employees from layoff. The broad band approach was not used for employees on layoff. Rule 34.3 relating to layoff list referral was added in 1980. There are three elements in the referral rule. Two are based on seniority. For a departmental layoff list, the rule of one applies. Thus, the most senior person in the class receives the appointment. Statewide layoff lists, again using seniority, are based on the rule of three. The third element relates to bargaining units with collective bargaining agreements concerning layoff rights. For those units that limit reemployment rights to the bargaining unit, and when no employment opportunities exists within the bargaining unit, employees are placed on a list where the rule of the list is used.

State agencies are required to use a departmental layoff list if available. If not available, an agency may turn to a statewide layoff list. Where applicable, the list derived from a collective bargaining agreement is used. It is only after these lists are exhausted that an agency may turn to a standard employment list. Few persons would argue with the principle that employees on layoff should be returned to positions they qualify for before new employees are hired. A problem develops with defining who is qualified. Is an accountant qualified for a budget position? Is a general clerk qualified as an account clerk? In some cases, agencies have contended they are forced to take a laid-off employee for a position for which the employee was not qualified.

C. Conclusions

In the more common job categories, the state does not encounter problems in attracting applicants. It is in certain technical and professional fields that the supply is limited, and active recruitment to fill vacancies must be carried out. Such recruitment may be particularly necessary in the case of protected groups, where the pool of trained employees in the job market often is small. Responsibility for active recruitment in technical and professional fields does not appear to be clearly defined.

Related to recruitment is the issue of manpower planning which was identified in 1977 as an important area requiring attention. Little has been done in the last ten years to improve manpower planning for state government.

The skills file works well for potential state employees, because they only have to file one application in order to qualify for a number of civil service examinations. It may not be efficient for the state to maintain a file of 188,000 names including the education, skills, experience and related data for each name, especially when only 6,000 appointments are made annually. Although the appointing agency gets to consider many people and has great flexibility in making appointments, there are problems with the broad band approach. Continued effort needs to be given to purging the employment lists of uninterested candidates, and improving the coding of candidates' experience and skills in order to reduce the length of employment lists.

The selection system was devised approximately ten years ago in an environment of continued growth of state employment. This clearly has not been the experience of the past several years. Instead of locating testing and referring applicants as new hires, the major selection activity of the past few years was placing laid-off state employees in vacancies as they occurred. There is need to review the selection system in light of this change to ensure that the needs of departments as well as laid-off employees are considered.

D. Recommendations

The following recommendations are made to strengthen the selection and recruitment system.

1. To facilitate the recruitment of applicants for professional and technical positions where shortages exists it should be made clear that the basic recruitment responsibility rests with the operating agencies for those classes generic to a specific agency.
2. Continued effort should be devoted to reducing the number of names on employment lists including purging excessive names in the skills file on a regular basis and improving the coding of candidates' experience and skills.
3. The total selection system should be reviewed in order to ascertain if it remains functional in light of the reduction in employment opportunity with state government.

Part II. Classification

A. General Considerations

One of the Civil Service Commission's constitutional obligations is to "classify all positions in the classified service according to their respective duties and responsibilities...." Although the final authority to classify positions is vested in the Commission, the administration of this, and other Commission powers is reposed in the State Personnel Director.

The Commission's responsibility to classify positions is implicitly limited to such positions as are in existence. This is so because appointing authorities possess the authority to create or abolish such positions. The state Constitution authorizes an appointing authority to "create or abolish positions [solely] for reasons of administrative efficiency without approval of the Commission." This provision was added to the present state Constitution to permit appointing authorities more flexibility in organizing state government.

The general purpose of any classification systems regardless of the approach taken, is to organize all positions having similar duties and responsibilities into like groups. Every position in state government may be characterized by the duties and responsibilities attached to it, the position being distinct from the individual who occupies it. The success with which the duties and responsibilities are performed is a measure of job performance.

B. History

Beginning in 1938, the Department of Civil Service employed a position comparison classification system, which involved comparing a position to existing similar positions to determine where it should be placed within the classification schemes an approach which had several decided disadvantages.

First, the position comparison approach was particularly susceptible to a proliferation of classes. It is often difficult to distinguish between the duties which comprise a particular position and the individual occupying the position. No two individuals may perform the same duties in precisely the same manner. Since the position comparison approach was based upon comparing positions to each other it was easy for an employee to contend that his or her position was unique — thus deserving its own classification — when in fact what was unique was only the manner in which the duties were being performed.

Secondly, there was an inherent pressure placed upon the classification system to reallocate employees from lower into upper pay grades. As the Commission's 1970 annual report noted:

> The classification function is the point of contention in any merit system. Since upward movement in grade can mean a substantial increase in pay, aside from annual wage increments within grade, it is a constant objective of many employees. For those who cannot achieve it through promotion, reallocation of existing positions is sought.

The position comparison approach exacerbated this pressure due to the subjective nature of the

comparisons. Because it lacked objective standards by which to classify positions, the approach contributed to the likelihood that an employee would contend his or her position was classified at too low a level. This fact was evidenced by the considerable number of requests received by the Department of Civil Service to reclassify positions to higher levels. For example, from 1968 to 1972, the Department approved a total of 170143 requests for reclassifications to higher levels, an average of 3,429 per year. It also denied another 6,767 requests, an average of 1,353 per year. During this five-year period, average state employment was approximately 45,514. Thus, about 10.5 percent of the state's work force requested and 7.5 percent was granted upward reclassifications each year.

The number of positions which were affected was probably understated because the data indicated the number of reclassification requests made, not the number of positions affected by each request. Each reclassification request was recorded as if it affected only one position, when in fact some requests may have affected a number of positions.

As a result of the above difficulties, in 1972 the Commission directed the classification and compensation bureau to examine ways in which the state's classification structure might be revised. The bureau in turn hired a consultant which ultimately recommended adoption of a benchmark classification system, a system which had recently been developed for implementation at the federal level. The benchmark system involved the establishment of a series of objective job factors, each factor being given a specific point value. The factors employed were: (1) requirements of the job; (2) the difficulty of work; (3) responsibility; (4) personal relationships, i.e. with whom an employee's job required him or her to have contact and the nature and purpose of the contact; and (5) specialized or unusual working conditions.

The conversion from the position comparison system to the benchmark system was conducted by grouping similar positions into classifications, the similar classifications into classification series, and finally similar classification series into service groups. For example, the secretary, stenographer clerk, and data coding operator classification series were among those which comprised the clerical support service group. A total of eleven service groups were established through the process of conversion, which took nearly seven years to implement and at a cost of $9.5 million. (See **Table 3.2.)**

Table 3.2

Conversion from Position Comparison System to Benchmark System

Service Group	Date Implemented	Number of Employees at Date of Conversion	Conversion Cost	Number of Classes Old	Number of Classes New
Labor and Trades	08-10-75	4,600	$ 227,200	160	124
Domestic Workers	12-18-75	3,300	191,200	54	45
Law Enforcement	04-18-76	2,100	98,600	23	18
Legal	10-31-76	400	95,500	31	15
Physicians & Psych.	08-22-76	300	8,300	21	13
Public Safety	04-03-77	4,600	201,000	152	115
Clerical Support	02-19-78	14,000	2,172,000	108	121
Eng. & Scientific	07-23-78	5,000	502,600	533	291
Human Services	09-16-79	23,000	4,959,000	358	308
Executive & Admin.	10-12-80	300	-0-	150	13
Business & Admin.	05-10-81	9,500	1,066,000	700	195
Total		67,100	$9,521,400	2,290	1,158

Source: Department of Civil Service.

The classification bureau is presently engaged in reducing the number of service groups to no more than five, one purpose of which is to reduce the likelihood of pay inequities having a gender basis. Presently, eight of the eleven service groups are male or female dominated. The reduction was recommended by a 1985 panel which studied the issue of gender-based pay inequities in the classified civil service.

C. Some Effects of Conversion

1. The Impact on Reallocation Requests

The benchmark system may be viewed as salutary to the extent that it was a more objective basis for classifying positions. One measure of the appropriateness of a classification system is the extent to which it accurately classifies positions. To the extent positions are accurately classified, other considerations being equals it would be expected that the system would experience fewer employee requests for reallocations to higher classification levels. Whether the benchmark classification system more accurately categories positions cannot be precisely determined. This is so for several reasons.

First, as has been noted, the data presented in annual reports when the position comparison approach was in use indicated the number of reclassification requests made, but not the number of positions affected by each request. These data are not comparable to those presented since adoption of the benchmark system, which do indicate the number of positions affected. The more recent data are presented in **Table 3.3.**

Table 3.3

	Number of Positions Reviewed	Percentage of all Positions in Classified Service
1981	16,530	24.6
1982	l2,324	21.0
1983	18,298	32.0
1984	12,386	22.1
1985	11,769	20.5
1986	10,103	17.1

Source: Department of Civil Service Annual Reports.

The number of classified positions affected by reclassification requests has ranged from 32 percent of all classified positions in 1983 to approximately 17 percent in 1986. These are substantial percentages. However, an increase or decline in the number of reallocation requests in a given year may be influenced by matters other than the accuracy of classification. For example, a decline may be a function of satisfaction with the rate of pay at a current classification level so that reallocation to a higher level is not sought, even though it may genuinely be believed that reallocation would be justified. Conversely, competition among employee organizations during the early years of collective bargaining no doubt attributed to an increase in the number of re-classification requests as employees were encouraged to vigorously pursue their rights. The web of cause and effect among the various factors is too complex to disentangle and existing data do not assist in this regard.

Existing Commission rules require that both a periodic and ongoing review of all classified positions be conducted. The Department hopes to implement the periodic review in conjunction with the planned reduction of service groups to no more than five, while response to requests is considered to constitute the required ongoing review. Because of the number of requests received annually, an actual on-site review of the duties of each position has not been practical. Given this situation, the Department has elected to limit on-site review to those requests where the responsibilities of the position require on-site investigation to ascertain whether the position is accurately classified. The actual number of on-site reviews conducted is not tabulated by the Department, but it is believed that approximately 150 to 175 were conducted over the last twelve months. Increasing the number of on-site reviews would not only give greater effect to the existing rule but would also facilitate communication between classification staff and employees requesting such reviews.

2. **Expansion of Employment Registers**

While the benchmark system may have alleviated some of the shortcomings of the position comparison approach it can be said to have produced several of its own. For example, adoption of the benchmark system made the possibility of large employment registers more likely. As noted, a total of 2,290 classifications were converted into 1,158. The vast majority of the old 2,290 classifications had their own employment registers. Thus, reducing the number of classi-

fications by nearly fifty percent had the same effect on the number of employment registers. If it is assumed that the number of applicants on the respective registers remained unchanged, then reducing the number of employment registers by half could only substantially increase the number of names on each. As a results an appointing authority seeking to fill a vacancy would be confronted with a substantially greater number of names on any given register. Larger employment registers have increased the burdens placed upon appointing authorities in the selection process.

Secondly, it may be argued that the benchmark system did not in fact substantially reduce the number of classifications so much as it added a layer of complexity. The Executive and Administrative service group serves to illustrate the point. As noted in **Table 3.2**, 150 classifications were converted into 13 to comprise this service group. The 15 classifications which now comprise that service group are presented in **Table 3.4.**

A given department selecting an employee from the employment registers for the State Executive I and II classifications might prefer someone with expertise in a particular field. Before the benchmark system was adopted, a department could meet its particular need by appointing from a register for a department-specific classification. Thus, one department might have had a finance classification, which was essentially the same as another department's budget classification. While the attempt was made to do away with department-specific classifications, the particular needs of departments remained. The recognition of this reality is what resulted in the creation of subcodes. Now, while there are only two legitimate classifications — State Executive I and II — standing in the place of what were 150 classifications, these two contain 107 separate subcodes, which are in many respects similar to the 150 individual classifications they supposedly replaced.

Table 3.4

Classification Series	Number of Classifications contained in Series	Number of subcodes contained in Series
State Executive	2 (I & II)	107
State Administrative Specialist	6 (I-VI)	—
State Administrator	4 (V-VIII)	—
Executive Office Administrator	3 (VI-VIII)	—
Total	15	107

Source: Department of Civil Service Compensation Plan, October 1, 1987. State Administrative Specialist and State Administrator contain no subcodes, since the positions are occupied by incumbents who have elected not to enter CES.

3. Designation of Classification Levels

It is interesting to note that the benchmark classification system returned the state to the Roman numeral method of designating classification levels that it had abandoned less than a decade earlier. As the Commission's 1968 annual report noted in pertinent part

> A major development during the years was discarding a Roman numeral lettering [sic] system for job classes and substituting numbers to identify the 21 grades of positions in the state service. The grade numbering (1 through 21) is more adaptable to data processing and generally better understood by the general public than the former Roman numeral grades.

This method of designating classification levels (i.e. grades 1 to 21) was in place in 1975 when the Civil Service Department converted to the benchmark classification system. Apparently the only manner in which the Department could monitor which positions it had converted was to give them the old Roman numeral designation at the time of conversion.

D. Classification and Executive Office Flexibility

Balancing merit system requirements with the desire to give Governors greater flexibility in organizing the executive office is always a difficult matter. Currently, the classification system provides three series of positions for that office. The Executive Office Administrator series, established in 1983, is comprised of upper-level management positions. The Executive Office Representative series, established in 1981, is comprised of mid-level management positions and the Executive Office Aide series is comprised of clerical-type positions.

Applicants for the three Executive Office series are not subjected to standard civil service competitive examinations but are evaluated based upon education and experience; if the criteria are met, the applicant is deemed to have posted a passing score of 70 and is placed on the appropriate employment register. Appointment from one of these registers is governed by the rule of the entire list, which means that anyone on the list may be selected. Appointment to a position in the Executive Office series is of limited terms in the sense that the appointment is reviewed annually, but as a practical matter, such an appointment is conterminous with that of a Governor's administration. The state Constitution provides for eight exempt positions in the Governor's office to allow for flexibility. The ostensible purpose of providing alternative selection and tenure arrangements in the Governor's office was to increase this flexibility.

Substituting education and experience for competitive examination as a means for determining qualifications might be appropriate for some types of positions. Where the position requires the applicant to hold a professional license for examples subjecting the applicant to civil service examination might serve little purpose since the possession of the license would be evidence of competence. However the managerial and office positions which comprise the Executive Office series do not require possession of particularized expertise or knowledge.

Secondly, even though the rationale for these three classification series was to provide a Governor with more flexibility to organize the executive offices many of the current positions in these series are in the principal departments and not in the Governor's office. (See **Table 3.5.)**

Table 3.5

Distribution of Executive Office Series among Governor's Office and Principal Departments

	Executive Office Administrator	Executive Office Representative	Executive Office Aide	Total
Governor's Office	2	19	30	51
Agriculture	-	1	-	1
Commerce	1	7	3	11
Corrections	1	-	2	3
Labor	-	5	1	6
Licensing & Regulation	-	-	1	1
Management & Budget	4	1	*2*	7
Mental Health	-	-	1	1
Natural Resources	-	2	-	2
Public Health	-	1	1	2
Social Services	-	3	*2*	5
State Police	-	1	-	1
Treasury	-	1	1	*2*
Total	8	41	44	93

Source: Department of Civil Service; CRC calculation.

The salaries for these positions come from the departmental budgets. There are currently eight Executive Office Administrator positions for example, but only two are actually in the Governor's office.

If most of these positions are in fact located in the principal departments, then they are providing more organizational flexibility to these departments than to the executive office, which complicates the rationale by making the potential number of such positions much larger. On the other hand, if these positions are located in the Governor's office and only appear in the various departments for organizational purposes then this practice permits the actual number of persons assigned to the Governor's office to be substantially understated. In either case, the spread of such positions beyond the Governor's office is questionable.

The appointments to positions in the Executive Office Administrator and Representative series are not subject to affirmative action review. Except for positions employed by the legislative Auditor General, appointments to which are voluntarily submitted for review, these two series are the only toplevel management positions not subject to such review. There is no obvious reason why these positions should be treated differently from all other positions with respect to terms of affirmative action.

E. Conclusions

The general purpose of any classification system, regardless of the approach taken, is to orga-

nize all positions having similar duties and responsibilities into like groups. Since 1938 the Commission has essentially employed only two approaches: position comparison and benchmark. The subjective nature of the position comparison approach resulted in decided disadvantages, leading to its eventual abandonment. The reduction in the number of classifications, brought about when the more objective benchmark system was adopted, contributed to large employment registers and created the need for classification subcodes.

Existing Commission rules require the Civil Service Department to conduct both a periodic and an ongoing review of all classified positions to ensure that each position is properly allocated. Few of the reviews that are conducted involve on-site investigation by classification staff. Increasing the number of on-site reviews would not only give greater effect to the existing rule but would also facilitate communication between classification staff and employees requesting such reviews.

The Executive Office Administrator, Representative and Aide classification series, the ostensible purpose of which was to provide a Governor flexibility to organize the executive office, are as prevalent throughout the principal departments as they are in the Governor's immediate office. The placement of these positions throughout the principal departments may substantially understate the actual number of persons assigned to the Governor's office.

It is important that a Governor be given sufficient flexibility to organize the executive office and to effectuate the policies for which elected; however, it is also important that the merit system be protected against the reintroduction of a spoils system under the guise of such flexibility. The Commission should therefore take particular care that the Executive Office Administrator, Representative and Aide classification series are adequate to the purposes for which they were created, but that their use is limited to increasing flexibility within the executive office.

F. Recommendations

1. Civil Service Department classification staff should increase the frequency of on-site review of reclassification requests to ensure a thorough consideration of their merit. In addition, classification staff should initiate a recurring review program for all classified positions, as required by current Commission rule, to ensure that classification levels are appropriate.

2. The Commission should reexamine the purpose and use of those positions which comprise the Executive Office Administrator, Representative and Aide series and require that such positions be restricted in location to the Governor's office.

Part III. Civil Service and Affirmative Action

Establishing equal employment opportunity in state service for all segments of the population has been a principal purpose of the Michigan civil service system since its inception in 1937 — although there were no concentrated efforts to implement the principle until 1967. At the same time, the Michigan Constitution requires the Civil Service Commission to develop employment

lists "exclusively on the basis of merit, efficiency and fitness" and prohibits state agencies from basing appointments promotions, demotions, or removals in the classified service on "religious, racial or partisan considerations." For more than twenty years, the state has been involved in initiatives to reconcile the principles of merit and representative selection, and to increase the representation of women, minorities, and handicappers in state employment. The true aim of affirmative action is to perfect the ideal of merit selection as articulated in a policy statement affirmed by successive Michigan administrations:

> The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons….

A. The Record: Growth of a Representative Work Force

The Departments of Civil Service and Civil Rights conducted an Affirmative Action Research Study and surveyed equal employment opportunity in the state classified service during the period 1967-71, concluding that "minorities and women will not become proportionately represented until a number of well-calculated modifications are made…[,] most of [which] must occur within the Civil Service area…."

According to the research, in 1968 the distribution of state employment between whites and non-whites, within broad employment categories and geographic areas, was as shown in the following table:

Table 3.6

Distribution of State Employment by Category and Geographical Area, 1968

Employment Category	Total Classified Employees	White		Non-White	
		Number	Percent	Number	Percent
Non-Professional	25,231	21,271	(84.3%)	3,940	(15.6%)
Semi-Professional	14,181	13,115	(92.5%)	1,066	(7.5%)
Professional	5,089	4,823	(94.8%)	266	(5.2%)
TOTALS	44,481	39,209	(88.1%)	5,272	(11.9%)
In Metro. Counties	27,599	220785	(82.6%)	4,814	(17.4%)
In Non-Metro. Counties	16,882	16,424	(97.3%)	458	(2.7%)

The 1971 report noted that

> A number of departments … have provided employment opportunities for numbers of minority groups and women in areas of minority population concentration and/or in what are largely the lower levels of employment. At [one department], a formal commitment to providing equal opportunity has been made through the appointment of an Equal Employment Opportunity Officer. At [another], an EEO Task Force has been appointed. [A third] has appointed an EEO officer who has had limited success in involving non-whites in two or three divisions but has demonstrated little, if any, progress on behalf of women. In the others, personnel

> officers, or other high-ranking professionals have sought to overcome imbalance. None has succeeded in providing reasonable representation at all levels and in all areas.
>
> The remaining departments… have not significantly implemented equal employment opportunity in any area….

The situation today is far different. Since 1980 the Department of Civil Service has published an Annual Work Force Report including data on the representation of women, minorities and handicappers in state employment. **Table 3.7** shows the key figures. In 1968, minority representation was less than 12%; in 1980 it stood at more than 20%. In the first seven years of the 1980s, the representation of women, blacks, Asian, and native Americans in state employment exceeded comparable working-age population levels, which have become standards for Michigan state government. Hispanic representation fell only 0.1% short by 1986; and, while handicappers fell substantially shy of the goal, their percentage in 1986 was 2.5 times its 1981 level. The record of the 1980s is all the more impressive when it is recalled that this period included large layoffs and a general reduction of state employment.

Table 3.7

Growth in Representation of Women, Minorities, and Handicappers in the State Work Force, 1980-1986

	1980	1981	1982	1983	1984	1985	1986	State Standard
Women	54.0%	53.3%	52.5%	51.8%	53.0%	52.9%	53.0%	50.0%
Blacks	17.5	17.6	17.9	17.8	18.7	19.5	20.1	12.9
Handicappers	N/A	2.4	2.5	N/A	N/A	3.5	6.1	9.7
Hispanics	1.3	1.3	1.3	1.4	1.5	1.6	1.7	1.8
Asian-Americans	0.9	0.9	0.9	0.9	1.0	1.0	1.0	0.9
Native Americans	0.8	0.7	0.8	0.9	0.9	1.0	1.0	0.4

Note: Percentages are not additive due to the presence of women and handicappers in each of the other categories.

The growth in representation has been widespread geographically. **Table 3.8** compares the 1986 percentages of minorities (blacks, Hispanics, Asian, and native Americans) in state employment with regionalized county representation goals in three broad regional areas of Michigan. In the late 1960s, minority representation among state employees outside metropolitan areas was minuscule. By 1986 representation in the upper parts of the state was broadly proportional to the work force population in those areas. In fact, the southern, more urban area lagged in representativeness as defined by the state's methodology.

Table 3.8

Minority Representation in State Employment vs. Official Representation Standards, in Three Regional Areas of Michigan, 1986

	Percent Minorities in: Regionalized Standards*	State Employment	Number of State Employees
Southern Lower Peninsula	30.3%	26.1%	53,799
Northern Lower Peninsula	3.7	3.8	4,373
Upper Peninsula	6.7	7.1	2,077

Source: CRC calculations based on data in Annual Work Force Report.

*Minority standards for the three regions are employment-weighted averages of official county standards for the counties included.

Minorities and, to a lesser extent, women also have gained greater representation in occupational categories wherein they had little presence in earlier years (comparable data for handicappers are not published). **Table 3.9** shows the growth in representation within the eight employment categories of Michigan state government 1980-1986. Clearly, the remaining category of largest under-representation is skilled craft classifications. In all other job categories, the 1986 minority percentage exceeded the 16.0% statewide work force population figure. For women the record is much worse in terms of the 50% statewide goals which was exceeded in only two of eight categories in 1986; yet the percentage gains in the three categories of lowest representation were large in both absolute and relative terms.

Table 3.9

Representation of Women and Minorities in Selected Job Categories, Michigan State Government, 1980 vs. 1986

Job Category	% of Full-Time Classified Employees: ——Women——		——Minorities——	
	1980	1986	1980	1986
Officials & Administrators	9.5%	19.0%	14.0%	18.6%
Professionals	39.9	42.9	16.6	19.4
Technicians	26.4	31.9	12.1	18.0
Skilled Crafts	2.1	6.0	10.2	14.3
Protective Services	9.3	17.3	12.7	22.1
Para-Professionals	70.9	70.9	31.5	33.9
Office & Clerical	94.3	95.2	19.8	24.5
Service & Maintenance	40.8	38.0	26.4	28.6

Even sot goals remain to be achieved in all departments in certain job categories. **Table 3.10** shows 1986 representation of women and minorities by Job category in selected state departments.

Table 3.10

Representation of Women and Minorities in Selected Departments, 1986

Job Category	———% of Full-Time Classified Employees——-							
	Atty. General		Mgt. & Budget		Public Health		State Police	
	Women	Minor.	Women	Minor.	Women	Minor.	Women	Minor.
Officials & Admin.	9.4%	5.7%	21.0%	6.5%	23.4%	12.5%	3.0%	3.0%
Professionals	21.2	7.9	36.7	16.9	38.7	16.0	10.6	3.7
Technicians	37.5	0.0	37.5	12.5	69.7	14.9	7.0	8.0
Skilled Crafts	—-	—-	10.7	16.2	6.5	10.9	14.3	0.0
Protective Svc.	22.2	22.2	44.4	33.3	8.3	41.7	6.2	10.9
Para-Professionals	83.3	0.0	75.6	9.8	84.0	19.4	75.0	0.0
Office & Clerical	99.2	12.9	94.8	18.2	96.8	14.1	89.3	12.8
Service & Maint.	—-	—-	22.6	31.5	49.3	28.4	12.8	15.4

The continuing improvement in the representative nature of employment in Michigan state government can be attributed to the combined efforts of the state's chief executives, lieutenant governors the Department of Civil Service t and appointing authorities. It is important to look at whether the methods employed are focused effectively on the problems that remain and are compatible with the merit system of employee selection mandated by the Michigan

Constitution. The following sections analyze the development of the affirmative action program in Michigan state government.

B. Federal Guidelines on Affirmative Action Programs

Affirmative action programs stem historically from the Civil Rights Act adopted by Congress in 1964 and amended in 1972 to cover the states. Title VII established a national policy of nondiscrimination in employment practices and "strongly encouraged employers, labor organizations, and other affected persons to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity…." (U.S. Equal Employment Opportunity Commission, "Guidelines on Affirmative Action," 44 Federal Register 4422, Jan. 19, 1979, hereinafter termed the "EEOC Guidelines.")

Congress in 1972 established an Equal Employment Opportunity Coordinating Council to coordinate the efforts of federal agencies administering anti-discrimination laws, and in 1976 this body issued a policy statement on affirmative action programs for state and local government agencies (hereinafter termed the "EEOCC policy statement"). Excerpts from that statement follow:

1. Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, colors religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial or ethnic characteristics….

2. ….The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the work force in the relevant job market who possess the basic job related qualifications.

   When substantial disparities are found through such analyses each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group …. recruitment, testing, ranking, certification, interview, recommendations for selections hiring, promotion, etc. [Emphasis added]

3. When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic 'conscious,? include, but are not limited to, the following:

   …a long term goal, and short range, interim goals and time-tables for the specific job classifications all of which should take into account the availability of basically qualified persons in the relevant job market;

   A recruitment program designed to attract qualified members of the group in question;

   A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking 'Journeyman' level knowledge of skills to enter and, with appropriate training, to progress in a career field;

   Revamping selection instruments or procedures … to reduce or eliminate exclusionary effects… ;

   … measures designed to assure that [qualified] members of the affected group are included within the [selection] pool … ;

   … career advancement training both classroom and on-the-job, to employees locked into dead end jobs; and

   … **a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments….** [Emphasis added]

4. The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans

should be based upon the ability of the applicants to do the work. Such plans should not require the selection of the unqualified or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion or national origin….

C. The Affirmative Action Program in Michigan State Government

Having received the results of the equal employment survey done by civil service and civil rights staff, the Governor in September 1971 issued an Executive Directive requiring all state departments to develop affirmative action plans and file annual reports with the Department of Civil Service. Four years later, as a result of the recognition that greater emphasis in the executive branch was needed in this area, the Governor issued a subsequent Executive Directive creating the Michigan Equal Employment Opportunity Council (MEEOC), chaired initially by the Governor and then by the Lieutenant Governor and including the Attorney General and directors of the departments of Civil Service, Civil Rights, and Management and Budget. One full-time staff member was retained.

Since 1975, then, both the Civil Service Commission and MEEOC have developed affirmative action policies and involved themselves in affirmative action administration. In 1983 MEEOC was renamed the Michigan Equal Employment and Business Opportunity Council (MEEBOC); its membership was broadened to include the Governor's Legal Advisor and Directors of Commerce, Labor, Transportation, and Social Services; and its duties were extended to procurement policy.

1. **Affirmative Action Policy**

Policy making for affirmative action in Michigan is shared by MEEBOC, which is structured to represent the administration's priorities and the Civil Service Commission, which has a constitutional responsibility for equal employment opportunity through its administration of the merit system. The basic focus of each set of policies follows from these responsibilities: the executive policy is oriented toward appointments and proportional representation, while the civil service policy is oriented toward the selection process and equal employment opportunity. These two emphases represent the tension inherent in affirmative action policy, and in harmonizing them the two sets of policies have been energetically developed and generally well coordinated. However, neither has required a statewide affirmative action plan, and none has ever been developed. Without a plan (and a planning process), there has been no ongoing, formal analysis of the broad range of selection processes to determine where the state's major equal employment problems are, to rationalize the methods chosen to resolve them, and to refocus efforts when required.

Executive policy. The official affirmative action policy of the executive has been developed through successive executive orders and MEEOC/MEEBOC policies and guidelines. These statements have been developed in a serial fashion and are published nowhere as a single policy document that is updated as policy is modified or extended. The basic outlines of the policy are sketched below.

In June 1976 MEEOC adopted "Affirmative Action Guidelines" to provide guidance for state departments in writing affirmative action plans and in setting representation goals and timetables. The purpose of the Guidelines was to place responsibility on departments for the whole

range of affirmative action activities. Departmental affirmative action plans were required to contain three policy items:

1. A firm commitment to equal employment opportunity for all persons regardless of races religions colors sex, national origin, age, physical or mental characteristic or other categories or groups protected by law.

2. A firm commitment to review all aspects of the employment [sic] (i.e, recruiting, hiring, transfer, promotion, training, salary/compensation, benefits, layoffs, terminations grievances, etc.) to identify and remedy those internal policies and procedures which unlawfully disadvantage minorities, women, or handicappers.

3. A clear acknowledgment that specific programs, including goals and objectives are required to overcome the present effects of past discrimination and/or exclusion.

The second item, which echoes the second section of the EEOCC policy statement (highlighted on page 42, above) in calling for a review of the entire selection system, is the key to development of a sound affirmative action strategy. Much of the system to be reviewed is beyond the purview of departments and could be analyzed more effectively by the executive or civil service staffs; yet there was no central component to the Guidelines. No statewide affirmative action plan was required, and none has ever been produced.

In November 1976, MEEOC endorsed the EEOCC policy statement excerpted above; subsequently it required all state departments to incorporate the statement by reference in their affirmative action plans annually, a requirement that still stands. The focus of affirmative action efforts, according to the third paragraph of that statement as well as the second policy item required by the MEEOC Guidelines, should be to remedy those aspects of the selection process where problems exists not only through the setting of representation targets for hiring decisions but also through steps to improve recruitment, selections classification and pay systems, training, and other efforts. In Michigan this would necessarily involve the executive and the Civil Service Commission as well as appointing authorities because of the budgetary and merit system implications. Yet there was no statewide analytic component to the policy, and thus no central focus on discovering the areas in which most work was needed.

In July 1978 MEEOC published a "Technical Manual" which centralized the setting of representation goals. According to this manual, the aim of the Michigan affirmative action program was

> To attain a state work force utilization of minority persons and women comparable to the representation of these groups in the population (minorities) and labor market (women) in each classification or job category within each unit of department organization, in every institutions office and facility where they are located throughout the state.

To implement this goal, the manual set utilization standards at the county level for all protected groups and Job categories in every department, and authorized departments to seek exceptions to this policy on a case-by-case basis. With subsequent updating, these standards remain in effect.

In 1979 MEEOC instituted a review of the selection process for all appointments to positions at the highest five levels of state employment (17-21) Executive Order 1983-4 extended this review to all positions at the 15 level and above "or other classified positions as determined by the council," and MEEBOC later extended the review down to the 12 level in four selected departments. The State Personnel Director instituted a "lock out" of such positions from the payroll/personnel system until MEEBOC approval was granted for the selection, insuring that the review could not be circumvented.

Since 1984 MEEBOC has issued annual "report cards" on appointments made at the 15 level and above. To receive an "outstanding" scores a department must have appointed protected group members to at least 62% of such vacancies, while its performance is "unsatisfactory" if fewer than 47% of such vacancies were so filled. The scorecard ignores underlying variations in the selection pool and all efforts other than hiring decisions made by departments to correct the exclusionary effects of the selection system. In other words, while the EEOCC policy statement and even the MEEBOC Guidelines urge a broad focus on the entire selection systems the current scorecard measures only the hiring proportionality for a select set of positions.

Civil service policy. In 1971 the Civil Service Commission adopted an equal opportunity rule which was permissive in natures providing that

> In order to assure equal employment opportunity based exclusively upon merit, efficiency, and fitness, the director may recommend to the commission, as an alternative to current means of evaluating applicants methods for selection of persons qualified for classified employment or for promotional opportunity which are designed to eliminate any discrimination based upon sex, age, handicap, race, national origin, religion or political partisanship and which eliminate all irrelevant factors for evaluation of applicants.

The next year civil service staff developed an expanded certification procedure to insure the capability to include individuals from underutilized protected groups on employment lists used by departments for selection purposes. In 1974 a rescheduled examination procedure was added, allowing targeted recruiting and testing of protected-group members whenever their representation in the applicant pool was below that in the population at large. MEEOC later required all departments to use these procedures, as well as to make use of other selection options that would enhance opportunity for protected-group members.

In 1980 the Civil Service Commission adopted six merit principles, among which two have an equal opportunity focus. The first principle calls for a merit system of selection and promotion to insure that "all segments of [the] population have an equal opportunity for state employment." The second states that

> All persons applying for employment and all employees should receive fair and equitable treatment in all aspects of personnel management without regard to race, color, religion, national origin, sex, marital status, age, handicapping condition, or political affiliation….

It was noted above that the executive policy on affirmative action contains no provision for annual analysis of the various facets of the selection system to determine where the state's greatest equal employment problems lie and to rationalize its program. This omission applies with greater force to the Department of Civil Service, which administers much of the selection system. The annual affirmative action plan of the Department of Civil Service includes a section entitled "External Statewide Merit System Affirmative Action Plant, which describes the functional responsibilities for analyzing affirmative action/equal employment issues in various elements of the department; civil service staff also produce an Annual Work Force Report that includes a great amount of data on the status of protected group representation within classified state employment. Yet in neither of these publications does the Department of Civil Service undertake the analysis recommended by the EEOCC policy statement of each element of the overall selection process, to determine which areas present the major problems and to document improvements achieved. The rules of the Civil Service Commission require the Department to maintain procedures for analyzing the applicant pool, as a basis for targeted recruitment; but the Commission does not require an annual report of the progress and problems in eliminating barriers to equal employment opportunity.

On balance, the executive and the Civil Service Commission have been energetic in pursuing affirmative action policies and the affirmative action program in Michigan state government consequently has undergone substantial development, that can be described in terms of three emphases: improving the selection pool from which employees are chosen, improving the basis of selection decisions, and setting representation targets for protected groups in state employment.

2. Improving the Selection Pool

The initial emphasis of affirmative action in Michigan state government was to remedy specific selection procedures with exclusionary effects. To increase protected group representation in the selection pool, the Civil Service Commission in 1972 approved an expanded certification policy allowing an appointing authority to request expansion of the list of persons eligible for selection to include the three highest-rated protected group members whenever the selection pool was unrepresentative, and in 1974 approved a rescheduled examination policy allowing targeted recruiting and testing of protected group members whenever their representation in the applicant pool was below that in the population at large. A separate register of handicapped persons also was developed for use by appointing authorities.

In 1978 the Department of Civil Service began to implement a new selection system designed with a view toward institutionalization of affirmative action concerns. Under the new systems applications for state employment are processed into a computerized skills file bank which can be analyzed for data relevant to protected group representation and used in setting recruitment strategy. The examination process is computerized, allowing analysis of test results for bias. A department with a vacant position is provided a list of certified candidates based on a "broad band" approach, rather than the "rule of three" used previously; under the new rule, the list contains all applicants who attain scores in a top band (normally the top ten scores) rather than just the top three scorers. A revision of the classification system begun in 1975 included a review of education and experience qualifications for all classifications to insure their relevancy for Job performance. The Department of Civil Service also sponsored affirmative action train-

ing for all managerial and supervisory personnel in state departments during 1985 and 1986.

MEEOC adopted a policy in November 1976 requiring all departments to utilize the rescheduled examination and expanded certification procedures in filling all classified positions. Two years later, departments were required to request the Civil Service Selection Bureau to announce promotional examinations on a statewide rather than departmental basis whenever the job available was of a classification without sufficient protected group representation in the county where it was located and the departmental eligibility list was similar**ly** unrepresentative. Departments also were required to request the Classification Bureau to review minimum education and experience requirements for underutilized technician professional and administrative classifications before announcing examinations for those positions, and to use more flexibility in interpreting education and experience requirements in reviewing applicants. Another MEEOC policy limited the conditions under which out-of-state recruitment could be undertaken, to promote the recruitment of protected group members. In 1980 MEEOC required departments to consider the impact of layoffs on protected group representation, and the Civil Service Commission allowed departmental layoff plans to contain exceptions to its employment preference rules with MEEOC approval.

Individual state departments also have taken initiatives to improve opportunities for protected-group members in occupational and geographic areas where they have little presence. Two examples: The Department of Mental Health has initiated a tuition reimbursement program for advanced degrees in psychology nursing, and social work, in which two-thirds of all grants will go to members of underrepresented protected groups. The Department of Natural Resources in cooperation with Michigan State University conducts a seven-week minority apprentice program to give high school students exposure to natural resources career fields.

The utility of focusing on the selection pool. Departments select individuals to fill vacant positions from employment lists furnished by the Department of Civil Service. To the extent that those lists are unrepresentative of the population makeup, the task of achieving a representative state work force becomes more difficult. It is doubly important that efforts to improve the selection pool should be measured and publicized: Not only should the work of those who focus on the selection pool be evaluated on its own merits, but also the impact of results in this area must be considered in evaluating the proportionality of hiring decisions made by departments that depend on the lists of candidates produced from the selection pool.

The importance of focusing on improving the selection pool as an approach to the achievement of a representative work force can be seen in the figures shown in **Tables 3.11** and **3.12t** which are derived from reviews of the affirmative action programs of five state departments conducted by the Civil Service Department in 1985 and 1986. **Table 3.11** shows protected-group representation on statewide employment lists for selected upper-level positions. Of the two employment lists reviewed in the officials and administrators category, blacks and Hispanics were represented at or beyond the statewide utilization standard in both, native- and Asian Americans in one each, and women and handicappers in neither. Twenty-five professional lists were reviewed, with Asian Americans meeting the representation standard in 19, native Americans in 11, blacks in 8, Hispanics in 7, and women in 2. The representation of women in both categories tended to be in the 20-30% range, as compared to a 50% utilization standard. There also were wide differences among occupational groupings: few blacks were present in the three biological

lists, for example; few women in the engineering lists; many Asian Americans in the math- and science-related lists. Under-representation on employment lists must be viewed as a contributing factor to the remaining areas of under-representation in state employment.

The adequacy of both the strategy and efforts of the Civil Service Selection Bureau and affirmative action personnel in that and other departments to reduce under-representation on certain employment lists, remains to be addressed systematically in statewide affirmative action planning and annual program reviews by MEEBOC.

Since the various classified position titles are not distributed evenly across state departments, and since the employment lists from which individuals are hired into classified positions vary in their, representation of protected groups, it follows that some state departments may be faced with a very difficult task to achieve a work force balanced according to population standards, while others may have less difficulty, because of the situation in the selection pool for the particular types of jobs they offer. These differences should not be ignored in evaluating the work done by the departments to improve representation of protected group members among their employees.

Table 3.11

Protected Group Representation on Selected Statewide Employment Lists, 1985-6

Class Series	No. on List	% Women	% Black	% His-panic	% Native American	% Asian American	% Handi-capper
——————————Officials & Administrators Job Category——————————							
Administrative Law Specialist	164	28.0	14.6*	2.4*	0.0	0.0	0.0
Departmental Administrator	6,689	28.6	16.1*	2.0*	0.9*	1.3*	0.0
——————————————————- Professional Job Category ——————————————————							
Accountant	1,134	23.7	11.2	1.9*	0.7*	5.0*	0.0
Aquatic Biologist	244	11.5	0.8	0.4	0.0	0.8*	0.0
Auditor	2,546	26.1	11.5	0.5	0.1	4.7*	0.0
Data Systems Analyst	258	29.8	10.9	1.9*	0.1	5.0*	0.0
Departmental Analyst	862	50.1*	15.5*	0.8	1.4*	2.3*	0.0
Departmental Manager	8,425	29.8	16.2*	1.6	0.9*	1.3*	0.0
Departmental Trainee	3,699	70.3*	25.7*	1.5	0.6*	0.4	0.0
Economic/Commercial Development Analyst	138	44.9	25.4*	1.4	0.0	0.0	0.0
Economic/Commercial Development Manager	205	31.7	27.3*	2.9*	0.0	0.4	0.0
Economic/Commercial Dev. Specialist	666	21.3	16.5*	2.0*	0.8*	3.8*	0.0
Environmental Engr.	2,171	13.0	3.8	0.3	2.8*	5.0*	0.0
Financial Manager	357	19.6	9.2	0.3	0.3	0.1	0.0
Fisheries Biologist	640	19.2	0.8	0.3	0.3	0.9*	0.0
Food/Dairy Spectlist	1,407	36.7	6.3	0.5	0.3	0.6	0.4
Forester	247	21.1	1.6	0.0	0.8*	0.0	0.0
Geologist	394	22.3	1.5	0.0	0.2	3.0*	0.0
Human Res. Developer	679	38.1	15.6*	2.8*	1.2*	0.1	0.0
Lab Scientist	1,163	31.0	7.0	0.6	0.0	7.6*	0.5
Plant Ind. Specialist	303	22.1	2.6	0.3	0.7*	2.0*	2.0
Public Utility Engr.	45	0.0	6.7	0.0	0.0	2.2*	0.0
Regulation Officer	390	31.0	19.0*	0.5	0.8*	1.5*	0.0
Resources Specialist	2,049	31.2	5.4	0.4	0.3	2.5*	0.0
Veterinarian	36	8.3	0.0	11.1*	0.0	5.6*	0.0
Water Quality Spec.	1,680	27.8	6.1	0.7	0.2	5.0*	0.0
Wildlife Biologist	2,499	27.3	4.5	0.7	0.5*	2.8*	0.0

*Denotes percentages meeting or exceeding statewide utilization standards.

Many of the variances in employment lists shown in **Table 3.11** may be influenced by labor market factors over which the state's recruitment and selection personnel can have little immediate controls and which require the adoption of efforts with a longer time horizon. For examples **Table 3.12** shows comparisons of the labor market ("Mkt") and employment in the Department of Mental Health ("DMH") within several occupational classes. Of the nine class series shown, seven appear to be drawing from female-dominated labor markets, but the psychiatric profession has relatively few women. The labor markets have lower percentages of blacks than the weighted population standards under which the Department of Mental Health operates, and although the Department has much higher representation than the markets in all but one of the classes examined, it meets the state standard only once. The labor markets also have lower percentages of Hispanics than state standards, but the Department has lower representation than even the market.

Table 3.12

Comparisons of Protected Group Representation in Selected Mental Health Occupational Classes with Labor Market Figures, 1987

Target*:	Women (50%)		Blacks (26.5%)		Hispanics (2.4%)		Indians (0.6%)		Asians (1.4%)	
Class Series	**Mkt**	**DMH**	**Mkt**	**DMH**	**Mkt**	**DM**	**Mkt**	**DMH**	**Mkt**	**DMH**
	%	**%**	**%**	**%**	**%**	**%**	**%**	**%**	**%**	**%**
Psychiatrist	16.0	29.3	1.5	3.8	4.3	1.4	0.1	0.0	7.6	46.5
Psychologist	40.9	33.3	5.5	8.7	1.7	1.4	0.2	0.0	1.7	3.4
Speech/Lang. Path	84.0	75.0	5.8	16.7	0.6	0.0	0.0	0.0	0.0	0.0
Occupational Therapist	93.3	92.7	5.6	15.5	0.0	0.0	0.0	0.0	1.0	0.0
Physical Therapist	74.8	33.3	4.2	0.0	0.8	0.0	0.5	0.0	3.4	0.0
Registered Nurse	96.0	87.6	7.3	22.9	1.1	0.4	0.2	0.4	3.5	5.4
Social Worker	96.0	68.3	7.3	18.8	1.1	0.3	0.2	0.3	3.5	3.1
Child Care Worker	93.1	44.3	18.9	21.6	2.2	0.9	0.5	0.3	0.4	0.3
Resident Care Aide	87.7	63.9	24.7	31.7	1.7	0.9	0.6	0.5	0.9	0.2

*Weighted utilization standards based on locations of department facilities.

Source: 1988 Affirmative Action Plan, Michigan Department of Mental Health. Labor market data are from 1983 "EEO Detailed Occupation Report," U.S. Bureau of the Census, and American Psychiatric Association (for psychiatrists only).

The comments made above regarding under-representation on employment lists are equally applicable to situations in which under-representation in the labor markets may hinder the development of representative employment lists and/or work forces: Strategy and efforts to deal with such restrictions remain to be addressed systematically in statewide affirmative action planning and annual program reviews by MEEBOC. In addition, the differences in labor market situations faced by the various state departments should not be ignored in evaluating the work done by the departments to improve representation of protected group members among their employees.

3. Improving the Basis of Selection Decisions

The Executive Order establishing MEEBOC in 1983 directed the new affirmative action body to

reviews in advances all appointments at the 15 level and above in Michigan state government to insure full consideration of protected group members in selection decisions. The Department of Civil Service cooperated by agreeing to the establishment of a "lock out" procedure preventing such appointments without MEEBOC approval. A MEEBOC policy statement implemented the mandate, requiring departments to provide for each appointment information of selection criteria, interview questions, recruitment efforts, a list of the applicants indicating consideration factors, and resumes. Later the review was extended down to the 12 level in four departments. The information is reviewed by an interdepartmental "liaison staff" committee which has power of approval or non-approval and is directed to act within ten days. The committee reviewing appointment procedures represents some but not all state departments, and the criteria for non approval are vague:

> Among the reasons for non-approval will be, by way of illustration and not limitation: the absence of a representative selection pool; inadequate recruitment efforts; department recalcitrance over an extended period of time in the appointment of protected group members; refusal to supply required documentation. (MEEBOC Policy 8)

It is not surprising, then, that there has been friction over the operation of this review, revolving basically around due process or "fair-play" considerations. A straightforward way to address such concerns would be to broaden the membership of the review committee and to refine the review criteria.

Because of the interdepartmental nature of MEEBOC itself, the MEEBOC review is basically a peer review of departmental selection activities. If structured properly such a peer review can have salutary effects by allowing all departments to see that the "rules of the game" are being followed by everyone else, encouraging the use of fair and objective techniques of selection, and facilitating the spread of innovations. But the salutary effects require universal participation: otherwise a peer review can take on the appearance of unfairness to departments on the outside. Modifying Executive Order 1985-2 to provide for participation, and thus "ownership" of the process, by all departments would appear to be a principal way to improve the selection review and its acceptance. While this would increase the membership to nineteen, the unwieldy size could be dealt with by rotating the membership or creating panels within the review committee.

There is also a need to refine the review criteria. The "broad-band" certification rule used by the Department of Civil Service produces relatively large employment lists from which departments can choose in filling vacancies (a matter discussed more fully in Part I of this chapter). This is intended in part to increase representation of protected-group individuals on employment lists, but it also enlarges the discretion exercised by departments in their selection activity.

The MEEBOC review is intended to insure that this process results in adequate consideration of protected-group members in all appointments at the 15 level and higher (or 12 level in selected departments). There were 288 such appointments in 1987, and documentation of the procedure used for each selection was reviewed by MEEBOC liaison staff. Criteria for non approval of the procedure, quoted above, lack any mention of merit considerations. Because civil service staff have agreed to support the MEEBOC review through payroll/personnel system controls, and

more generally because the broad-band certification approach allows greater discretion to departments in selection, Civil Service Commission standards are necessary to insure a merit orientation, and MEEBOC should explicitly affirm such standards as the basis of its review.

The Department of Civil Service published an expanded "Selection Interview Guide" in 1986 to provide guidance to appointing authorities in the circumstances that have been created by the broad-band certification process. The Guide points out that departmental selection actions are subject to review by civil service staff and (where applicable) by MEEBOCP and that "serious flaws resulting in violation of Merit Principles" can lead to the voiding of appointments. The title of this document may mislead appointing authorities, since it covers pre-interview activities and the Department of Civil Service should clarify that the fundamentals of consideration specified in the document do, in fact, have the status of procedural requirements.

Inclusion in MEEBOC review criteria of "department recalcitrance" on past selection decisions appears antithetical to a procedural review based on objective criteria and conducted by an interdepartmental staff committee. Denial of the privilege of an appointing authority to fill vacancies is an executive prerogative that may be exercised at any time, including when review indicates "recalcitrance" toward affirmative action policy; but it is appropriately an **executive** action rather than a **staff** function. It would be preferable not to mix such a policy consideration with the merit-oriented criteria for a peer review procedure that should focus on individual selection decisions.

The need to review **all** appointments at the 15 level and above, and the effectiveness of focusing reviews on appointments at given levels, rather than on occupational groupings with representation problems (such as skilled craft positions) or specific geographic areas, should be addressed. According to the departmental affirmative action plans, various departments already are using alternative review strategies internally. There are of course time and resource constraints on the number of such reviews. Essentially, the MEEBOC reviews now provide blanket coverage of selection for upper-level managerial and professional positions. One alternative strategy might be to cover a broader range of levels but focus on occupational or geographic areas where underrepresentation exists. A sampling technique might allow greater coverage and a focus on priority areas without producing greater burdens of documentation or time delays; the uncertainty of a peer review theoretically would serve the same purpose as reviewing every selection decision. MEEBOC already has a pilot project with the Department of Corrections which allows the Department to conduct the reviews, subject to MEEBOC audit. Decisions on review strategy would be an important component of statewide affirmative action planning.

Finally, the "report card" used by MEEBOC to grade departmental selection activities deserves scrutiny. All departments are graded annually on the proportion of their appointments at the 15 level and above which result in selection of individuals from protected groups. To achieve an "outstanding" rating, a department must hire and/or promote protected-group members in at least 62% of all selection decisions at those levels, while it is "unsatisfactory" if less than 47% of such choices are of protected-group members. No consideration is given to the labor markets and employment lists that underlie such scores. There is no annual report card that gauges activities designed to improve representation on employment lists, nor is attention given to occupational or geographic representation considerations. In a nutshell, the Michigan approach

is focused exclusively on those who make hiring decisions at the end of the causal chain that leads to adequate representation of all population groups at the upper levels of state government.

The assumptions implicit in this approach are that all departments can meet uniform representation targets regardless of the varying situations in the underlying selection pools from which they must draw, and that the efforts to make those selection pools more representative are not important enough to need public scrutiny. The danger in an affirmative action approach that is narrowly focused on certain hiring decisions in the selection process and only on the actors who must make those hiring decisions, is that it can too strongly emphasize the meeting of numerical targets rather than the improvement of equal employment opportunity. Ultimately, such an emphasis is needlessly divisive. By way of contrast, the EEOCC policy statement emphasizes the whole range of selection activities and all of the actors who together can improve the representative nature of the state work force.

4. Setting Representation Targets

Affirmative action programs are based on a comparison of protected group representation between the employer's work force and a relevant labor force. The comparison is used to set representation targets, or "utilization standards," for protected groups. Utilization standards are based on three interrelated elements of comparison:

- a relevant labor force to be compared with the employer's work force,
- a relevant geographical area (or labor market) within which the above comparison is appropriate, and
- a particular job category or classification covered by the labor force and geographical definitions.

The relevant labor force. Initially Michigan state departments set their own representation targets within the required annual affirmative action reports. The EEOCC policy statement of 1976 (see pages 44-45, above) recommended that targets "take into account the availability of basically qualified persons in the relevant job market." However in 1977 MEEOC adopted as a standard the availability of minorities in the work force population (all persons aged 1665) and of females in the labor force (persons employed, on layoff, and looking for work). The standard for handicappers, who were added in 1980, was based on the work force population. In 1987 the female standard was changed to the broader population basis as well. The current statewide standards for all protected groups are as shown in Table 3.13.

The population-based standard selected for women, handicappers, and minorities is the most stringent comparison the state could have chosen for evaluating representation of these protected groups in its employment, since it measures the state work force against all working-age adults whether they are in the labor force or not. The argument for such a strict standard is that it captures the ideal of a perfectly representative employment mix; on the other hand, it may be unattainable in the near term because of labor market factors. Yet any standard reflecting labor market realities necessarily also would reflect whatever discrimination existed in the past.

The relevant geographic area. From the outset of concern over developing a representative state work forces, the geographic distribution of protected group employment has been consid-

ered important. Accordingly, MEEOC in 1977 also adopted **county** work force comparison standards. The county standards for minorities were based on the highest of applicable city, county, metropolitan, regional, or (in some cases) statewide population figures, while the statewide female and handicapper percentages were applied to all counties. **Table 3.13** shows the current work force comparison standards for Alpena and Wayne counties for purposes of illustration.

In adopting county-level standards, MEEOC implicitly decided to treat all 83 counties as separate labor markets within each of which representative employment should be achieved independently. Against this is the most stringent comparative method the state could have chosen, since there can be no carryover from one county to another under such a rule. The argument for such a strict standard is that it captures the ideal of a perfectly distributed employment mix, but like the perfectly representative work force discussed above, it may be unattainable. On the other hand, averaging among geographic areas might introduce the possibility that concentrated rather than broadly distributed protected-group employment could satisfy the representation goal. One way to overcome such a possibility would be to develop a measure of the dispersion of protected-group employment that stopped short of independent county-by-county standards.

Table 3.13

Selected Utilization Standards for Protected Groups in State Employment

Protected Group	Statewide Standard	Alpena Co. Standard	Wayne Co. Standard
Women	50.0%	50.0%	50.0%
Blacks	12.9%	0.6%	50.0%
Handicappers	9.7%	9.7%	9.7%
Hispanics	1.8%	1.0%	2.4%
Asian-Americans	0.9%	0.4%	1.2%
Native Americans	0.4%	0.6%	0.3%

The relevant job categories. The occupational distribution of protected group employment also has been an important consideration. The (federal) EEOC developed eight standard occupational groupings, styled "job categories," for equal opportunity reporting. All classified position titles in Michigan state government were identified in terms of these Job categories, and MEEOC adopted the EEOC categories and the individual departmental appointing authorities as the standard bases for occupational comparisons for affirmative action purposes. However, MEEOC did not establish differential utilization standards for these occupational categories: from the "officials and administrators" category, which includes the highest level state positions, to the "service and maintenance" category, which includes low-skill, low-paid positions, the employment makeup of each county office in each state department is compared with the makeup of the entire work force population in that area.

Implicitly this represents a decision to treat the labor market as if it were uniform and local for all types of state classified positions, and within each department. This too is the most stringent comparative method the state could have chosen. However, alternatives which recognize the reality of labor market differentials for the different job categories also would allow some standards to be affected by past discrimination or concentrations of protected group employment.

In other words, the Michigan affirmative action utilization standards represent in each of their three elements a prescriptive ideal.

As an alternative to this prescriptive approach, MEEOC might have used a descriptive methodology to determine utilization standards. The State of Wisconsin, for example, plans to incorporate protected-group representation in the applicant pool and in feeder job classifications as a part of its availability analysis for determining utilization goals for the various job groups in the state classified service. The State of New York bases representation targets on the labor force segments that correspond to each of the eight Job categories used for equal employment comparisons; thus, targets for officials & administrators are set based on protected-group representation in similar positions in the relevant geographical labor force (rather than simply on the distribution in the entire work force population as is done in Michigan).

The MEEOC/MEEBOC Guidelines and Technical Manual do allow the possibility of modifying, on a short-term basis and ' for certain types of jobs, either the population or geographical element of the Michigan standards:

> It is recognized that for some administrative, professional, higher level technical and skilled craft classes, the work force population or labor force standard by itself, may not suffice as an index of availability, and in some instances the department may want to revise the recruiting area. Any department which believes the MEEOC Utilization Standards to be inappropriate must substantiate the use of other availability data in a written attachment to the utilization analyses and the goals and timetable form for review and approval by MEEOC.

However, the MEEOC Technical Manual makes clear that the county-by-county, population-based standards apply for the long term.

There are two measurement problems with the state's utilization standards. The first is a problem of small numbers: there simply are too many comparisons required for the size and dispersion of the state work force, and as a result rounding errors can have a large impact on the measured shortfall in representation. The effect of rounding is pronounced when numbers are small, and the method of separate comparisons for six protected groups and eight Job categories in every county office of every department insures that small numbers are the rule.

The Department of Education, for example, has five employees in the officials and administrators category in Wayne County, including one black and one Asian. The representation standard in Wayne County for blacks is 50%, which translates to 2.5 employees; this is rounded up to threes leaving the office short by two in that protected group. The same 50% standard applies to females, thereby leaving the office short by 2.5, or three, female employees. On the other hand, the representation standard for Hispanics in Wayne County is 2.4%, which would not round to a shortfall of one employee unless the size of the work force were at least 21. Thus the county-by-county, department-by-department, job category-by-job category method tends to overstate utilization shortfalls of large protected groups and understate the shortfalls of small protected groups. Continuing such arithmetic from county to county can misstate shortfalls dramatically on statewide roll ups.

A seconds related problem is that the state's methodology fails to distinguish between **under-utilization** (i.e, too few individuals) and **concentration** (i.e, too little dispersion). For examples the 1987 affirmative action plan of the Department of Social Services showed 5,105 permanent paraprofessional employees statewide, of whom 4,091 (80%) were female — yet the state's methodology for measuring under-utilization indicated a shortfall of 108 women in relation to the official standard of 50%. The affirmative action plan of the Department of Education showed 90 officials and administrators statewide, of whom 18 (20%) were black — yet the plan indicated a shortfall of four in relation to the statewide standard of 12.9%. This can happen in part because of the rounding problem noted above, and in part because there is sufficient, but geographically concentrated, representation in **a** job category and department statewide.

Whether the county-by-county distribution of employment is significant or not logically would seem to depend on the labor market from which employees are drawn and the level and expectations of the position. The labor market for top-level positions such as those in the officials and administrators category almost certainly is statewide in nature and inter county moves a reasonable consideration. On the other hand, the labor market for paraprofessionals is certainly more local in nature, with inter county moves less of a consideration. Should the state's method for counting under-representation treat both types of positions as if county boundaries were significant?

It seems clear that the states' affirmative action personnel understand the problematic aspects of the labor-force and geographic components of the current utilization standards. An advisory committee has been working with the State EEO/Affirmative Action Coordinator on alternatives and the Department of Civil Service has produced draft proposals which would change the labor force component for certain class series, as follows:

- any class series requiring special experience, education and/or training at the entry level would be measured against a civilian labor force representation standard (i.e, a figure based on representation of protected groups among those working, on layoff, or looking for work);
- any class series which requires no prior experience, education, or training at the entry level would continue to be measured against the work force population standard;
- internal representation in feeder job classes would be allowed and in some cases required as a factor in standard-setting.

While the draft proposal addresses some options for changing the geographic component of the current standards in the end it recommends staying with the county basis despite the problem of small numbers.

However, the logic used in the Civil Service draft proposal for changing the labor-force component also suggests a method for changing the geographic component of the standards – namely, that some classes should be considered differently based on legitimate labor-market factors. A reasonable alternative to current practice would be to develop a method of varying the geographic component of the utilization standard according to the nature of the position. The Wisconsin technique described on page 57 is an example of such a method: county and statewide

utilization factors are weighted in accordance with recruitment patterns for the position. But it might be administratively simpler and just as appropriate to designate a pay level above which it can be assumed, based on salary and professional considerations, that use of statewide rather than county representation comparisons is justified. Since the higher level classes are also likely to be the smaller classes (organizations tending to be pyramidal)p such an alternative would have the further advantage of providing for larger numbers and thus less distortion in utilization comparisons.

D. Conclusions

The State of Michigan has a longstanding interest in making its work force representative of all population segments and a constitutional mandate for merit selection. of its employees. Considerable progress has been made in improving the representation of minorities, handicappers, and women in state employment during the last twenty years. Even so, under-representation remains in some occupational and geographic areas, and it is important that efforts to remedy such situations continue. The methods employed in the states affirmative action program should be focused effectively on the problems that remain and should be compatible with the merit system of employee selection mandated by the Michigan Constitution.

Affirmative action policy making for the state is shared by the Michigan Equal Employment and Business Opportunity Council (MEEBOC), which is an interagency body structured to represent the administration's priorities, and the Civil Service Commission, which has constitutional responsibility for equal employment opportunity through merit system administration. The two sets of policies have been developed energetically and generally are well coordinated.

The Department of Civil Service has developed an array of selection techniques to increase equal employment opportunity and the representation of women, minorities, and handicappers in state employment, including methods for targeting recruitment, broadening examination opportunity, and increasing representation on employment lists. MEEBOC has required departments to take advantage of such techniques, and the departments themselves have initiated efforts to improve the selection pool.

Under-representation remains a problem on employment lists, in some cases due to underlying under-representation in the labor market. Although the Department of Civil Service has substantial analytical capabilities in this area and includes a section on its external affirmative action responsibilities in the departmental affirmative action plan, there is no annual report of the state's progress in overcoming this problem nor of the strategy and efforts employed. Annual report cards on affirmative action ignore activities to improve the selection pool.

MEEBOC conducts a review by interdepartmental committee of all selection decisions at the higher levels of state employment. Providing for participation by all departments would improve the acceptance and probably the results of the reviews, by spreading "ownership" of the process. The utility of reviewing all top-level selection decisions should be examined; a sampling approach would allow focusing on occupational and geographic areas as well. In addition, the merit focus of such reviews deserves emphasis.

Representation targets, or "utilization standards," for Michigan state government have been set without regard for labor market differentials among different occupational groups. The Department of Civil Service has proposed changing the work force comparisons for certain classes of employees to better reflect the labor markets. As an additional step in this direction, the geographic comparisons might be varied according to the level of the position.

E. Recommendations

1. The Civil Service Department should expand the "external statewide merit system affirmative action plan" currently published as a part of its annual departmental affirmative action plan. The expanded plan should provide an analysis of the broad range of recruitment and selection activities documenting equal-employment problems and progress in overcoming them. This analysis should form the basis for an annual review of affirmative action strategy and efforts, and for an evaluation of the selection system.

2. MEEBOC should update and publish in one document its affirmative action policies and directives. The document should be kept current thereafter as policy is modified or extended.

3. Membership on the MEEBOC "liaison staff" committee, which reviews and approves or disapproves departmental appointment decisions at the 15 level and above, should be expanded to include all state departments.

4. The Civil Service Department should take steps to insure that its Selection Interview Guide is understood to contain merit standards governing selection procedures utilized by departments and to form the basis for any MEEBOC review of such procedures.

5. MEEBOC should affirm in its policies that the merit standards of the Civil Service Selection Interview Guide are the basis for its review of departmental selection procedures for positions at the 15 level and above.

6. MEEBOC should evaluate the utility of reviewing all top-level appointment decisions and consider adopting a sampling approach allowing it to focus on various problem areas without undue administrative burden on appointing authorities.

7. The Civil Service Department should develop an annual evaluation of the selection system for the classified service and publish it annually in its external statewide merit system affirmative action plan (see Recommendation 1). This evaluation would complement the report card on hiring decisions issued by MEEBOC annually.

8. MEEBOC should modify its utilization standards for greater consistency with recent case law requiring such standards to be based on relevant labor

markets and to overcome the distorting effects caused by the current county-by-county basis for all positions. Primary consideration should be given to the Civil Service Department proposal for labor-force standards for certain classes and to broadening the geographic area for measuring utilization in higher-level positions.

Chapter 4

Civil Service Programs and the Management of State Government

Introduction

Sound personnel administration facilitates managerial efficiency by providing a working environment conducive to performance. The Michigan Constitution gives the Civil Service Commission the responsibility to regulate conditions of employment in the state classified service, a power that appropriately should be used to foster a performance orientation. But the Civil Service Commission is not management and cannot insure that performance-oriented methods of personnel administration are used to the fullest: that role is given constitutionally to the Governor and departmental executives. The role of personnel administration is to make such tools available to the executive.

One of the most significant managerial tools available to the executive is the potential to appoint and remove at pleasure over 100 employees to assist in policy making. These policy positions are outside the purview of the classified civil service by constitutional directive and their pay is controlled by the legislative appropriation process. At present this tool is ineffectively utilized, with many positions unused or poorly located for policy leverage. Part of the problem lies in low pay levels, which the Governor and Legislature took initial steps to correct this fiscal year.

For many years the basic management-oriented personnel efforts of the Civil Service Department were a training program and a performance appraisal system. Much of the training effort is delegated to departments and a 1984 task force recommended that civil service training programs be better focused to increase their effectiveness; no steps have yet been taken to carry out those recommendations. The performance appraisal system has been weak and little-used by managers to reward good and deter poor performance. In 1986 a new performance appraisal system was developed and is now being implemented.

In 1980 two other performance-oriented personnel programs were developed. One **was** a link between pay and performance, a goal long espoused by the Civil Service Commission but little evident in the compensation system for state employees. The Commission adopted a standard which denies or reduces the general pay raise for poor-performing employees in upper-level positions — a reform that will depend for its success on the extent to which managers enforce the performance appraisal system. Fewer than 150 state employees were given poor performance ratings in 1987. The second program authorized by the Civil Service Commission in 1980 was a classified executive service of upper level positions with compensation based more heavily on performance incentives. With modifications, this program could become a valuable tool for management improvement in state departments, but as currently structured its merit basis is weak.

It seems clear that performance-oriented personnel management efforts require the sustained attention of both civil service staff and the executive in Michigan state government. The following sections focus on significant issues in this area.

Part I. Classified Executive Service (CES) & Performance Appraisal

A. Background

The concept of a classified executive service (CES) has been discussed for several years by public administrators. The genesis for a CES began with the Second Hoover Commission in 1955o which called for the creation of a senior civil service. The service was to be composed of 1,500 to 3,000 career administrators. They were to be highly competent and politically neutral career executives with rank in the individual rather than the position, and mobility between agencies was to be encouraged. The rank in the person concept **was** to be similar to the military. The proposal clearly contained an emphasis on program management rather than policy development. The Commission recognized there **was** a need for additional unclassified employees to develop and defend administration policies. Thus, the Commission recommended that the existing 700 to 800 unclassified executive positions be increased to about 5,000.

The program was not enacted into law and little effort was made to promote the CES during the 1960's. During the first term of President Nixon, the Civil Service Commission recommended the creation of a federal executive service which was similar to the Hoover Commission proposal. One important difference was that the federal executive service was to include up to 25 percent non career executives. The most significant departure from the previous proposal was the concern with policy development rather than managerial competence. Civil service reform was scheduled to be a major policy initiative of the second term, but no action was taken.

Civil service reform was a centerpiece of President Carter's plan to reform the federal government. One of the elements **was** a senior executive personnel system that included the important elements from the Hoover Commission recommendations. In addition to rank-in-persons performance appraisal system and bonuses, the proposal provided for policy and political responsiveness. The proposal was enacted into law in October, 1978 and became operational in July, 1979.

Similar experiences have occurred at the state level. California became the first state to establish a CES in 1963. Minnesota followed in 1969 and Wisconsin in 1974. After the federal government completed action in 1978, several additional states adopted the system. At both the federal and state levels what began as a system for improving the management of government has evolved into a second concern relating to providing the chief executive with flexibility in the policy area. Some jurisdictions have attempted to meet both objectives, and others have chosen one of the objectives as their major purpose.

In Michigan, serious discussion began with the 1976 State of the State Message, which indicated that the Department of Civil Service was developing an executive service proposal. In 1978, the Michigan Citizens Advisory Task Force on Civil Service Reform was requested to examine the executive service concept.

In its formal report to the Civil Service Commission, the Task Force recommended:

A Classified Executive Service should be established which includes the following features: (1) limited tenure for positions which are part of the program; (2) periodic evaluation of executives assigned to it with compensation tied to the evaluations; (3) maximum flexibility in assignment of the executives; and (4) minimal appeal rights upon evaluation or reassignment.

Two task force members dissented, arguing that no evidence had been presented indicating career employees had not been responsive in developing policy and programs acceptable to political leaders.

The Civil Service Commission approved the CES concept in June 1979. The next several months were devoted to developing an operating system acceptable to interested parties, including responding to legal questions raised by the Attorney General. On August 27, 1980, the Civil Service Commission approved CES regulations.

Although there had been significant support from state government management when CES was being developed, the results of the first 18 months were not encouraging. A total of 302 CES positions had been identified, but as of April 1982 only 49 were filled as CES positions. Of the 49 positions, 11 were located in the Department of Civil Service. The balance were vacant, filled by incumbents who chose not to enter the CES, or were positions that, although identified as CES positions, department directors filled as regular civil service positions.

A CES review completed in April 1982 included survey results that identified two major problems as perceived by classified employees eligible for CES participation. One was a lack of financial incentives. CES included a bonus system for outstanding performance. The bonus system required a line item appropriation which the Legislature refused to appropriate in 1982. In addition to legislative reluctance to provide bonuses for "bureaucrats," the state's financial difficulties militated against any such appropriation in 1982. A second problem was the perception on the part of many career state executives that the CES was not an extension of the career system. This concern related to job security and fear of political pressure.

In September 1982s proposed CES changes were circulated to interested parties for comment. Modifications to the CES system were adopted by the Civil Service Commission at its November 1982 meeting. Significant changes included:

1. The two-year maximum limited term contract was eliminated in favor of contracts for any time period agreed to by the parties.

2. The experience requirements for entry into CES were raised and the classification level for crediting CES time was spelled out.

3. Reference to a bonus payment system was removed, and a merit pay system based on performance appraisal was incorporated in the compensation system.

4. An employment preference provision was added which prevented a CES employee from being bumped from the CES position by an employee whose posi-

tion was abolished, but CES Incumbents were given employment preference rights outside the CES if their positions were abolished.

5. It was made clear that removal from a CES position must be for cause or by mutual agreement of the parties.

Three of the five states visited in this study (California, New Jersey and Wisconsin) operate viable CES programs. Of these, Wisconsin also has removal for cause only. California and New Jersey have no such limitation.

Since the new requirements were adopted, the number of filled CES positions has grown steadily. **Table 4.1** provides information on this growth. There still are approximately 200 executives in CES-eligible positions who have chosen not to enter CES. When incumbents leave these positions, they will be filled by CES employees.

Table 4.1

Classified Executive Service Employees by Date

Date	Number
April 1982	49
July 1984	136
November 1985	266
September 1986	293
April 1987	318
September 1987	351

Source: Department of Civil Service

Ostensibly, Michigan has adopted the CES to provide flexibility to department directors in selecting a management team. The recommendations of the Citizens Advisory Task Force on Civil Service Reform emphasized this purpose and Department of Civil Service reports to the Civil Service Commission continue to emphasize this purpose. However, the implementation of CES has not advanced this objective. The 1982 modification that removal from a CES position be for cause or by mutual agreement effectively eliminates management flexibility.

Executive flexibility in the area of policy development is a need of any governmental jurisdiction. Section 5 of Article 11 of the Michigan Constitution recognizes this need by excepting from the state classified service heads of principal departments and -exempting five other positions, four of which must be policy making positions. Excluding the Department of Civil Service, there are 18 other principal departments. Excluding the two elected department directors these departments have a potential for 106 unclassified positions to provide the flexibility required to deal with policy issues. The actual number of positions funded is 83. In addition, there is a significant number of full time commission members excepted from the classified service. Examples include the members of the Public Service Commission and the Chair of the Tax Commission. Finally, there are eight exempt positions in the Office of the Governor.

At the present time, state departments are not making full use of existing unclassified positions for policy making purposes. Nine of the principal departments have fewer than the constitutionally authorized five exempt positions. The Department of Military Affairs has no exempt positions, the Department of Education has ones the Departments of Corrections, Civil Rights and State Police have twos the Department of Natural Resources has threes and the Department of State has four. The Department of Management and Budget and the Department of Public Health are large departments with major public policy issues to considers yet each has only four exempt positions.

Many of the current exempt positions are not policy level positions. In the Department of Agriculture, three of the exempt positions relate to the Racing Commission. One of the exempt positions in the Department of Management and Budget is the director, Office of Services to the Aging. The Department of Natural Resources has an exempt position for the superintendent, Mackinac Island. There are a number of administrative assistant exempt positions. It is clear that effective use is not being made of the existing exempt positions for policy development purposes.

It also is clear that one of the major problems with the use of unclassified positions for policy making is the low salary appropriated for many of the unclassified positions. This is a serious problem and one that should be addressed by political leaders. An initial step was taken in 1987-88 when all non-elected unclassified department directors were raised to an annual salary of $79,700.

Because there is an existing framework for providing policy development positions that could be used more effectively it is questionable if the CES should be used for this purpose. Instead consideration might be given to using the CES to strengthen the management of state government.

B. Selection Process

There are two CES levels, State Executive I and State Executive II. The I-level positions are primarily staff level assistants to top level managers or executive officers to a board or commission. An employee in such a position is part of the top executive team and participates in the formulation and implementation of agency policies and programs. A I-level employee may supervise a small staff of specialists. The current salary range for State Executive I positions is $27,833 to $72,766. The II-level positions serve as assistant bureau directors, bureau directors or deputy department directors. In addition to having responsibility for policy developments the position must have responsibility for implementing agency policy and managing the activities of a major organizational unit of an agency. The salary range for these positions is $63,496 to $83,290.

Persons interested in a CES position must possess minimum qualifications as defined by the Department of Civil Service. Both levels require two years of administrative experience, although the II-level experience requirement is at a higher organizational level and assumes two years of experience at the equivalent of a I-level position. Until recently, neither level required a bachelor's degree. In February 1988, an educational requirement was adopted requiring a bachelors degree or its equivalent in education, experience and skil1s. A number of other staff

and management positions within state government use the same examination system as CES to identify eligible candidates. However, with the exception of physicians and psychiatrists having management responsibilities the maximum pay for these positions is at or below the pay for State Executive I positions — and the experience requirements are greater for these positions than for State Executive I. Most such jobs require three or four years of experience.

An applicant for a CES position can expect to be examined within two weeks after submitting an application. The examination is a structured oral appraisal and lasts about two hours. It consists of an in-basket exercise followed by an oral interview with a three-member panel. The in-basket exercise is a 60 minute written test which requires an applicant to demonstrate management skills in a simulated management setting. An applicant takes the role of a director, and must make immediate decisions on a number of issues that are described in written documents. The three-member oral panel interview focuses on the applicant's handling of the in-basket exercise and the applicant's background and experience.

All candidates are rated highly qualified, qualified, or not presently qualified. Although there are no specific standards concerning the percent of applicants who should fall in each of the three categories, most people would expect the majority of applicants to be in the qualified category. This has not been the experience. **Table 4.2** presents data for fiscal years 1984-85 through 1986-87.

Table 4.2

State Executives and Administrators Examination Scores

Year	Highly Qualified		Qualified		Not Qualified		Total
	Number	Percent	Number	Percent	Number	Percent	Number
1984-85	396	66.2	148	24.7	54	9.1	598
1985-86	277	56.6	152	31.1	60	12.3	489
1986-87	240	52.4	153	33.4	65	14.2	458
Totals	913	59.1	453	29.3	179	11.6	1,545

Source: Department of Civil Service; CRC calculation.

For the three-year period approximately 60 percent of the applicants were rated highly qualified. It should be noted that the trend is toward lower percentages in the highly qualified category; however, even in the last fiscal year over half the examinees were rated at the top level.

There are approximately 2500 names on the State Executive I list and 1300 names on the State Executive II list, which together comprise the pool of CES candidates. According to Department of Civil Service figures, the annual number of CES appointments is approximately 60, although there were 124 appointments in fiscal 1984-85. The relatively few vacancies in conjunction with the large employment lists and the high percentage of applicants receiving a highly qualified score results in employment lists provided departments that are too long. In one situation, a department received a list with 400 names to fill a financial management position.

In summary, it is questionable whether the selection process is stringent enough. The qualification requirements to take the examination are not stringent. There are only two bands of passing

scores and the majority of applicants are scored as highly qualified. This results in long employment lists that reflect little screening of individuals by the examination process.

C. Appointments

One of the salutary effects of the CES system has been its impact on the state's affirmative action program. Although an increase in the number of protected group members was not emphasized as a CES goals it has proved to be an effective affirmative action tool, -especially for blacks. **Table 4.3** provides data on protected groups based on 351 CES members as of September, 1987.

Table 4.3

Protected Groups in CES Compared with General Population

Protected Group	Utilization Standards[1]	CES Work Force[2]	
	Percent	Number	Percent
American Indian/Alaskan Native	.4	*2*	.5
Asian/Pacific Islander	.9	3	.8
Black	12.9	78	22.2
Hispanic	1.8	4	1.1
Women	50.0	107	30.0
Handicapper	9.7	18	5.0

Source: Department of Civil Service; CRC calculation.

[1]Based on state affirmative action standards.
[2]Based on the 351-member CES work force as of September, 1987.

Blacks are represented in the CES work force in numbers that are 70 percent higher than their "utilization standard" as promulgated by the state (22.2 versus 12.9 percent). Although women fall below the utilization standards the 30 percent CES work force figure is higher than female representation in the "officials and administrators" category which is the generic classification for top level managers. For 1985-869 women represented 19 percent of this classification. The handicapper 5 percent figure is below the 6.1 percent handicapper figure for the total classified work force as well as the 9.7 percent utilization standard.

During the development and implementation of CES, there was concern that CES would become a means to circumvent the merit system. This concern was expressed in a dissent by two members of the Michigan Citizens Advisory Task Force on Civil Service Reform in its report of July 1979. The dissent indicated there would be two winners and two losers if CES were adopted. The winners were identified as "political patronage and cronyism," and the losers included "career employees who are likely to be shunted aside because they are not willing to become partisan activists" and the taxpayers "who will have to finance the salaries of two people to do the work of one individual." Other states have responded to this concern by prohibiting or limiting appointments to the CES from outside the classified service. For example, California limits its program to classified employees, and New Jersey allows no more than 15 percent of its CES to be from outside the career service. The federal limit is 25 percent from outside the

classified service. These limits are in keeping with a CES focused an improving management by developing a cadre of career managers for the upper levels of state government.

Staff reports to the Civil Service Commission on November 16, 1984 and April 23, 1987 made specific claims that the merit system has not been undermined by CES. The 1984 report states, "the 117 appointees who came directly into CES from the regular classified service comprise 86% of all appointees." The 1987 report indicates that 184 new CES appointments were made in 1984-85 and 198586 combined, and that over 75 percent were from within the classified service.

These claims include incumbents of CES-designated positions, who have the option of converting to CES or remaining in the regular classified service. Incumbents converting do not go through any additional examination or selection process. Thus, it does not seem appropriate to include converted positions in any statistics purporting to show the results of the CES selection system. Excluding converted positions results in a different set of statistics, and possibly different conclusions as to the impact of CES on the merit system.

An analysis of the 351 CES incumbents on September 30, 1987 indicates that 76 positions were filled through the conversion process. This left 275 individuals who entered CES positions from the classified service; from the unclassified service, including legislative staff; and from outside state service. Of these, 199 or 72.4 percent were transfers from the classified service. The balance of 76 positions or 27.6 percent reflected CES appointments from outside state service (33 positions) and the unclassified service (43 positions). The 351 positions reflect appointments over the full life of the CES program.

Table 4.4 presents information on the source of CES appointments over the last three fiscal years.

Table 4.4

Source of CES Appointments

Source	1984-85		1985-86		1986-87	
	Number	Percent	Number	Percent	Number	Percent
Classified Service	77	77.7	33	57.9	40	69.0
Unclassified Service	6	6.1	17	29.8	13	22.4
Outside State Service	16	16.2	7	12.3	5	8.6
Totals	99		57		58	

Source: Department of Civil Service; CRC calculation.

The 1984-85 statistics support the contention that a large number of CES appointments came from the classified service. However, the 1985-86 figures reveal a significant drop in this percentage, and in both of the last two years the percentage of CES appointees coming from the unclassified service is dramatically higher than in the earlier year. Meanwhile, the numbers of CES appointees coming from outside state government have dwindled almost to none — meaning that the CES is drawing talent into classified employment less from the outside and more from the political arms of state government itself. (It should be noted, of course, that appointees from outside state service may or may not be political.)

Except for a merit pay systems the pay for CES employees is comparable to non CES employees in comparable positions. Most management positions have a five-step progression beyond the minimum level. Not all positions are filled at the minimum level. Because there is overlap in pay ranges, an employee at the top of one pay range might experience a reduction in pay if the employee were promoted and paid at the minimum level. In such situations, the employee would be paid above the minimum level. Similarly, it often is necessary to pay a new classified employee at a level higher than the minimum in order to attract the employee to the state service. A prospective employee may be making more than the minimum at an existing Job and is unwilling to move for the minimum salary. However, no new employee can receive more than the top salary for the position.

The CES system includes a merit pay concepts which will be discussed in more detail in the next section. At this point, it is sufficient to say that the concept envisions additional or merit pay when an employees on-the-job performance warrants additional compensation. In order to be compensated above the maximum for the class an employee must be rated superior or outstanding.

The Civil Service Commission standards and procedures for the CES provide, with the approval of the Director of the Department of Civil Service, for the appointment of new CES hires at a level higher than the maximum for the class. In other words, it is approval for merit pay even though the employee has not had an opportunity to perform in a CES position. There are five conditions any one of which if met might qualify a new employee for a salary above the maximum for the class. In 1984-85, six such approvals were given; in 1985-86 the number was five. During the 1986-87 fiscal year, 17 approvals were given. Several of the 1986-87 approvals were necessary to maintain existing pay rates for employees involved in organizational changes. Five of the approvals during the three year period involved movement from the unclassified service to CES.

It is difficult to justify using a pay system that exists to reward superior or outstanding performance as the basis for setting a salary level above the maximum for an employee new to a position. Such a procedure exists no where else in the classified service.

In addition to the basic concept being flawed, some of the specific requests that were approved were not framed in terms of any of the five conditions outlined in the standards and procedures. One request that was approved pointed out that the position would have intense interaction with the private and public sectors, and the position would function in a coordinator capacity. Another agency gave as the reason for its request that the applicant had vast experiences but didn't describe the nature of the experience.

In summary of the appointment process, the CES has been an effective affirmative action tool. There is some indication that the CES may be drawing more from the political arms of the state than is acknowledged in reports to the Civil Service Commission. The existing practice of using merit pay guidelines to hire new CES employees at a salary level higher than the maximum salary for a comparable position outside the CES does not appear justified and could lead to abuse of the compensation schedule.

D. Performance Appraisal and Merit Pay

One of the principal features of CES is a merit pay system which allows CES executives who perform at a superior or outstanding level to be rewarded with a merit pay salary supplement. Unfortunately, the state does not have an effective statewide performance evaluation system on which to base the pay supplements that are given.

There are two existing systems for appraising the performance of state employees. A probationary system is used for new employees and recently promoted employees. Employees are rated twice during the first six months. This approach has been in effect for many years and was last revised in 1975. Annual service ratings are used for all other employees. Employees are rated on an exception basis. Service ratings are submitted only on those employees identified as unsatisfactory. It is a "no news is good news" system.

Rule 4-04 of the Civil Service Rules requires that prior to making an appointment to **a** position in CES, "the appointing authority shall establish standards against which the performance of the incumbent shall be measured subject to review and approval by the State Personnel Director." This system applies only to CES employees. In addition to the traditional uses for an employee appraisal system, the CES performance appraisal system is tied to the merit pay system. High ratings qualify executives for merit pay increases.

Employees can be rated unsatisfactory, satisfactory, superiors or outstanding. The Standards and Procedures for Administration of Compensation and Fringe Benefits indicate the Civil Service Commission expectations as they relate to the incidence of the ratings. The following quotations reflect these expectations.

1. Unsatisfactory - Few employees are expected to fall into this category.
2. Satisfactory - The majority of employees are expected to fall into this category.
3. Superior - A significant number of executives are expected to fall into this category.
4. Outstanding - Performance at this level on a continuous basis is relatively rare.

Except for the unsatisfactory ratings actual experience has been the reverse of what was anticipated. There were 501 ratings completed in the 1984-85, 1985-86 and 1986-87 fiscal years. One employee was rated conditionals and the others were rated as shown in **Table 4.5**.

Table 4.5

CES Performance Appraisal Ratings

	Outstanding Rating		Superior Rating		Satisfactory Rating		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
1984-85	55	57	28	29	14	14	97	19
1985-86	116	62	41	22	28	15	185	37
1986-87	132	60	52	24	34	16	218	44
Totals	303	61	121	24	76	15	500	100

Source: Department of Civil Service; CRC calculation.

In the three-year period, 85 percent of the employees rated were rated either outstanding or superior. This is comparable to saying 85 percent of all the baseball players in the American League are of all-star caliber.

There is a problem in obtaining performance appraisal reports from departments. In the three-year period 1984-87, there were 661 individual ratings due, but the actual number submitted was 501 — meaning that 24 percent of the ratings due were not submitted to the Department of Civil Service. This fact takes on increased importance because of the relationship between the performance appraisal system and merit pay.

Another problem arises because the merit pay becomes part of an employees base pay. An employee receiving an outstanding rating can receive up to an eight percent merit increase. The increase is reflected in equal amounts in the biweekly paycheck received by the employee. The employee considers the merit pay as base pay and adjusts his or her lifestyle accordingly. It is more difficult for management to take away or reduce merit pay that is part of base pay than it is a lump sum bonus payment.

No CES employee once rated outstanding has received a subsequent lower rating. Probably the major reason contributing to this situation is a provision in CES pay procedures that denies a general pay adjustment to any employee who is being compensated in the outstanding work range and who receives a performance rating of superior or satisfactory. An employee in this situation is denied a cost of living pay raise even if performing in a superior manner.

The impact of these factors on pay levels within the CES can be seen by looking at the pay history of CES employees, especially as compared with the pay history of other classified state employees. The biases built into the CES merit pay system make it logical to expect that CES employees would tend to receive larger pay raises than other classified state employees, and that generally is the case. **Table 4.6** presents data on 278 employees who entered CES positions between October 1, 1981 and October 1, 1986, comparing their cumulative rates of pay increase with the general pay raises received by all other classified state employees during the same period.

A non-CES classified employee who entered the state work force on or before September 30, 1981 and remained through April 30, 1987 (the date of data used for this analysis) received over

that period general pay raises accumulating to 35.0 percent. The average employee who entered CES at the same time received pay raises totaling 47.8 percent; furthermore, 23 percent of the CES employees in this group received pay raises that were more than 60 percent higher than those received by non-CES employees.

Table 4.6

Pay Raise Comparisons Non-CES vs. CES &Employees

employees Entry Period:		Non-CES employees cumulative general Pay Raise, Entry Date Thru	Average CES employees cumulative Pay Raises, Entry Date Thru	Percent and Number of CES Employees Whose Cumulative Pay Raises Exceeded the General Pay Raise by:								
				0%		up to 30%		30-60%		over 60%		Total
From	Thru	4-30-87	4-30-87	%	No.	%	No.	%	No.	%	No.	No.
On/before	9-30-81	35.0%	47.8%	23	3	23	3	31	4	23	3	13
10- 1-81	9-30-83*	23.9%	36.2%	19	7	33	12	17	6	31	11	36
10- 1-83	9-30-84	15.8%	28.8%	27	15	2	1	27	15	44	24	55
10- 1-84	12-15-85*	10.3%	18.1%	19	24	7	9	22	27	52	66	126
12-15-85	9-30-86	5.0%	8.9%	46	22	4	2	8	4	42	20	48
			Total		71		27		56		124	278

Source: Department of Civil Service; CRC calculation.

*No general pay raise was given in 1982; in 1985 the general pay raise was made effective on December 15 rather than the normal October 1.

Of the 278 CES employees, 207 or 74 percent received merit pay raises during the time period analyzed, and many of them received increases substantially above those given non-CES employees. For example, more than half of the 126 employees who entered the CES after October 1, 1984 but before December 15, 1985 received cumulative pay increases more than 60 percent higher than the general pay raises given during the time analyzed.

The widespread nature of these substantial premiums for CES employees suggests that the program is not operating in a cost-effective manner as a spur to performance among top executives in the classified service. One department director stated the matter succinctly by saying outstanding performance doesn't happen every year. Thus, a bonus system makes more sense than the existing merit pay system. The Department of Civil Service recognizes there is a problem with the existing system. The April 23, 1987 report to the Civil Service Commission recommended that "consideration should be given to modifying the current pay incentive program to a lump sums non-recurring pay incentive system."

There is also a recognition that the state's performance appraisal system, including the CES performance appraisal system, requires a major revision. In June 1986, a representative of the Governor's Executive Corps submitted a performance appraisal report to the Governor on behalf of **a** task force of state employees. The report proposed parallel performance appraisal systems.

One would apply to managers, administrators, and executives, and the other would apply to non-supervisory employees. The task force recommended that the Civil Service Commission accept

the basic responsibility for implementing and administering the proposed employee appraisal system because of its responsibility for operating a merit system.

The Civil Service Commission reviewed the report and in November 1986 directed staff to proceed with implementation of the recommendations. It was further decided that implementation would be from the top down beginning with CES eligible positions in all departments. A 16-member Performance Appraisal Advisory Committee was appointed by the Civil Service Commission. The advisory committee has co-chairs, with one chair from the Department of Civil Service and one from the Office of State Employer. The committee will provide guidance and develop support within agencies as the performance appraisal system is implemented.

The actual development of a system for executives and managers will be the responsibility of a private contractor. The request for proposal was sent to interested vendors in June 1987, and a vendor was selected to conduct training for executives and managers concerning the performance appraisal system. Implementation for managers and executives will cover fiscal years 1987-88 and 1988-89. Seven agencies have expressed an interest in participating in the first phase of implementing the new performance appraisal in CES.

In-service training will be conducted to provide executives with an overview of the performance appraisal system, specific training on how to arrive at mutually agreed-upon performance standards, and instruction in the development of performance standards. Subsequent training will be provided in the areas of evaluating performance, how to conduct a performance appraisal interview, and how to develop a plan for professional growth and performance improvement.

The Department of Civil Service will be responsible for monitoring and evaluating the system once it is implemented. In addition to assuring that merit principles are being adhered to, there will be a need to ascertain if the performance appraisal system has been fully implemented in a meaningful manner in each of the 19 principal executive departments and the Department of Auditor General. It also will be necessary to continue the monitoring system to assure that the system is maintained at an acceptable level.

E. Conclusions

There are two related but distinct functions involved in the top level management of state government. One is the need for policy accountability. A Governor must be able to appoint individuals sympathetic to his or her policy goals. This need is recognized in the Michigan Constitution through the authorization of excepted and exempt positions in the Governor's Office and principal departments. This authority could be better used than it has been in the past.

A second function is managerial competence. Any administration must count on a cadre of competent managers with the know-how to administer a large, diverse and complex government. The classified executive service is a method for building a performance orientation into the top management of state departments and is best suited to focus on strengthening management competence and continuity. The CES must maintain a merit basis because it is in the classified service.

Weaknesses of the current CES include the following:

1. There is not a clear indication concerning whether the principal purpose of CES is to strengthen the management of state government or to provide department directors more flexibility in top management appointments.
2. Individuals can gain entrance to the CES examination with as little as two years of administrative experience.
3. The examination is not an effective process for identifying quality candidates. For the three-year fiscal period 1984-1987, almost sixty percent (59.1 percent) were rated highly qualified, which is the highest possible rating. Only 11.6 percent were rated not qualified.
4. There are approximately 3800 names on the two employment lists from which CES appointments are made. The result is departments receive long employment lists, often numbering more than 100 names, when a vacancy occurs in a CES position.
5. Recent evidence suggests the CES is drawing more heavily from the political arms of the state than is indicated by Department of Civil Service reports. If CES conversions are excluded, a review of data for 1985-86 and 1986-87 reveals that 37 percent of the vacant CES positions were filled by individuals from outside civil service.
6. The Civil Service Commission standards and procedures for the CES allow the appointment of new hires at a salary level higher than the normal maximum for the position.
7. A merit pay system rewards CES executives who perform at a superior or outstanding level with a merit pay salary supplement. Although it was expected that a minority of CES employees would be rated superior or outstanding in the three-year fiscal period 1984-87 some 85 percent of the employees rated were either outstanding or superior.
8. Related to the loose performance appraisal system is the number and size of merit pay increases. A review of 278 CES employees revealed that most have received substantial premiums above the general pay increases given non-CES employees.

F. Recommendations

The following recommendations are made to strengthen the existing classified executive service (CES) system.

1. In light of the availability of a significant number of unclassified positions, the purpose of CES should be clarified to be the strengthening of the management of state government.
2. A limit should be established on the percent of CES employees that can come from outside the classified service.

3. Entrance requirements to the CES examination should be strengthened as they relate to experience. Although no specific experience recommendation is made, it is believed that the current requirements are not adequate to prepare an individual for a high-level position in state government.
4. There is need for further delineation of the testing system. A minimum of three bands of passing scores should be established. Specific objective criteria should be developed to guide raters in rating CES candidates.
5. Employment lists should be purged annually and steps taken to identify the specific skills of individuals in order to reduce the length of employment lists sent departments.
6. No new CES employee should be paid above the maximum for the position to which appointed.
7. In lieu of the existing merit pay systems an annual bonus pay system should be established that does not become part of an employees base salary.
8. The Civil Service Commission should pursue vigorously its decision to implement a new performance appraisal system.
9. Until a 'new bonus system and performance appraisal system are in place, a moratorium should be declared on any future merit pay increases. A new performance appraisal system is scheduled to be operational in October, 1989.

Part II. Pay and Performance

A. Discussion

One of the six merit principles adopted by the Civil Service Commission to govern personnel actions in state government relates to the pay system. The third principle is:

> Equitable compensation should be provided for work of equal value and incentives should be provided for excellence in performance. Adequate compensation should be provided with appropriate consideration of the relevant compensation provided by other employers.

There are three general elements embodied in this principle. One is pay equity. This is accomplished through a system that groups positions involving similar types of work into classes. Within broad occupational groups, positions in different classes with comparable responsibilities generally receive comparable pay. Other factors such as supply and demand for specific skills also affect pay rates for specific classes. A significant issue relating to this element involves comparable worth for female dominated classes. The Commission has taken several steps to address this issue including a pay adjustment in 1985-86 and 1986-87 for those classes which are comprised 70 percent or more of females. The United Auto Workers took the Commission to federal court over this issues and the Federal District Court on November 18, 1987 ruled in favor of the Commission. The decision has been appealed by the United Auto Workers.

The second element relates to adequate compensation. For many years, adequate compensation was based on comprehensive surveys of compensation paid similar positions in other public Jurisdictions and the private sector. Using this information, the Commission ordered periodic general pay raises for classified employees. Over times this process changed to a meet and confer system, whereby the Commission invited interested parties to make recommendations concerning compensation matters. Final approval continued to rest with the Commission. Because of the move to collective bargaining, the pay setting process changed beginning with the 1981-82 fiscal year. Pay levels for employees exclusively represented are set through the collective bargaining process subject to Commission approval. Pay rates for employees excluded from collective bargaining and those employees not having elected an exclusive representative are set by the Commission based on recommendations made by the Employment Relations Board.

A compensation survey done for the Office of the State Employer in 1985 by Arthur Young & Company indicated that salary levels for Michigan state employees compared well both with statewide labor markets for comparable skills and with other state governments. Sixty of the 64 Michigan classified positions in various occupational areas surveyed were compensated better than comparable positions in other states, and over half were compensated at least 20 percent better. The statewide labor market comparison showed less of an advantage, as might be expected: 65 percent of the state positions with private-sector comparability were better compensated than the market levels and about one-fourth were compensated at least 20 percent better.

The third element relates to pay for performance. Even though the merit principle calls for a performance emphasis, the existing system is based primarily on seniority rather than performance. There are three categories of salary ranges covering all positions in the classified service. Two provide a five-year progression to the maximum salary for the class, and the third a ten-year progression to the maximum salary. One of the five-year schedules provides increases every six months for the first three years and annual increases for the last two years. Positions assigned to this progression generally are non-professional positions. The second five-year schedule provides for annual increases, and includes supervisory and professional employees. The ten year schedule has annual increments and applies to teachers. As of September 20, 1986, almost 72 percent of all classified employees were at the top of their pay range.

Progression within a salary range is based upon satisfactory completion of a specific number of hours. For a six-month step increase, an employee must complete 1,040 hours of satisfactory service; for an annual increase the requirement is 2,080 hours of satisfactory service. Under Commission rule 2-17.3 the step increase is automatic unless an employee receives a conditional or unsatisfactory service rating. In calendar year 1987, there were 146 conditional or unsatisfactory ratings given at all classification levels. A conditional or unsatisfactory rating results in a postponement of the next salary step increase to which the employee is entitled. The ultimate sanction is dismissal, which is provided for under Commission rule 2-10.2. In 1985-86 there were 296 employee dismissals due to misconduct, unsatisfactory service rating or rules violation.

There is one merit element in the step increase system. An employee may be advanced to a higher step in the salary range by an appointing authority if one of the following apply:

1. The employee has completed special assignments that have resulted in a major benefit to the employees department or agency.

2. The employee has performed outstanding service, when compared to fellow workers, for reasons that have been documented.

Because these data are maintained at the department level, there is no central data base available, so it is not known how often this provision has been utilized.

Another seniority provision in the compensation system is the longevity pay schedule. Each permanent employee is eligible for a longevity payment each year upon completion of six years of continuous full time classified service. There is no requirement that an employee be rated satisfactory in order to qualify for a longevity payment. In addition to longevity the payment is geared to position level. In 1987-88, the largest payment would be $1,036 for a non exclusively represented employee at the 21 level with 30 years or more of classified service. A person at the same level with six to nine years of service would receive a $264 payment. Comparable payments for an employee at the lowest state classification are $704 and $158. In fiscal year 1985-86, 45,490 employees or 75 percent received a longevity payment. During 1986-87, approximately $16 million was paid to classified employees for longevity.

Effective in 1988-89, the Commission has approved changes in the longevity pay schedule. Exclusively represented employees will receive an across the board increase of 21 percent. The last longevity increase for these employees was in 1970. For non-exclusively represented employees, a single rate table based on years of experience will be used. This will move the longevity pay schedule to a complete seniority system for these employees.

Some effort has been made to introduce pay for performance on a broader basis. The Citizens Advisory Task Force on Civil Service Reform considered this subject and recommended a performance appraisal system for employees at the executive, managerial, and supervisory levels. It was further recommended that employees at these levels be granted a portion of the general increase afforded other employees with the balance being used for merit increases. As was reported earlier in this chapter, a performance appraisal and merit pay system are in place for the classified executive service. However, the existing system has a number of weaknesses including that the merit payment becomes part of the base pay.

At its April 25, 1980 meeting, the Commission took an initial step to move toward pay for performance for employees at the 16 level and above. The system as implemented does not provide additional compensation for outstanding services but denies the general pay raise for unsatisfactory performance, and provides conditional employees with 50 percent of the general increase. Employees are evaluated as part of the annual service rating system for all employees. The ratings are based on performance standards developed by the Department of Civil Service or standards developed by individual departments. All that is required is a general certification statement that employees at the 16 level and above are satisfactory based on performance standards.

The most recent example of merit pay incentives adopted by the Commission at its Februarys 1988 meeting, relates to an investment incentive compensation plan for professional employees

in the Bureau of Investments, Department of Treasury. Employees would be eligible for bonuses when their investment record is in the top five percent of all state retirement funds, and when their investments have earned a return four percent above the average of the S & P 500 average and the Shearson Lehman Government/Corporate Bond Index.

Individuals would be eligible for incentive compensation equal to 100 percent of base pay at senior levels and 20 percent at entry levels. An employee would receive 50 percent of the bonus immediately and 12.5 percent in each of the four succeeding years. If an employee left state service, except by death, retirement or disability, the employee would forfeit the current year incentive plus previous deferred portions.

There continues to be interest in a broad based performance based pay system for state employees. The most recent support for such a proposal is found in the 1988 State of the State Message in which the Governor identified the need for a better system of rewards for hard working state employees and disincentives for others not performing at an acceptable level.

B. Conclusions

The compensation system meets two of the three elements included in the third merit principle. The compensation system clearly is based on pay equity and a living wage, but has only a slight relationship to performance.

A performance based system is difficult in any large organization, but especially is difficult for a service oriented organization as contrasted with a product oriented one. Two keys to any performance based pay system are a comprehensive and carefully implemented performance appraisal system, and a direct tie between pay raises and such appraisals. As was pointed out earlier in this chapter, **a** member of the Governor's Executive Corps has submitted a report on the design and implementation of a statewide performance appraisal system. A new system is being implemented under the guidance of the Commission. Two parallel applications for a performance appraisal system were recommended, one for managers, administrators and executives and the second for non-supervisory employees. At the present time, only the system for managers, administrators and executives is being implemented. Any changes of this type for employees represented by unions granted exclusive bargaining rights may have to be negotiated with such unions.

The Commission rules already provide that pay raises and step increases be denied or reduced for those whose performance is inadequate. What remains is to develop a link between salary increases and performance appraisal. it should be remembered that any properly administered performance based pay system will have employees in all rating categories. Theoretically, the distribution would follow the bell-shaped curve with small equal numbers at each end of the curve and the majority of employees in the middle.

Any move to emphasize performance based pay should be implemented only after a careful planning process that deals with all the issues inherent in any merit pay proposal, including any collective bargaining considerations. A proposal for a merit pay systems initially should apply to managers, administrators, and executives. Potential sources to finance a merit pay proposal

are longevity payments, step increases, and the general pay raise. The longevity payments step increases or general pay raises for any employees not in the merit pay system should not be used for merit pay purposes.

C. Recommendations

The following recommendations are made to strengthen the compensation system:

1. To ensure that employees are treated fairly, the new performance appraisal system should be in place and functioning adequately before any consideration is given to an expansion of the performance based pay system.

2. In expanding the performance basis of the pay systems consideration should be given to limiting longevity payments to employees who have received satisfactory performance ratings.

3. In any performance based pay systems priority should be given to management, administrative and executive positions.

Part III. Personnel Development (Training)

A. Discussion

Employee 'training was one of the first programs established after the statutory civil service system was created in 1937. The first Civil Service Commission rule on training appears to date from about 1945. Section 2-11 of the Commission's rules spells out the current policy. It places primary responsibility for agency training on department management, but reserves for the Civil Service Commission the right to provide training it deems necessary.

The Commission also is responsible for assisting agencies in conducting periodic evaluations of training programs to determine the effectiveness of such programs. In accordance with Commission policy, the majority of training occurs outside the Commission. Two of the best known programs are the State Police Academy and the program to train corrections officers. Other elements in the rule require the Department of Civil Service to assist agencies in determining their training needs, offer advisory help to agencies when requested, and to encourage interagency training.

In 1984, the Commission appointed a Civil Service Training Plan Advisory Task Force which on October 10, 1984 submitted its report entitled Training in State Government 1985-1990. The report recognized the need for more effective training in state government, and indicated training provided in isolation from day to day events in state agencies will not be very productive. Three distinct training needs were identified including the needs of the individual employee, the basic work unit and the larger organizational unit. The report observed that state training tends to stress the training of individuals. It was recommended that the emphasis be shifted to improving the functioning of organizational units. One useful personnel development program in the organizational area would be training for top level managers concerning use of the civil service system for meeting agency personnel needs. Such a program would be useful especially for

unclassified executives and CES appointees from outside state government. A staff review of the report was accepted by the Commission on April 4, 1986, but no action was taken to implement the recommendations contained in the report.

There also is the question of which training programs should be provided by the Department of Civil Service and which programs by other state agencies. The existing general policy is for agencies to provide for their special needs and the Department of Civil Service to provide system wide training. Thus, the Department of State Police and Department of Corrections operate law enforcement training programs, and the Department of Treasury trains tax auditors. The Department of Civil Service provides a four level management development program for all departments. Another criterion that should be used in establishing statewide training programs is emerging issues. Human relations training in racial and sexual discrimination, and dealing with downsizing are recent examples of statewide training needs.

As part of its employee relations policy rule, the Commission specifically delegated the responsibility and authority to provide training in the employment relations area to the State Employer. The Commission provides technical assistance to the State Employer. In 1984, the State Employer began a training program to train about 80000 supervisors and managers. The program objective was to enhance the knowledge and skills of supervisors and managers concerning the fundamentals of labor relations so that a positive labor-management climate will prevail. There has been discussion concerning the desirability of extending the State Employer's training responsibilities to include management development, which is viewed, by some, as a management function rather than a merit activity. This view was presented by the Office of the State Employer in testimony on October 30, 1987 to the Citizens Review Committee on Civil Service. However, the Citizen's Advisory Task Force on State Labor-Management Relations in its report to Governor Blanchard in December, 1987 recommended strengthening training in the labor relations area, but made no recommendation for the management training area.

In the five states visited for this study, training is not a high priority state activity. Most programs are department based with responsibility in a central agency for planning and assisting state agencies in the development of training programs. Rarely are funds appropriated to a central agency to provide a training program. In Wisconsin, the Department of Employment Relations offers a central training program, but must, by law, charge agencies the full cost of providing the program. State departments find it less expensive to contract with an independent contractor to provide training.

New Jersey is unique in that it offers a certified public manager program through Rutgers University. It is a six level program. The first three levels are for supervisory managers. The classroom programs are conducted by the New Jersey Department of Personnel. Levels four, five and six are for high level managers and lead to a certified public manager designation. The 150-hour classroom program is conducted by Rutgers University. Tuition for the lower level program is $450 and is paid by the sponsoring agency. The higher level program includes a tuition charge of $l0,000, of which $250 must be borne by the employee.

New York has a training program that has evolved out of the collective bargaining system. Training is a negotiable matter and has resulted in the establishment of joint labor-management

committees for each of the bargaining units. This has resulted in a system that is oriented to the training of individuals rather than management needs, except as individual training is consistent with management goals.

In recent negotiations with the Michigan Professional Employees Society, a $40,000 professional development fund was included in a contract approved by the Civil Service Commission in November, 1987. No guidelines have been developed for the program which is to become operational on October 1, 1988. The specific use of the money is to be a joint decision of the employee organization and management. It appears that the emphasis **will** be on individual improvement rather than organizational improvement.

B. Conclusions

Although a significant amount of training occurs in state government, a great deal of attention has not been given to training in recent years. The Civil Service Training Plan Advisory Task Force made strong recommendations concerning training to improve the operations of state government. The recommendations appear to be languishing.

As was pointed out by the Citizen's Advisory Task Force on State Labor Management Relations, training in the labor relations area continues to be an important need in state government. Knowledge and skills in this area are new to many managers, and it is important to the orderly operation of state government that managers acquire the skills necessary to work with a represented work force. The Office of State Employer should be given adequate resources to permit this to take place.

C. Recommendations

The following recommendations are made to strengthen the existing training system:

1. The Civil Service Commission should implement the recommendations of the Civil Service Training Plan Advisory Task Force.

2. The Office of the State Employer should continue to provide labor relations training for all management levels in order to train managers in contract development and administration.

Part IV. Contractual Personal Services

A. Background

The Department of Civil Service is responsible for reviewing and approving personal service contracts before such contracts are processed by the Department of Management and Budget. Contractual personal services are defined to mean "the hiring of a firm or person to perform personal services, as opposed to purchase of a product, material or equipment." Department of Civil Service procedures provide pre-authorized contractual service approval in some situations. For example, personal service contracts of less than $100, construction contracts previously approved by the State Administrative Board, and contracts for maintenance of office machinery

and emergency medical services are pre-authorized. The responsibility for approving or disapproving personal service contracts is found in Section 5 of Article 11 of the Michigan Constitution which indicates the Commission shall "approve or disapprove disbursements for all personal services…."

The purpose of the review is to protect the merit system from being abused through the use of contractual service employees in lieu of classified employees. The review is carried out by staff in the Bureau of Classification. Agencies submit requests on a civil service form specifically developed for this purpose. Most requests are reviewed and approved by personnel analysts. When appropriate, requests are reviewed and approved at higher levels in the organization. Agencies seeking approval must meet at least one of the following criteria:

1. The services are so temporary, intermittent or irregular in nature that they cannot be practically provided through the classified service.

2. The services are uncommon to state employment because they are so specials highly technical, peculiar or unique in character that the talent, experiences or expertise required to accomplish the duties and responsibilities cannot be recognized as normal to the state service and efficiently be included in the classification plan.

3. The service involves the use of equipment or materials not possessed by the state agency at the time and place required, and the cost to the state in procuring such materials or equipment and establishing the needed positions would be disproportionate to the contract cost.

4. The service would be performed at substantial long-term savings to the state when compared with having the service performed by classified employees.

Contract review was uneventful until the fourth review criterion was added in November 1982. The principal Justification for this criterion was that it would be cost-effective and result in savings to the state. It also was consistent with state policy relating to downsizing the work force. Employee organizations have expressed opposition, because they believe the criterion could be used on a broad basis to reduce the number of classified employees.

Table 4.7 presents data on personal services contractual approvals since 197980, when Civil Service began compiling and reporting these data.

Table 4.7

Contractual Personal Services Approvals Compared With Classified Payrolls (Dollar Figures in Millions)

Year	Contracts Approved	% Increase in Approvals	Amount Approved	Classified Payroll	Contract Amount as % of Payroll
1979-80	5,579	—	$144.8	$1,242.3	11.7%
1980-81	4,210	-25%	133.0	1,300.3	10.2
1981-82	4,215	-0-	170.5	1,347.2	12.7
1982-83	4,558	+8%	208.1	1,371.8	15.2
1983-84	4,225	-7%	207.1	1,430.9	14.5
1984-85	5,085	+20%	257.7	1,515.1	17.0
1985-86	5,797	+14%	354.8	1,633.9	21.7
1986-87	5,254	-9%	366.2	1,802.2	20.3

Source: Department of Civil Service; CRC calculation.

After a drop in 1980-81, the number of contracts approved was essentially level until 1984-85, when the number began to increase significantly. A staff analysis made by the Department of Civil Service in 1986 suggests that the number of contracts approved varies with the financial condition of the state. Generally, this appears to be true, but 1983-84 is an exception to such a trend.

However, these contracts are growing not only in number but also very rapidly in dollar value and in relation to the classified payroll. The dollar value of contracts approved in 1986-87 was two and one-half times greater than the 1979-80 amount approved. The total increase in the last three fiscal years is in excess of $159,000,000. Contractual personal services approvals as a percent of classified payroll have increased from 11.7 percent to 20.3 percent in seven years. This **is** an increase in excess of 85 percent. If a comparison is made between 1980-81 and 1986-87o the proportion has more than doubled. In 1986-87, for every $100 in classified payrolls the state expended over $20 for contracted personal services.

California has a situation similar to Michigan's. In 1982, the Legislature passed a cost savings personal service contract statute. Employee organizations believe personal service contracting is an attack on the civil service system. The California State Employees' Association has challenged the statute in court on the basis the California Constitution prohibits such contracting.

B. Discussion

Some parties have raised the question as to whether the Civil Service Commission has authority to approve contracting-out for personal services in lieu of using classified employees. This contention is based on the constitutional provision that says, "The classified state civil service shall consist of all positions except…." The exceptions are specific and do not include contractual positions. This question **was** considered by the Michigan Court of Appeals in **Michigan State Employees Association** v **Michigan Civil Service Commissions** (141 Mich App 288; 1985). The MSEA challenged the fourth criterion relating to contracting personal services when

a long-term savings to the state can be demonstrated. The Court of Appeals found for the state and indicated there was "no requirement that all who provide services for the state must be in a civil service position." (141 Mich App at 293.)

The Chief Judge of the Michigan Court of Appeals dissented from the majority opinion. The Chief Judge raised the practical consideration as to where the line would be drawn in replacing classified positions when substantial long-term savings would accrue to the state. If a private company could provide police service more economically than the State Police, would the Civil Service Commission be justified in abolishing State Police positions and contracting out these positions? The Chief Judge concluded that the principle established by the majority would permit such action.

The concern that the merit system may be undermined by the expanding use of contracted personal services is a serious one. State agencies are faced with a policy of downsizing the state work force. This is a conscious decision that has resulted in a significant reduction in state classified employment. For example, the average number of classified employees was reduced from 67,246 in 1980-81 to 58,283 in 1984-85 before rising to 61,386 in 1986-87 as a result of opening additional correctional facilities.

In a downsizing environment, it is expected that state agencies will look to other avenues in order to fulfill their statutory responsibilities. One such avenue is contracted personal services, which may contribute to the significant increases identified in **Table 4.7.** It is the responsibility of the Civil Service Commission to protect merit principles in such an environment and insure that increasing use of contracted personal services does not reintroduce partisanship or other illegitimate practices into state employment procedures.

A review of the existing four criteria used to review contracts reveals a lack of specificity in the criteria. This lack of specificity may have been satisfactory in a different environment, but it may be time to review and tighten up the existing criteria.

The criterion that has the most specific guidelines is number four, relating to long-term savings. Agencies must show a minimum annual savings of ten percent and $20,000, and must demonstrate that classified employees are not supplanted. This criterion, which is controversial, appears to receive the most scrutiny from Department of Civil Service staff and outside organizations such as employee unions. Consequently, state agencies have an incentive to justify requests on other criteria which may be defined less specifically.

In 1982-83, criterion four accounted for $73,606,000 in contract approvals. One $60,000,000 Department of Transportation contract for road maintenance with several counties accounted for most of the approval. For 1983-84, the criterion four approval figure dropped to $6,190,000, increased to $13,606,000 in 1984-85 and to $22,781,000 in 1985-86. The Department of Transportation maintenance contract continues to be awarded annually, but is justified on different criteria than in 1982-83. The 1987-88 $81,500,000 contract was justified by the Department of Transportation on the basis of eliminating the need for hiring additional staff and buying costly equipment. Department of Civil Service approval was given on the basis of criteria one and

three. No effort was made to justify the contract on long term savings to the state.

State agencies may prefer to justify contracting for employees under the other three criteria because they are less well defined. For example, the terms "temporary, intermittent or irregular" in criterion one are subject to a variety of interpretations. Does temporary mean six months? Without specific guidelines the definitions of these terms can shift over time as state agencies seek definitional changes to meet their changing needs. This would be an acceptable process if conscious changes were made in the written criteria. Instead, subtle changes in interpretation can occur when the criteria are not specific, but rather are vague and subject to a variety of interpretations.

C. Conclusions

One of the constitutional responsibilities of the Civil Service Commission is to "approve or disapprove disbursements for all personal services." In order to protect the integrity of the merit system, a process has been established for staff review and approval of contractual personal services. Added pressure has been applied to this review system in the past few years. State agencies are faced with position ceilings that have been imposed to downsize the state work force. It appears that state agencies have looked to contract employment as an alternative to classified employment. There has been a significant increase in the total dollar value of contracts approved since 1979-80, and in the relationship of the dollar amount of contracts to classified payroll. It may be easier to exert political influence on a contractual employment system than it is on a classified systems and for that reason civil service review of contractual decisions is significant. Most of the staff scrutiny currently relates to the substantial long-term savings criterion. However, this is not the criterion being used by agencies seeking approval for contractual employment. Attention needs to be given to further defining the terms used in the first three criteria and developing guidelines to assist staff in their review.

D. Recommendations

The following recommendations are made to strengthen the existing review of contractual personal services.

1. The terms used in the four criteria to justify personal service contracts, such as "temporary," "uncommon" and "equipment not possessed by the state," should be specifically defined in supplemental guidelines issued by the Civil Service Commission.

2. A study should be made of the current system to review and approve requests for contractual personal services in order to determine if system modifications are necessary to uphold the merit system. It may be that the State Personnel Director or the Commission, or both, should become more involved in certain types of personal service contract decisions.

Chapter 5

Civil Service and the Employment Relations Framework

Introduction

One of the fundamental purposes of the civil service system is to foster the kind of working environment conducive to the attraction and retention of capable employees. In theory the development of such an environment, and the consequent development of a career service, should enhance the efficiency of state administration by providing capacity with continuity. In order to bring about these ends, the Michigan Constitution gives the Civil Service Commission responsibility to set rates of compensation for all classes of positions and to regulate all conditions of employment in the classified service. The Commission, however, no longer performs these constitutional functions directly; they are now discharged by subordinate agencies established by, but subject to the review of, the Commission.

This chapter consists of three parts. **Part I** examines the chronology of Commission decisions and staff studies which eventually led to the establishment of collective bargaining. **Part II** examines and describes the characteristics of the current employment relations system. A necessary object of inquiry is an assessment of how collective bargaining has functioned within the context of a merit system. **Part III** examines the legal issues concerning the Commission's delegation of authority and the extent to which it has retained adequate authority to fulfill its constitutional role.

Part 1. The Origins of Collective Bargaining in the Classified Civil Service

The introduction of collective bargaining into the classified civil service is of fairly recent origin. State police troopers and sergeants were granted rights of collective bargaining and binding interest arbitration by constitutional amendment in 1978. The Commission granted collective bargaining rights to the majority of other classified employees in 1980. The decision by the Commission to grant such rights was a substantial departure from the view formally adopted by the Commission in early 1976. As will be expanded upon below, the Commission was of the view in 1976 that it had no authority, absent constitutional amendment, to extend collective bargaining to classified employees because to do so would involve an unauthorized delegation of the Commission's authority.

The movement toward collective bargaining was incremental. From the time the civil service constitutional amendment was adopted in 1940 until 1968, the Commission itself determined compensation, fringe benefits and working conditions for the classified work force. Beginning in 1968, the Commission undertook various adjustments designed to permit more input from departments and greater participation on the part of employee organizations.

Late in 1974 the Commission established a Staff Task Force on Employee Relations, hereinafter referred to as the task force, to study employee relations in the classified civil service and to recommend revisions to the February 1, 1971 employee relations policy then in effect. Specifi-

cally, the task force was directed to look at employee recognition and unit structure; the scope of negotiations; impasse resolution procedures and unfair labor practices; and a mechanism to administer the policy. The task force was directed by the bureau of labor relations within the Department of Civil Service and received input from other state departments and agencies such as the Attorney General and the Michigan Employment Relations Commission.

The task force took testimony or written statements, or both, from a variety of employee associations, state department personnel and other interested organizations and issued its report on August 5, 1975. The report offered the Civil Service Commission two proposals, each in the form of an employee relations policy: proposal 1 called for the granting of full collective bargaining rights within a limited spheres while proposal 2 suggested a modified meet and confer plan.

A. The Collective Bargaining Proposal

The collective bargaining proposal established a framework whereby covered employees could bargain with a state employer over "wages, hours and all conditions of employment except as otherwise provided herein." A "covered employee" was one who was eligible for rights of organization and exclusive representation under the proposal. The Governor or his designee was to be the state employer because, as the proposal stated, collective bargaining "provides employees with a special procedure to participate in budget making, which is the focus of bargaining, and the Governor has the primary responsibility for budget formulation and administration …."

The proposal required a collective bargaining agreement reduced to writing to contain standard language stating that Commission and, where appropriate, legislative approval were conditions precedent to the contract taking effect. Employees covered by a valid contract were to be excluded from all Commission rules "except those covering classification, selections political activity and conflict of interest…." The proposal also called for the Commission to create a neutral, classified labor relations board to resolve unfair labor practices, and to make bargaining unit determinations and supervise and conduct exclusive representation elections. Employee representation was to be along broad occupational units.

The argument has seldom been heard that collective bargaining ought to be adopted solely for its own sake. Even in the private sector, collective bargaining did not arise by spontaneous generation, but rather in response to particular and pressing problems which existed in the work place. It is noteworthy therefore that the report did not indicate precisely what conditions if any, existed in the classified civil service that required correction through collective bargaining.

The report suggested a general discontent among some employee organizations with the existing employee relations framework. However, the report made no mention of the task force having received any testimony for- examples that classified employees were being paid deficient wages, that the working conditions of classified employees were unsafe or unhealthy, or that classified employees were subject to arbitrary dismissals. Such testimony was lacking despite the fact that the task force received written statements from one employee organization, nine principal departments, six miscellaneous organizations and conducted interviews with eleven other employee organizations and two other principal departments.

The report did note that a number of states had recently granted collective bargaining rights to their employees but it did not indicate how the wages, hours and working conditions in those states compared with the wages, hours and other terms and conditions of employment of the Michigan classified civil service. In fact, the transmittal portion of the report noted that "for many years state classified employees enjoyed a preferred status among most of their counterpart public workers in competing Michigan jurisdictions in terms of pay and benefits, job security, grievance rights and labor relations stability." But it was also pointed out that "[t]he advent of collective bargaining rights for other public employees in Michigan under the Public Employment Relations Act has tended to erode or reverse the balance of this status."

The Public Employment Relations Act was passed by the Legislature in 1965. The authority to enact the legislation derived from Section 48 of Article 4 of the state Constitution, which empowers the Legislature to "enact laws providing for the resolution of disputes concerning public employees, **except those in the state classified civil service."** (Emphasis supplied.)

Labor relations academicians have long recognized that public sector collective bargaining has a political dimension in addition to the economic dimension found in the private sector. However, the drafters of the state Constitution intentionally sought to insulate the classified civil service system from politics. As a direct corollary to this, Section 48 of Article 4 prohibited the Legislature from providing dispute resolution procedures for classified civil service employees. This constitutional limitation on the Legislature, when coupled with the perception of many civil service employees that despite their wages and working conditions, they lacked rights enjoyed by public employees at the local level, no doubt accounted for much of the discontent.

At its February 20, 1976 meeting, the Civil Service Commission adopted a formal statement responding to the task force proposal dealing with collective bargaining in the classified service. The Commission noted in part that

> [t]he growth and proliferation of employee organizations and the changes in Civil Service Commission policies in response thereto have led inexorably to this day of decision on the basic issue of whether under the Michigan Constitution the Commission has the power to extend true collective bargaining to employee organizations. We have unanimously concluded that **we** have no such power. Any such fundamental change in the constitutional structure regarding classified employees of the State of Michigan would, in our opinion, have to be accomplished by a vote of the people.
>
> In reaching this conclusion, we have reviewed the detailed language of the Michigan Constitution of 1963, the debates in the Constitutional Convention, relevant Michigan Supreme Court decisions, the historical development of Commission employee relations policies and the continuing in-put of employee organization representatives and members of the Executive Branch.…
>
> **We cannot adopt Staff Proposal 1, which provides for 'collective bargaining,' because true collective bargaining is beyond our power to grant, while modified collective bargaining, or collective negotiation, such as is recommended**

> **could only result in frustration to the employees organization [sic] and their memberships, so long as the Commission discharged its constitutional responsibilities of fixing rates and regulating 'all conditions of employment in the classified service.'** (Emphasis supplied.)

As noted above, the proposal recognized the necessity for certain limits on collective bargaining in the classified civil service. While covered employees would bargain with the state employer on wages, hours and other terms and conditions of employment, the proposal specifically recognized that a collective bargaining agreement "requiring action of the Michigan Civil Service Commission or legislative action to permit its implementation [would] not become effective until the appropriate body [had] given approval." Furthermore, the proposal recognized that "the State Civil Service Commission, the Governor and the State Departments must operate within the lawful limits of their authority." Nevertheless, the Commission remained unconvinced that it could authorize even a limited form of collective bargaining within which it would retain ultimate decision making authority. The Commission observed:

> It is urged, however, that the Commission may delegate these functions to others if it retains the veto power. Without attempting to decide the constitutional question of delegation of powers, it is sufficient to say that in view of the detailed responsibility incumbent upon the Commission, to install decision-making machinery within the Department of Civil Service which would effectively preclude the Commission from discharging these constitutional duties would, at the very least, be contrary to the spirit of Article XI, Section 5.
>
> In establishing the Public Employee [sic] Relations Act of 1965, it is clear that the Legislature was acting pursuant to Article IV, Section 48 of the Michigan Constitution, which specifically empowers the Legislature to enact collective bargaining laws. **It seems clear that if the framers and adopters of the Constitution had meant for the Civil Service Commission to have such broad powers, they would have done so in the enumeration of the Commission's powers. Instead, there was provided in a contemporaneously adopted Article that the Commissions itself, has the responsibility of decision in all matters affecting classified employees….** (Emphasis supplied.)

Thus, the Commission declined to extend collective bargaining to the classified service, not because collective bargaining was necessarily viewed as inappropriate, but because the Commission determined that to do so would not comport with existing constitutional provisions.

B. The Meet and Confer Proposal

The second proposal suggested by the task force granted employees the right to "organize, join or assist in employee organizations and [to] engage in concerted activities for the purpose of meeting and conferring with the employer and the Department of Civil Service over wages, hours and all conditions of employment except as otherwise provided herein." The employer was defined as "the appointing authorities of the various state departments or their designated representatives." Because this proposal provided for a meet and confer procedure rather than

collective bargaining, there was no need to designate a single individual as having authority to bargain. The proposal also provided for exclusive representation along broad occupational lines in contrast to the employee relations policy then in effect which provided for "multiple or proportional recognition within a unit with dues check off and limited consultation rights."

The Commission also declined to adopt the meet and confer proposal as presented. The Commission noted that "[v]igorous objections to this proposal have been raised by employee organizations. In view of the disposition made of Staff Proposal 1, [concerning collective bargaining] it is now extremely important that substantial proposals be made for improving employee effectiveness in the existing meet and confer system." The Commission referred the proposal back to its staff for further study.

The task force report was anomalous in several respects. For example, even though the collective bargaining proposal designated the Governor or his representative as the state's bargaining agent, apparently those involved in the study did not consult with the Governor's office in advance to ascertain whether he would be willing to play such a role. Had such consultation taken place it would have been discovered, as it later was, that the Governor's office believed there to be a number of unanswered questions.

One question was what conditions necessitated collective bargaining. As already noted the report did not address this matter. Secondly, in light of the extraordinary lengths to which the Constitutional Convention had gone to insulate the classified civil service system from political influence, the administration found it somewhat puzzling that the Commission would consider delegating so much of its authority to the Governor.

Perhaps the most pressing question raised by the administration with respect to the task force report was whether the Commission had authority to implement collective bargaining. As noted above, the Commission itself confronted this issue and concluding that it lacked such authority, eventually rejected the report. The Governor's office was of the view that collective bargaining should be implemented, if at all, through constitutional amendment. Some union officials also favored a constitutional amendments but out of concern that a collective bargaining system based only on Commission policy would lack permanence.

The lack of permanence continues to this day. Even if it is assumed that the Commission's delegation of authority in 1980 was constitutional, the Governor has never been under any obligation to exercise that authority. The only legal basis for the existence of the Office of State Employer, as part of the executive branch, is an executive order, which a Governor could rescind at any time.

C. The Employee Relations Policy of 1976

The employee relations policy adopted by the Commission on August 20, 1976closely resembled in several respects the meet and confer proposal suggested by the task force. Classified employees were granted the right to "engage in concerted activities for the purpose of meeting and conferring with the employer over wages, hours and all conditions of employment except as otherwise provided herein." This language was somewhat misleading, however, since section 1

of the policy made clear that the meet and confer system would be used "in determining conditions of employment **other than** compensation for state classified employees." (Emphasis supplied.)

The Commission itself continued to fix rates of compensation, although it cast itself in the role of a "government wage board." The Commission formalized a procedure whereby a three-member compensation hearings panel would be established annually to conduct an evidentiary hearing to take testimony and gather data with respect to proposed compensation for classified employees. One member of the panel was appointed by the Commission from a list of three names supplied by recognized employee organizations and another from a list of three names supplied by the Governor or his designee. The Commission itself appointed and designated a chairman. The panel was required to submit to the Commission a proposal for decision regarding compensation, containing findings of fact and reasons justifying the proposal. It was clear under the 1976 policy, however, that the Commission made "the final determination in the public interest."

While the Commission reaffirmed its position that the Constitution prohibited "the establishment of a collective bargaining system for state employees similar to the system presently utilized in the private sectors" the 1976 policy adopted some of the attributes of the task force collective bargaining proposal. For example, the 1976 policy provided for a state employer to be designated by the Governor. The policy also provided for exclusive rather than multiple representation and for broad occupational units. While it is true that the meet and confer proposal of the task force had also called for exclusive representation and broad occupational units, one of the stated reasons therefor was that if "the state later were to go to collective bargaining it would not have to relive the trauma of new unit concepts and elections."

Thus the Civil Service Commission continued to walk a tightrope. Faced with increasing employee demands, but convinced that it could not grant classified employees collective bargaining rights, it nevertheless moved inexorably toward that very result. The evolution of various procedures adopted by the Commission from 1963 to 1976, particularly from 1968 to 1976 — from complete control over fixing compensation, to eliciting input from departments and employee organizations, to allowing meet and confer rights with multiple recognition, to allowing meet and confer rights with exclusive recognition evinced an attempt to find some middle ground between what employee organizations were demanding and what the Commission felt it could constitutionally offer.

During this time, the Legislature was considering several proposals dealing with the classified civil service system. For example, House Joint Resolution X, which was introduced in May of 1975, would have granted collective bargaining rights to state police troopers and sergeants. While this particular resolution never passed, troopers and sergeants were successful in receiving such rights by initiative petition in 1978.

There were additional resolutions. House Joint Resolution EE introduced in October of 1975 would have amended both Section 48 of Article 4 and Section 5 of Article 11 of the state Constitution to allow the Legislature to provide dispute resolution procedures for classified employees and to provide collective bargaining for such employees as well. House Joint Resolution K introduced in April of 1977 would have authorized the Commission to institute collective bargaining. The resolution would also have eliminated the Commission's guaranteed appro-

priation. Senate Joint Resolution Z introduced in December of 1978 would have required collective bargaining and binding arbitration for classified employees.

Also in 1978, the Attorney General issued a letter opinion stating the Civil Service Commission did possess the authority to grant collective bargaining to classified employees. The Attorney General cited as authority for his conclusion a 1970 Attorney General opinion which concerned the division of authority between the Commission and appointing authorities. The 1970 opinion concluded with the oblique statement that "by its own rules, only the civil service commission may enter into **collective bargaining agreements** with state classified employees and appointing authorities may not do so without the consent of civil service." (OAG, 1969-1970, No. 4709 at 173; emphasis supplied.)

The phrase "by it own rules" referred to the Commission's 1966 employee relations policy, which was set forth in an appendix to the opinion. It is clear, however, that the policy itself did not provide for collective bargaining. Both the 1970 and 1978 Attorney General opinions appear to have been based on the assumption that since the voters had explicitly denied the Legislature the power to authorize collective bargaining for classified employees, the voters must have intended the Commission to exercise it. It may, however, have been the intent of the voters to reserve exclusively to themselves — and neither to the Legislature nor the Commission — the authority to grant collective bargaining to classified employees. It is noteworthy in this respect that state troopers and sergeants, the first group of civil service employees to bargain collectively, were granted bargaining rights **by the people.**

The Citizens Advisory Task Force on Civil Service Reform of 1979 made reference to the Attorney General's letter when it recommended that collective bargaining be adopted "[w]here the majority of employees in an appropriate unit desire it...." It also recommended that supervisors be excluded from bargaining collectively.

The Citizens Task Force noted that all labor organizations testifying had favored collective bargaining. It was also noted that some management personnel favored collective bargaining because "they felt the current meet and confer system gave them the disadvantages of collective bargaining but few of its advantages."

The Citizens Task Force, as had the 1975 task force, failed to indicate what problems existed which would be solved or eased by the introduction of collective bargaining. The dissent to the collective bargaining recommendation noted in part that the recommendation

> was adopted by the task force with no evidence having been presented that collective bargaining would in any way improve state governments service to the public, nor assist management officials in carrying out their responsibilities. Neither was any persuasive showing made that a change to collective bargaining would result in real benefit to state employees. Advocates of collective bargaining stressed essentially that other public jurisdictions in Michigan and elsewhere have adopted it and that employee organization representatives favor it....
>
> Furthermore, the Michigan Constitution clearly provides that final determination

> of rates of compensation of classified state employees is to be a unilateral action on the part of the Civil Service Commission subject only to veto or reduction of the recommended increases by extraordinary vote of the legislature. Such a concept and collective bargaining are so disparate in nature and philosophy that collective bargaining should not be instituted without constitutional amendment.

The final step of granting collective bargaining, without constitutional amendment took place when the Commission at its April 25, 1980 meeting adopted a revised employee relations policy according rights of collective bargaining to the majority of classified employees. The minutes of the meeting stated in pertinent part that the proposed policy was "believed by the [Commission's] staff to be workable as a means of achieving true collective bargaining for exclusively represented employee…." This decision, which may have been influenced by a 1978 letter opinion of the state Attorney General, was the opposite of that reached by the Commission in 1976.

It is interesting to note that during this period when it was being confronted with momentous decisions, the Commission itself was undergoing significant turnover. Only one individual who had been on the Commission in 1976 when the collective bargaining proposal was rejected by the Commission was still serving in 1980 when collective bargaining was approved.

Part II. Characteristics of the Present Collective Bargaining Framework

Presently, approximately 72.2% (45,670 employees) of the classified civil service work force is organized for purposes of collective bargaining into ten broad occupational bargaining units. The membership of each of the bargaining units have selected an exclusive representative to engage in collective bargaining with the employer. (See **Table 5.1.)** Despite the fact that these occupational bargaining units cut across the nineteen principal departments of state government six of the ten bargaining units have over fifty percent of their membership in a single department. (See **Table 5.2.)**

Table 5.1

	Bargaining Unit:	Size:	Average Wage Hourly:	Exclusive Representative:
1.	Administrative Support	11,186	$11.09	United Auto Workers
2.	Human Services	10,510	14.68	United Auto Workers
3.	Institutional	6,790	11.16	American Federation of State, County and Municipal Employee,
4.	Security	5,779	10.99	Michigan Corrections Organization
5.	Labor and Trades	3,583	11.72	Michigan State Employees Association
6.	State Police Enlisted	1,841	14.96	Michigan State Police Troopers Association
7.	Technical	10452	13.01	United Technical Employees Association
8.	Scientific and Engineering	1,633	16.80	Michigan Professional Employees Society
9.	Safety and Regulatory	1,469	13.04	Michigan State Employees Association
10.	Human Service Support	1,327	11.92	Service Employees International Union
	Subtotal	45,670	12.47	
Non-Exclusively Represented:				
11.	Business and Administrative	7,250	18.55	
	Ineligible Excluded			
	supervisory	7,866	17.14	
	managerial	461	24.44	
	confidential	1,373	13.23	
	Non-Career	550	6.06	
	Unassigned	71	13.37	
	Subtotal	17,571	17.53	
	Total	63,241	13.88	

Source: The Office of State Employer, for pay period ending October 17, 1987: CRC calculation

Table 5.2

	Bargaining Unit:	Size:	Highest Percentage Of Membership In A Single Department:	Department:
1.	State Police Enlisted	1,841	100.0	State Police
2.	Security	50559	96.2	Corrections
3.	Human Services Support	1,240	93.4	Labor (Michigan Employment Security Commission)
4.	Institutional	5,404	79.6	Mental Health
5.	Human Services	10,510	61.8	Social Services
6.	Technical	15452	61.4	Transportation
7.	Scientific and Engineering	15633	39.4	Natural Resources
8.	Safety and Regulatory	1,469	27.8	Natural Resources
9.	Administrative Support	11,186	26.4	Social Services
10.	Labor and Trades	3,679	25.3	Transportation

Source: The Office of State Employer, for pay period ending October 17, 1987: CRC calculation.

The Office of State Employer, as representative of the Governor, negotiates collective bargaining agreements with the exclusive representatives, although certain matters are excluded from the scope of bargaining. Excluded matters include selection, classification, subcontracting and the rules and regulations of the Commission.

The remaining 27.87o of the state work force (17,571 employees) are non-exclusively represented and do not engage in collective bargaining. An eleventh occupational unit, the business and administrative unit, could if desired, engage in collective bargaining but its membership has never elected an exclusive representative. The largest category of non-exclusively represented employees occupy managerial supervisory and confidential positions which are excluded from collective bargaining rights under the Commission's employee relations policy. Excluded employees are permitted membership in limited recognition organizations and such organizations have the right under the employee relations policy to "meet and discuss'' with the employer regarding specified matters.

Compensation for those classified employees not represented by an exclusive representative is established by the Employment Relations Board. The Board is a three member body, appointed by the Civil Service Commission to coordinate the compensation of non-exclusively represented

employees with that of the classified employees covered by collective bargaining agreements. In addition to acting as a coordinated compensation panel, the Employment Relations Board also disposes of grievances on behalf of the Civil Service Commission with respect to those employees whose grievance procedure is not determined by contract an acts to resolve impasses which arise during the course of contract negotiation.

Collective bargaining agreements as well as the coordinated compensation plan, may be modified or rejected by the Civil Service Commission, but when finally approved are transmitted to the Governor, who is required by the Constitution to include such recommendations in his executive budget. The Legislature may by a two-thirds majority vote of the members elected to and serving in each house reject the recommendations or reduce them uniformly within 60 days of receipt. Unless rejected or uniformly reduced, the recommendations take effect at the start of the next ensuing fiscal year, unless the Legislature by majority vote specifies a different effective date.

Because of the importance of the roles played by the Office of State Employer and the Employment Relations Board, in the present framework, each of these entities requires separate treatment.

A. The Office of State Employer

One of the ways in which the difficulty of extending collective bargaining to the public sector manifests itself is in determining precisely with whom an exclusive representative must negotiate. While collective bargaining in the public sector is usually defined as the mutual obligation of the employer and union to bargain in good faith on matters with respect to wages, hours, and other terms and conditions of employment, the term public employer is rarely defined.

In the case of **Wayne County Civil Service Commission** v **Board of Supervisors,** (22 Mich App 288; 1970), the Court of Appeals was confronted by this problem because the statute which grants collective bargaining to local public employees did not define the term employer. The Court found that

> the general characteristics of identification of an employer are: (1),that they select and engage the employee; (2) that they pay the, wages; (3) that they have the power of dismissal; (4) that they have the power and control over the employees conduct (35 Am Jur, Master and Servants sec 3, p 445). A most significant requisite of the employer is his right to exercise control over the method by which the employee carries out his work. (22 Mich App at 294.)

No single public office or official is likely to possess all of these characteristics of a private sector employer. In the public sector, governmental authority is intentionally dispersed among several branches. This separation of powers can fragment the authority needed to bargain collectively in a manner not found in the private sector. Negotiations with a public union are usually conducted by a labor relations or personnel office, which is generally part of the executive branch. The funding to pay for the terms of the contract actually agreed upon requires the appropriation of money, a function typically committed to the legislative branch. To lodge the functions of the various branches of government in one office would be impossible under the

theory by which the federal and state governments are organized, this separation being a device to protect the public from tyranny. Thus, in the public sector the term "employer" or "public employer" is little more than a term of convenience designating the locus of responsibility to bargain, but not intending to convey the suggestion that a single public official possesses all the attributes of a private sector employer.

The Civil Service Commission addressed the difficulty of identifying the employer by defining the term in its employee relations policy. The need for some central authority to negotiate with employee organizations was increased when the Commission recognized representation along occupational lines. When representation was organized along departmental lines, each appointing authority could deal with its own unit within the confines of his or her respective department. This ability of appointing authorities was diminished when occupational units were established which cut across departmental boundaries.

The Commission could not logically impose upon itself an employer's bilateral duty to bargain and at the same time claim the unilateral right to approve contracts. Additionally, the failure of a party to observe a collective bargaining duty constitutes an unfair labor practice. Casting itself as employer might have resulted in the Commission having to enforce an unfair labor practice against itself. The 1976 policy adopted by the Commission defined the "State Employer" to be "the Governor's Designated Representative who has the obligation to represent the state government as a whole before the Compensation Hearings Panel, and with regard to other labor relations responsibilities at the central level including all primary negotiations."

Executive order 1979-5 formally established a separate Office of State Employer to be headed by a permanent director. The new office was established within the Department of Management and Budget. The director of the office is directly responsible to the Governor and is not a part of the classified civil service. Previously, in 1977, the Governor had designated the director of Management and Budget as state employer for purposes of implementing the Commission's 1976 policy.

A second executive order was issued in 1981 which added to the duties of the Office of State Employer "matters affecting state police troopers and sergeants who exercise the right of collective bargaining pursuant to Article XI, Section 5, of the Michigan Constitution of 1963.11 As was noted above in **Chapter 2,** there was initially disagreement as to which state agency would implement the collective bargaining process governing troopers and sergeants and conduct the certification process for selecting an exclusive representative.

A third executive order, issued on May 25, 1988, was directed towards clarifying the role of the State Employer vis-a-vis the principal departments with regards to contract interpretation and administration, grievances and arbitration, and labor relations training. Executive order 1988-6 stated the duties of the office to be in pertinent part

a. To represent executive branch departments and agencies before the Civil Service Coordinated Compensation Panel addressing issues for non-represented classified employees.

b. To determine the policies of the employer with respect to matters subject to collective bargaining negotiations.

c. To represent the employer in primary negotiations with exclusive representatives. To assist the Director, departmental bargaining team members shall be nominated by the departments subject to the approval of the Director.

d. To enter into collective bargaining agreements with exclusive representatives concerning negotiable matters.

e. To determine the issues which shall be the subject of primary negotiations and those which shall be the subject of secondary negotiations.

f. To participate in secondary negotiations at the departmental level and to approve all collective bargaining agreements.

g. To represent the employer in dispute resolution conferences and in mediation.

h. To initiate requests for modifications in the Civil Service Employee Relations Policy Rule and Regulations of 1980, as amended.

i. To coordinate employer responses to personnel policy and rule changes being considered by the Civil Service Commission.

J. To initiate, or approve the initiation, of prohibited practice charges against employee organizations and to respond to and represent the employer with respect to prohibited practice charges filed by employee organizations.

k. To review positions included within specific bargaining units and raise objections to the inclusion of positions determined to be excluded on the basis being managerial, confidential or supervisory.

1. to have final authority for contract administration and to approve all contract interpretation documents and Letters of Understanding.

m. To make the management determination regarding which grievance cases should go to arbitration after consultation with the effected department; to approve the management advocate in the presentation of all arbitration.

n. To supervise the training of all management personnel involved in the labor relations process with the full cooperation and participation of the departments.

o. To do such other things as are necessary in order for the employer to meet his responsibilities to recognized employee organizations, and to foster responsible labor-management relations.

Primary negotiations occur between the State Employer and an exclusive representative. The resulting contracts cover all employees in a particular bargaining unit, which as noted above,

cuts across departmental lines. By contrast, secondary negotiations occur between an appointing authority usually the department director — and an exclusive representative and cover any issues delegated by the respective primary agreements. Commission rules permit a department headed by a constitutionally elected director to request that all non-compensation issues be handled through secondary negotiation. Secondary negotiations culminate in "departmental agreements."

This framework by which the State Employer, and not the Commission, negotiates contracts with exclusive representatives but by which the Commission can disapprove contract language, has led to both confusion and criticism. Much of the confusion concerns who has authority to do what and whose authority derives from whom. It has even been suggested of late that the Office of State Employer possesses plenary powers, but this is incorrect.

The quantum of authority exercised by the State Employer cannot exceed the amount delegated by the Commission through the terms of its employee relations policy. While the language of the executive order establishing the office spoke in broad terms, the executive order itself made clear that the duties of the office were limited "to employee relations matters affecting classified employees covered by the Civil Service Employee Relations Policy and Regulation of 1976, as amended."

An important question at this juncture is whether the Commission bestowed adequate authority upon the Governor to permit that officer, or his or her agent the State Employer, to properly and efficiently manage the labor relations system which it established. The Commission made clear that the Governor, or in the alternative the State Employer, would exercise primary responsibility. Rule 6-4.2(l) of the present employee relations policy states that the Governor, or his designee, has the "responsibility and the authority to direct, coordinate and develop the employer's employment relations policy in the area of collective bargaining, contract administration, grievances, unfair labor practices, improvements in work performance and administrative efficiency, and training in support of these activities."

This labor relations system has been criticized for being too decentralized. It has been suggested on occasion that a department may not send to the bargaining team directed by the State Employer an individual who is knowledgeable about how, for example, proposed contract language might affect that particular department. It has also been suggested with respect to the administration of contracts, that a given department may refuse to accept the interpretation placed upon particular language by the State Employer. Assuming for the sake of argument that these criticisms are true, the fault does not lie with the amount of authority which the Commission delegated.

The State Employer and the principal state departments do not operate along parallel lines; their lines of authority converge at a single point: the office of Governor. It is true that the Governor does not, in all respects exercise direct control over the directors of all nineteen principal departments. Several departments such as Corrections and Natural Resources are headed by commissions which are appointed by the Governor. The commissions then select a director. The heads of the Departments of Attorney General, Secretary of State, and the board which governs the Education Department are elected officials. Nevertheless, it is difficult to imagine that depart-

ments would not coordinate their labor relations activities under the direction of and in cooperation with the State Employer if directed to do so.

Among the matters it has been suggested be centralized under the auspices of the State Employer is the administration of employee benefits. It is said in support of the suggestion that employee benefit administration is an employer attribute. The logical extension of this line of reasoning would require that the State Employer also be invested with the authority to hire and discipline employees since these are also employer attributes. But as has already been noted, no single public official is intended to possess all the attributes of a private sector employer. The proper role of the State Employer — despite the misleading nomenclature — is limited to acting as the state's labor relations negotiator. There is no suggestion that the Commission has failed to adequately administer existing employee benefit programs nor any suggestion that transfer of such programs to the State Employer would result in any improvements. Other states having a separate labor relations office have not accorded such offices the responsibility for employee benefit administration.

On the other hand, the centralization of **some** labor relations matters would no doubt be appropriate. For example, it serves little purpose for the state to negotiate a primary agreement with a given bargaining unit, the membership of which may be comprised of individuals employed by several departments, if each respective department is free to interpret the contractual language as it sees fit. Secondary agreements are supposed to be employed to meet the peculiar needs of a given department. The May 25 executive order has addressed this situation by directing that the authority for contract administration and interpretation is vested in the State Employer.

There may of course be a number of considerations which militate against the centralization of additional labor relations functions in a given agency. Whether centralization of additional labor relations activities should occur or not is a matter which ought to be addressed within the executive branch since it is clearly within the authority delegated by the Commission.

B. The Employment Relations Board

The Employment Relations Board was established by the Civil Service Commission through adoption of its April 25, 1980 employee relations policy. The Board consists of three members appointed by the Commission to three-year terms of office. Board members are not a part of the classified civil service, but are compensated on a per diem basis. The budget of the Board comes from the Commission's annual appropriation.

The Board handles certain functions which the Commission has chosen not to perform directly. These functions may be grouped generally into three areas: acting as an appellate body with respect to certain matters; developing a coordinated compensation plan for classified employees not covered by collective bargaining agreements; and serving as a panel to resolve impasses arising during the course of contract negotiations.

Appellate Functions. The Board receives administrative support from the labor relations bureau in the Department of Civil Service. The labor relations bureau consists of two divisions. The **employee relations division** handles union representation and certification elections, and

also provides mediation and other procedures to resolve collective bargaining impasses.

The **hearings division** handles grievances involving employees not covered by collective bargaining agreements; unfair labor practice charges, which may arise within the context of the collective bargaining relationship; and selection and classification decisions made by the Civil Service Department. The latter category of appeals, known as technical appeals, may involve both exclusively and non-exclusively represented employees since selection and classification are outside the scope of bargaining.

The decisions of both the employee relations and hearings divisions may be appealed to the Board. The procedures of the Board state that only an employee dismissed for cause from the classified civil service may appeal to the Board by right. All other types of appeals are by leave or, discretion of the Board. Dispositions by the Board must be filed with and represent the final decision of the Civil Service Commission unless overturned by the Commission at its meeting next after the filing. Prior to the creation of the Board, the Commission itself disposed of all grievances.

The Commission's employee relations policy rule 6-9.7 requires the Personnel Director to "establish a standard grievance procedure for the resolution of employee grievances, including grievances against determinations of the Department of Civil Service." The grievance procedure for employees not covered by a collective bargaining agreement consists of several steps. Step one involves an oral report of the alleged grievance by the affected employee to his or her immediate supervisor within ten days of becoming aware of the grievance and an oral response from the supervisor within two days. Step two involves a filing of the grievance in writing within five days of the supervisor's oral response. The supervisor then has ten days to respond at the step two level.

Step three involves a written appeal to the director of the employing department or to a designated personnel representative within five days of the issuance of the step two decision. The employing department or designated personnel representative then has fifteen days to issue a written decision. Step four involves appeal to a hearings officer in the hearings division. These time limits are contained within the employee relations policy.

As an alternative to step four, an employee not covered by a collective bargaining agreement may elect to proceed by means of arbitration, in which case the employee and the employing department share equally the cost of arbitration. The Commission has chosen by rule to defer to a grievance arbitration award unless the Commission determines that the matter was not properly before the arbitrator, the arbitration process was procedurally flawed, or that the award would contravene a statute or Commission rule.

Departments occasionally do not respond to grievances within time limits set by the Commission. An employee who registers a grievance, but fails to abide by the same time limits, is precluded from proceeding to the next step. Rarely, however, is the department involved precluded from proceeding with its case when acting in a tardy manner. Obviously, this disparate treatment has not escaped the attention of the state's employees.

It may be that grievances are filed in such numbers that departments cannot conscientiously respond within the required time. Be that as it may, an employee who files a grievance exercises a right. An employee should not have to forego the right to file a grievance in hopes that by contributing to a reduced volume, those grievances which remain might be handled more expeditiously.

The precise scope of the problem cannot be determined due to a lack of documentation. Even though the employee relations policy requires a written form to be filed at the second through fourth steps respectively the forms with respect to the second and third steps are retained if at all, only by the individual departments. It is not until the fourth step, when a grievance proceeds outside the originating department, that a written form is filed with the hearings division within the Department of Civil Service.

It is important to note that the failure of departments to abide by the time limits within which grievances must be addressed is not limited to non-exclusively represented employees. Classified civil service employees covered by a collective bargaining agreement may confront the same difficulty. Here, to the extent that the difficulty stems from the time limits being unrealistically short, the problem is arguably less egregious because at least the unions play a role in establishing the time limits contained in the collective bargaining agreement. But the time limits contained in the employee relations policy were unilaterally established by the Commission.

The Commission, acting as the impartial regulator of the classified civil service system, has the authority to require both departments and employees to adhere to these rules and there is no reasonable basis for permitting departments to violate them. On the other hand, it may also be reasonable to give the departments a longer period in which to answer than is given to a grievance, since an adequate response may require an investigation of the complaint. The proper remedy therefore seems to be modification of the employment relations policy and its consistent enforcement.

Coordinated Compensation Functions. The present employee relations policy requires the Board to submit to the Commission by December 1 of each year a proposed compensation plan for all classified employees not exclusively represented. The Board establishes each fall a deadline by which interested parties must submit written position statements.

The submission of statements is usually followed by several days of hearings, during which exclusive representatives, limited recognition organizations, individual employees, and the State Employer may appear to offer their views. The Commission's August 1985 employee relations policy rule 6-4.2(3) states that the Office of State Employer has the responsibility and authority "to develop, in consultation with principal departments, a comprehensive plan for, compensation and conditions of employment of excluded and non-exclusively represented employees for presentation to the Employment Relations Board…."

The term "coordinated compensation" is a misnomer in many respects. The employee relations policy does not define precisely what is being coordinated. Since 1980, the Office of State Employer has had the authority under the employee relations policy to participate in the process

by which compensation and benefits are established for non-exclusively represented employees. However, the State Employer has no history of "coordinating" such participation with limited-recognition organizations. It was not until the bargaining sessions of 1986 that the State Employer worked closely with limited-recognition organizations to produce, for presentation to the Board, a consensus wage and fringe benefit plan covering most non-exclusively represented employees. The consensus plan was approved neither by the Board nor by the Commission.

Nor, in practice at least, does the term coordinated compensation mean that the wages and benefits of non-exclusively represented employees are "coordinated" with those of employees covered by collective bargaining agreements. The consensus plan developed in 1986 by the State Employer and limited recognition organizations would have treated non-exclusively represented employees essentially the same as employees covered by collective bargaining agreements. As noted, the consensus plan as proposed was rejected. The Commission noted at its January 12, 1987 meeting that "[r]epresented groups do not set absolute standards for the unrepresented.11

The Commission justified its decision in part by noting that it had previously given non-exclusively represented employees larger than proposed increases. Again, on January 12, the Commission stated, "we must determine what is reasonable and we cannot abdicate that responsibility, which means sometimes we adopt [what is proposed with respect to coordinated compensation], sometimes we give more, or sometimes we give less."

Disparate treatment with respect to compensation of similarly situated groups of employees who work in proximity to each other, particularly where one group supervises the other, inevitably leads to invidious comparisons. These invidious comparisons may in turn lead to the desire for corrective measures. For example, the Commission at its April 1987 meeting was presented with a supervisory collective bargaining proposal made by the State Police Command Officers Association.

The command officers cite specific circumstances where they feel the lack of a fully equitable compensation determination procedure has put them at a disadvantage when compared with their trooper and sergeant counterparts. They note that troopers and sergeants have their parking costs reimbursed by the state; command officers do not. Troopers and sergeants have one hundred percent of their hospitalization costs paid for; command officers have ninety-five percent of their hospitalization costs covered. State police troopers and sergeants who are stationed at post 29 in Detroit receive thirty cents more per hour than troopers and sergeants stationed anywhere else in the state. However, if a sergeant at post 29 were promoted to lieutenant — that is, promoted into the command structure — that individual would lose the thirty-cent per hour differential enjoyed before receiving the promotion.

The Commission was quite correct in stating that it must determine what is reasonable and that it cannot abdicate that responsibility. Should the Commission feel that coordinated compensation proposal produces a result contrary to merit principles, equity, or public policy, then it should adjust the document accordingly. But, ensuring equitable treatment for all classified employees is a primary consideration, and in the absence of such a consideration it would appear

to be a sound approach for the Commission to weigh heavily the perceptions of equity represented in coordinated compensation proposals developed under the direction of the State Employer.

Impasse Functions. The Board may either act as an impasse panel or designate others to do so. The criteria to be observed by the Board in resolving impasses appear to have been borrowed from Section 9 of Public Act 312 of 1969 which provides for compulsory interest arbitration to resolve disputes involving municipal police and firefighter personnel. Employee relations policy rule 6-9.3(3) enumerates the criteria to be

(a) Stipulations and agreements;

(b) The interests and welfare of the public and the financial condition of the state;

(c) Comparison of wages, hours and conditions of employment of the employees involved with employees performing similar services and other employees generally;

(d) Appropriate economic indicators and forecasts;

(e) Total compensation including fringe benefits presently received by employees including continuity and stability of employment and all other benefits,

(f) Such other factors which are normally taken into consideration in the determination of wages, hours and conditions of employment.

Parties who desire impasse assistance from the Board are required to submit a request by no later than September 1 of the year and impasse panel recommendations must be submitted to the Commission by December 1 of the same year. Because impasse resolution is in the nature of writing a new contract and it is desirable that the parties perform this task on their own, the parties themselves may voluntarily resolve the impasse at any time before final action is taken by the Commission.

Part III. Matters Bearing Upon the Suitability of Collective Bargaining in the Classified Civil Service

A. General Considerations

Neither private nor public sector employees have any entitlement to bargain collectively, in absence of enabling legislation. Collective bargaining is a matter of legislative grate in the sense that it is achieved through a measure having the force and effect of law. Employees' as do all citizens in general, have the right to gather together in voluntary associations. This right stems from the First Amendment to the United States Constitution. However, the right of employees to associate has never, without more, placed upon an employer a concomitant obligation to recognize such an association for purposes of bargaining.

When distilled to its essences collective bargaining is a sharing of the power by which wages,

hours and other terms and conditions of employment are determined. In the absence of collective bargaining, this power is lodged exclusively in the hands of the employer. The 1975 task force recognized as much when it observed that public sector collective bargaining "… shifts the weight from governmental leadership towards careful and organized consultation with and concessions to employees."

This sharing of power in the private sector has been accomplished by federal statutes and in the public sector in Michigan — exclusive of the classified civil service — by a combination of statute and judicial interpretations. Fundamental issues arise, however, when the employment relationship involves a public agency that has been given by the people specific responsibilities of constitutional dimension.

1. Conflicting Perspectives

Many of the organizations that represent classified civil service employees view the collective bargaining framework rather skeptically and not without some justification. Their concerns fall broadly into two categories: that the scope of bargaining at the state level is too limited and that the collective bargaining procedures are not really neutral. With respect to the former concern, the Commission has retained certain limited attributes of decision making, essentially dealing with selection, classification and subcontracting. It has been suggested that some classification matters ought to be bargainable because they relate to questions of compensation and that subcontracting ought to be bargainable because it relates to job security. The other states to be examined in **Chapter 6** also place merit principles outside the scope of bargaining, the only substantial difference being that such matters were placed off limits legislatively.

Many employee organizations have never been satisfied with the fact that a body which they view as a **participant** in the labor relations framework — the Civil Service Commission — unilaterally decided certain matters would be outside the scope of bargaining. Secondly, the labor relations framework established by the Commission is seen as improperly slanted against employee organizations. In a general sense, the Office of State Employer, the Employment Relations Board — which also acts as an impasse resolution panel and as a coordinated compensation panel — the Civil Service Department, and the Civil Service Commission are often viewed as simply various layers of the same management structure. It is noted for example, that an employee organization has to negotiate a contract with the State Employer — an agency of management — only to have the same contract reviewed and perhaps modified by the Commission, another part of management.

This view treats the management of state government as much more monolithic than is actually the case. Nevertheless the view exists and because of it, many employee organizations hold the perception that at no point are they afforded the opportunity to make their case before a truly impartial forum. A number of employee organizations would much prefer to have most labor relations matters decided by independent arbitrators whose decisions would be as binding upon the state as upon employee organizations. However, such a system of binding arbitration at the state level would be susceptible to challenge on grounds of unlawful delegation of authority. Given its constitutional responsibility to regulate the classified civil service system, it is doubtful

the Commission could legally agree to a system which would be finally binding upon it.

These concerns have led to the complaint that what the Commission instituted in 1980 was not "true" collective bargaining. The observation has also been made that the collective bargaining framework which exists in the private sector, and in the public sector at the local level in Michigan, is the ideal to which the classified civil service employment relations framework ought to aspire, particularly because the scope of bargaining at the local level is substantially broader.

The question whether that which exists in the classified civil service is true collective bargaining begs the far more important question of whether true collective bargaining, however defined, is suitable for adoption at the state level. Therefore, both the complaint and the observation require an examination into the nature of employment in the classified civil service and the extent to which that employment may differ in comparison with both the private sector and the public sector at the local level.

Private sector labor relations are governed essentially by the National Labor Relations Act. The principal Section, 8(d), requires an employer to bargain in good faith with its employees, or their exclusive representatives, with respect to "wages, hours, and other terms and conditions of employment." Public sector collective bargaining at the local 'level in Michigan is governed by the Public Employment Relations Act or PERA. Section 15 of PERA is virtually identical in content to Section 8(d) of the National Labor Relations Act and has been so interpreted by Michigan courts on numerous occasions.

The philosophic foundation upon which the National Labor Relations Act was erected was the equalization of bargaining power between private parties employer and employee — each of whom sought to improve his or her private economic position. This foundation was clearly stated in the "findings and policies" set forth by Congress in Section 1 of the act. The view had emerged by 1935, the year in which the National Labor Relations Act was adopted, that workers would not be taken seriously unless placed on an equal footing with their employers. Industrial strife would occur, one result of which would be economic waste and a burden on commerce. The avoidance of industrial strife was the desired end: collective bargaining but one means by which it might be achieved.

Private sector collective bargaining is by nature bilateral. The obligation imposed upon an employer and a union to bargain in good faith is a mutual one. While the public does have an interest in private sector collective bargaining, that interest is more remote. The interest does not extend to the substantive content of a particular agreement, but is limited to ensuring that the collective bargaining process does not become disruptive of the public peace. To the extent that the content of a private agreement requires an increase in the cost of the item produced, that cost is passed on only to purchasers of the product and not to the public at large. In general a particular customer may avoid the increased cost by avoiding the product. There exists no parallel, purely economic component in the public sector.

The essence of the public sector is the art of governing, not that of operating a business. A unit

of government does not exist to earn a profit, but rather to provide services, many of which may be mandated by law. Notwithstanding the technical difficulty which arises in the public sector of ascertaining who the "employer" is, practically speaking the people who comprise a unit of government and pay the taxes to support it constitute the employer.

As the New Jersey Supreme Court noted in **Ridgefield Park Education Association** v **Ridgefield Park Board of Education,** "the true managers are the people." (393 A2d at 287.) This is so because the cost of a tax-supported service is borne by all the taxpayers who comprise the governmental unit, even those taxpayers who may not be eligible for, nor wish to partake of a particular service. Since the public sector is a monopoly not subject to market discipline, the taxpayer can only avoid the cost by moving to another location outside the unit of government. It is axiomatic that the compensation paid to public employees has a direct relationship to the cost of services provided. This direct effect which public sector collective bargaining agreements can have on taxpayer costs makes reasonable the position that the public interest with respect to such agreements should properly extend not only to the integrity of the process, but also to the substance of any agreement.

Labor relations academicians have long given obligatory reference to these fundamental differences between the public and private sectors, and then recommended that states adopt the private sector model as if the differences did not exist. It is true that collective bargaining in the private sector has existed for over half a century, while it is of fairly recent origin in the public sector. As a result, the private sector has offered a wealth of experience from which to draw. But the challenge remains to develop a labor relations framework especially designed to meet the unique needs of the public sector. As the Pennsylvania Supreme Court noted in **Pennsylvania Labor Relations Board** v **State College Area School District,** (461 PA 494, 499; 1975),

> We emphasize that we are not suggesting that the experience gained in the private sector is of no value here, rather we are stressing that analogies have limited application and the experiences gained in the private employment sector will not necessarily provide an infallible basis for a monolithic model for public employment.

In Michigan this challenge involves harmonizing labor relations with the constitutional scheme found in Section 5 of Article 11.

B. The Constitutionality of the Commission's Decision to Grant Collective Bargaining

Whether the present employment relations framework established by the Commission comports with the state Constitution requires an examination of two related but distinct legal issues. The first, to which reference has been made throughout this chapter, is whether the Commission had the authority to institute collective bargaining absent constitutional amendment. This issue does not concern an unlawful delegation of authority since an agency cannot delegate, lawfully or otherwise, authority which it does not rightly possess.

The fact that an agency possesses plenary authority, as the Civil Service Commission has been

held to possess, does not mean that the agency may act in derogation of the very system entrusted to it. While the term plenary has been defined as "completed or "unqualified," such power cannot exceed the quantum granted by the people. If the voters of Michigan, having established the classified civil service system, reserved to themselves the right to modify it through collective bargaining, then the Commission's act was void for want of authority to accomplish it.

While nothing in Section 5 of Article 11 explicitly prohibits the Commission from providing a collective bargaining framework for classified employees, the authority to do so cannot be presumed. It is generally accepted that a state legislature is presumed to have any authority not denied it by the national or its own state constitution. Nevertheless, the 1961 Constitutional Convention provided in Section 48 of Article 4 that the Legislature was empowered to provide "for the resolution of disputes concerning public employees, except those in the state classified civil service."

The point was raised at the Convention whether, if the Legislature already possessed the authority to resolve public sector disputes, the proposed language might not be superfluous. Delegate Habermehl responded that

> [t]his may seem a little bit elementary that they [the Legislature] should have that power, and I think in this day and age there is probably very little doubt that they do have that power, but it must be remembered that for quite a long period in our history of labor relations there was a good deal of doubt about whether the legislature could act in this field.
>
> There are no cases in Michigan, but there were federal cases and cases in other states which held that any legislative enactment in this field was an impairment of the right of private contract that the legislature could not state anything relating to employment because that was a matter between employer and employee. None of us wish to continue that, and we wanted to insure that that line of cases would never come up again, so all we attempted to do was to insure that the constitution made clear that the legislature had the power to act in these fields. 2 Official Record, Constitutional Convention 1961, at 2339.

It is highly unlikely that the Constitutional Convention believed the Commission to have the presumptive authority to provide for collective bargaining when the same Convention was unwilling to rely upon a similar presumption with respect to the Legislature. To the contrary, rather than relying upon a presumption as to legislative authority the Constitutional Convention explicitly set forth in a contemporaneous section of the same Constitution the Legislature's authority to resolve public sector employment disputes. No such explicit provision, however, is found in Section 5 of Article 11.

The construction given to Section 5 of Article 11 by the Commission is entitled to serious consideration. However, the Commission cannot determine with finality whether its acts comport with the Constitution from which its authority derives. "It does not lie within the power of the Commission to decide with finality whether its acts are in conformity with constitutional

requirements as a matter of fact or of law. That is a question for judicial determination." **Reed** v **Civil Service Commission,** (301 Mich 137, 151; 1942).

The question whether the Civil Service Commission's decision to grant collective bargaining to the classified civil service was beyond its authority has not been judicially addressed. It is true that in **Council No. II, AFSCME v Civil Service Commissions** (408 Mich 385; 1980), the state Supreme Court noted

We do not question the commissions authority to regulate employment-related activity involving internal matters such as job specifications, compensations grievance procedures, discipline, collective bargaining and job performance, including the power to prohibit activity during working hours which is found to interfere with satisfactory job performance.

However, the **AFSCME** case is inapposite for two reasons. First, the quoted language was unnecessary to the decision reached in the case. The Court was merely attempting to contrast examples of employment-related activity – which the Commission could regulate — with the before or after work political activities of classified employees which were at issue in the case and which were, in the Court's opinion, beyond the Commission's reach. Secondly, the Court assumed only that the Commission had the authority to "regulate" collective bargaining, not that the Commission could establish such a framework absent constitutional amendment.

The legal issue of the Commission's authority to establish collective bargaining, while no doubt the source of some discomfort, is unavoidable to a serious analysis. Because the employment relations framework established by the Commission has been in place since April of 1980, some inconvenience might result if it were struck down as unconstitutional. However, the mere passage of time cannot render appropriate an act if unconstitutional when done. Furthermore, Section 5 of Article 11, which permits any citizen of the state to enjoin a violation of or to compel compliance with the classified civil service provisions by bringing an action in the nature of injunction or mandamus, neither states nor implies that such an action must be brought, if at all, within a specified time.

While the question whether the Commission was authorized to grant collective bargaining to classified employees has not been addressed by Michigan courts, the question whether the Commission was **required** to do so has been addressed in no uncertain terms. The case of **Welfare Employees Union** v **Civil Service Commission,** (28 Mich App 343; 1970), involved a challenge to a reorganization plan proposed by the Wayne County branch of the state Department of Social Services. Because the union contended the reorganization would impact upon the wages, hours and working conditions of certain of its employees, the union sought to negotiate over the matter. The Commission and the Social Services Department took the view that they were neither required, nor "… empowered to, negotiate with plaintiff union , * * * as regards wages, hours of work, and other working conditions." (28 Mich App at 346.)

The trial court issued a declaratory judgment in the case, part B of which stated in pertinent part, "(e)mployees of the state classified service under the jurisdiction of the Michigan Civil Service Commission have the right to collectively bargain with their employer as pertains to wages,

hours of work, and other conditions of employment…." (28 Mich App at 347.) The Court of Appeals disagreed with the phraseology used by the trial court. The appellate court noted that

> The phrase 'right to collectively bargain' in part B of the Judgment can be construed as meaning that the various state agencies are obligated to bargain with the union in the same manner as are public employers who are subject to the Michigan public employees [sic] relations act of 1965. **If the phrase is construed in that manner it is completely inaccurate. The Commission controls all conditions of employment and is vested with plenary powers in its sphere of authority.** (28 Mich App at 352; emphasis supplied.)

The Court of Appeals modified the language of part B to clearly state that the Commission was under no obligation "… to extend to state classified employees collective bargaining benefits." (28 Mich App at 354.) Thus modified, the matter **was** remanded to the trial court so that affected employees could pursue the matter through existing grievance procedures established by the Commission.

C. The Commission's Delegation of Authority

Should it be determined that the Commission acted within its authority in granting collective bargaining, there would remain the question whether the Commission implemented its decision in a proper manner. This legal issue relates to the validity of the Commission's delegation of authority to other officials.

It is clear that the Commission no longer fixes compensation; that function is now performed by subordinate agencies. However, collective bargaining — and the corollary process of coordinated compensation — may be viewed simply as having altered the **method** by which wages and working conditions are established, without having lessened the Commission's constitutional duty to regulate the overall process.

Herein lies the source of a considerable misinterpretation with respect to the Commission's role. The Commission has sought to portray itself as a neutral in the employment relations framework. In one sense, this portrayal is proper. The Commission represents neither the interests of management, nor of labor, but rather the long-term public interest in the merit system. Neutrality, however, does not connote an abrogation of constitutional duty. While the Commission does not actively participate in the collective bargaining process, in the sense that it does not bargain on behalf of the state, the Commission does have a constitutional duty to regulate both the process and the results produced by it to ensure that the public interest is protected. Much of the criticism directed at the Commission's role has implicitly suggested that the exercise by the Commission of its regulatory function is tantamount to interference with the collective bargaining process. Such criticism is misplaced.

The provisions of Section 5t together with the Constitutional Convention debates relating thereto, evince the intention to create a comprehensive and unitary framework for the classified civil service. The people of Michigan invested the Civil Service Commission, and none other, with the responsibility to "classify **all** positions" in the civil service system, "to fix rates of compen-

sation for **all** classes of positions," to approve or disapprove monies for personal services, "to make rules and regulations covering **all** personnel transactions, and regulate **all** conditions of employment in the classified service." (Emphasis supplied.)

This constitutional language makes reasonable the inference that the voters intended the Commission to play an active and vital role in the management of the state's personnel systems irrespective of the method employed to give it effect. Therefore, the question must be asked whether the Commission has delegated so much authority to others and placed such limitations upon its own discretion so as to have abrogated its duty to **"regulate** all conditions of employment in the classified service." (Emphasis supplied.)

1. Areas of Responsibility Retained by the Commission

It would appear that the validity of the manner by which the Commission delegated its authority to subordinate agencies must hinge, if at all, upon the extent to which the Commission retained adequate decision making authority. Commission employee relations policy rule 6-9.5 sets forth the standards by which the Commission reviews the employee relations recommendations now made by other agencies. The rule states that

> It is the policy of the Civil Service Commission to encourage agreement between the parties in the contract negotiation. Upon publication the commission will review and ratify or modify negotiated agreements, impasse panel recommendations, [and] Board recommendations in accordance with the following criteria:
>
> (1) Any provisions contrary to the constitution, or a statute shall not become effective until such constitution, or statute is amended.
>
> (2) Any provision affecting rules, regulations or procedures of the Commission shall be effective for the employees in the affected unit upon ratification by the Commission. However, any provision affecting rules, regulations or procedures of the Commission shall not affect employees not represented by the exclusive representative until such rule, regulation or procedure has been amended.
>
> (3) Any provision in violation of the merit principles promulgated by this Commission shall not become effective.
>
> (4) An impasse panel decision which includes an award involving conditions of employment over which the employer is not required to bargain under this rule shall, separately from the remainder of the award, be null and void unless the employer shall have voluntarily submitted such conditions of employment to negotiations. Prohibited subjects of bargaining [Section 6-2.1(19)] shall not be negotiated or subject to impasse panel consideration.
>
> (5) Any provision which is arbitrary, capricious or contrary to the public interest shall not become effective.

All other provisions shall be ratified promptly by the Commission. Ratification shall not affect the Commission's constitutional responsibilities.

(6) Any provision which prohibits or severely limits a state agency in the use of contractual services shall not become effective. This rule shall not be construed to prohibit provisions in labor contracts which:

(a) Involve reasonable notice to the union of impending contractual services;

(b) Provide reasonable "meet and confer" rights for the union in such circumstances;

(c) Provides [sic] that the employer will make reasonable efforts (not involving a delay in implementation) to reduce the impact of such contractual services on existing state employees.

Several facets of the rule invite attention. First, the term "modify" as used in the first paragraph of the rule is a misnomer. None of the criteria contained in paragraphs (1) through (6) permit the Commission to "modify" a contract in the sense of adding to it, or rewriting it in whole or in part. To the contrary, the rule speaks in terms of holding the contractual provision in abeyance until the Constitution or statute is changed to remove a conflict. The criteria do not allow the Commission to resolving a conflict by modifying a collective bargaining agreement.

The Commission is no doubt cognizant of the fact that since it is not a party to negotiations it may not have an adequate appreciation for the intricacies by which a particular agreement was reached. Therefore, the Commission must feel some obligation to approve contracts unless they would clearly do violence to those limited areas over which the Commission has retained control. This fact is evident by the language contained in paragraph (2).

Paragraph (2) permits the State Employer and a union to negotiate a Commission rule, regulation or procedure out of existence as to the affected employees. This in effect allows the negotiating parties to exercise the Commission's quasi-legislative rule-making power, notwithstanding the fact that Commission ratification is required. Presumably when paragraph (2) is read in conjunction with paragraphs (3) and (5), negotiating parties could not supersede a rule involving merit principles, nor could a provision which was arbitrary, capricious or contrary to the public interest become effective.

Secondly, the language of paragraph (2) could lead to a lack of uniform application of Commission rules with respect to classified employees generally, since a rule would only cease to be effective with respect to those employees who had negotiated it out of existence, but would remain in force for other classified employees.

As was noted in **Chapter 2,** the rules of the Commission constitute the "legislation" which governs the civil service system. It may be that the Commission does not view all classes of its rules to be of equal dignity. For example, the Commission has adopted the policy of permitting the negotiating parties to alter, or negotiate away, rules governing general conditions of employ-

ment, or other matters not excluded from the scope of bargaining.

A sound argument can be made that a Commission rule which implements a merit principle should be treated in the same manner as paragraph (1) treats the Constitution and statutes, namely that a conflicting contractual provision cannot take effect unless and until the former are amended. However, it may not be clear at the time a contract is ratified that it conflicts in some particular with an existing Commission rule or with merit principles, or that it is arbitrary, capricious or contrary to the public interest. Yet under the language of paragraph (2) ratification would have the effect of superseding a conflicting rule, and without an opportunity by the Commission to consider the consequences.

D. Judicial Interpretations Concerning the Delegation of Authority in Public Employment

Two cases involving the delegation of authority in the public employment relations context have been decided by the Michigan Supreme Court. Both **Firefighters Union Local No. 412** v **City of Dearborn,** (394 Mich 229; 1975) and **City of Detroit** v **Detroit Police Officers Associations** (408 Mich 410; 1980) involved the constitutionality of Public Act 312 of 1969. Act 312 provides compulsory interest arbitration to resolve disputes involving municipal police and firefighter personnel.

Neither the **Dearborn Firefighters** case nor the **Detroit Police Officers Association** case is precisely on point when focus turns to the state classified civil service system. In neither case was the Legislature delegating its authority in a manner which would limit its own discretion. Act 312 placed certain limits upon the ability of **local** units of government to act unilaterally. The Commissions however, has in effect placed limitations upon itself.

Secondly, the **Dearborn Firefighters** and **Detroit Police Officers Association** cases involved the delegation of legislative powers, while the Commission possesses a combination of legislative and quasi-judicial powers. These differences notwithstanding, the **Dearborn Firefighters** and **Detroit Police Officers Association** cases do offer some insight into how the Court might resolve the question concerning the validity of the Commission's delegation of authority.

One of the challenges leveled against the arbitration statute in the **Dearborn Firefighters** case was that the act constituted an unlawful delegation of legislative authority. At the time the case was decided, each of the parties to the dispute selected a delegates with the two delegates then selecting a third individual from the community at large to act as a neutral arbitrator. The tenure, and thus the accountability, of the arbitrator lasted only so long as the dispute over which he or she presided. The state appointed an arbitrator only in the event the parties could not agree.

The constitutionality of the statute was upheld in a two-one-one decision. (Although the state Supreme Court consists of seven Justices, during the two years it took the Court to reach a decisions the Court lost three of its members. Therefore, only four were left to dispose of the case.) However, the Court appears to have agreed on two points. First, legislative authority cannot be delegated to private parties, meaning individuals not politically accountable to the

public. Two members of the Court would have held the statute unconstitutional because it failed in their view to meet this first test.

Secondly, a delegation to be valid must be accompanied by sufficient standards to guide the conduct of the person to whom the authority is delegated. All four members of the Court were of the opinion that the standards were adequate. The **Dearborn Firefighters** case offered little in the way of precedential value since the split decision simply had the effect of upholding the result reached by the Court of Appeals.

Five years later, in the **Detroit Police Officers Association** case, the Supreme Court revisited the constitutional issues surrounding Act 312. The question of accountability had subsequently been addressed by the Legislature. In 1976 Act 312 was amended to require the Michigan Employment Relations Commission to maintain a permanent panel of arbitrators. This amendment satisfied a majority of the Court that authority was no longer being delegated to private parties.

The question whether Act 312 contained adequate standards created more difficulty for the Court. The Court majority articulated a standards test originally set forth in **Osius** v **St Clair Shores,** (344 Mich 693; 1956). The **Osius** Court had observed that

> There is no doubt that a legislative body may not delegate to another its lawmaking powers. It must promulgate, not abdicate. This is not to say, however, that a subordinate body or official may not be clothed with the authority to say when the law shall operate, or as to whom, or upon what occasion, provided, however that the standards prescribed for guidance are as reasonably precise as the subject matter requires or permits. (344 Mich at 698.)

The standards test may be viewed as a yardstick used to measure the point at which a court will declare a delegation invalid. In summary then, the **Dearborn Firefighters** and **Detroit Police Officers Association** cases suggest two points which are of relevance at this juncture. First, legislative authority cannot be delegated to parties who are not politically accountable to the public. Secondly, a delegation to be valid must be accompanied by sufficient standards to guide the conduct of the person or agency to whom the authority is delegated and those standards need only be as "reasonably precise as the subject matter requires or permits." It is within the context of these two considerations that the employment relations framework established by the Commission must be judged.

E. Delegation of Authority to Private Parties

The Commission's delegation does not run afoul of the first point because the Commission has not delegated its authority to private persons. Both the Office of State Employer and the Employment Relations Board are public agencies, with lines of accountability to superiors. The State Employer is appointed by and accountable to the Governor, based upon both the Commission's employee relations policy and the executive order which established the office. The members of the Employment Relations Board are appointed by and accountable to the Commission. Likewise, employees within the Department of Civil Service who perform various employment rela-

tions functions do so under the auspices of the state Personnel Director, who is in turn accountable to the Commission.

F. Sufficiency of Standards

The necessity for adequate standards arises principally in two contexts: first, to guide the conduct of those to whom certain employment relations responsibilities have been entrusted by the Commission, such as the Office of State Employer and the Employment Relations Board, and secondly to guide Department of Civil Service staff whose function it is to review the work done by these subordinate officials to ensure that the public interest and the merit system is preserved.

1. The Office of State Employer

The standards which guide the conduct of the State Employer's office are found in the Commission's employment relations policy and in the Governor's executive order which implemented that policy. Rule 6-2.1(21) of the policy states that "[t]he State Employer shall direct negotiations of primary contracts at the central level." The rule goes on to state that … "the State Employer shall coordinate all negotiations and collective bargaining contract administration with appointing authorities."

Rule 6-4.2(l) states that the Governor, or his designee, has the "responsibility and the authority to direct, coordinate and develop the employer's employment relations policy in the area of collective bargaining, contract administration, grievances, unfair labor practices, improvements in work performance and administrative efficiency, and training in support of these activities." Additional responsibilities are set forth in rule 6-4.2(2) and (3). The Governor's executive order delineates similar responsibilities in thirteen separately lettered paragraphs.

These standards appear to adequately delineate the authority of the State Employer which was delegated to that office by the Commission. A lack of cooperation between the State Employer and principal departments has been noted, but it does not appear to stem from a deficiency of standards.

2. The Employment Relations Board

As was stated previously in **Part II,** the three-member Board was established by the Commission in 1980 and performs three functions, which are: acting as an appellate body with respect to certain grievances developing a compensation plan for classified employees not covered by collective bargaining agreements, and serving as a panel to resolve impasses arising during the course of contract negotiations. Each of these functions is in the nature of a delegation of authority by the Commission and should therefore be accompanied by adequate standards.

Coordinated Compensation. Employee relations policy rule 6-3.4(3)(c) requires the Board to recommend to the Commission a compensation plan for employees not covered by collective bargaining agreements. (It has been noted that the compensation of non-exclusively represented employees is in fact not coordinated with anything in particular.) Rule 6-9.4 requires that the recommendation be transmitted by December 1 of each year. Article II of the Board's proce-

dures sets forth the framework and indicates what parties may participate in the process.

Exclusive representatives, limited recognition organizations, individual employees, and the State Employer take part in the process. These parties present economic and wage data to support their proposals, but there are no written standards to indicate how much weight, if any, is accorded this evidence by the Board. Nor is it clear to what extent the Board may rely upon economic or budgetary data not presented by the parties, but of which the Board is independently aware. To the extent that the Board may rely upon data not presented to it in public hearing, it is impossible for the other participants in the process to evaluate such data or to offer rebuttal evidence. Neither the employee relations policy nor the Board's procedures indicate the manner by which a compensation plan is developed.

Impasse Functions. The criteria by which the board resolves impasses were set forth in **Part II.** The criteria are similar to and appear to have been borrowed from Section 9 of Public Act 312 of 1969. The Court in the **Detroit Police Officers Association** case upheld the Act 312 criteria as meeting the **Osius** test.

3. The Merit System and Contract Review

Collective bargaining agreements entered into between a union and the State Employer's Office, on behalf of the state, must be ratified by the Civil Service Commission before taking effect. Since the contracts can be both lengthy and complex, the Commission itself goes not conduct the review, but relies upon the Department of Civil Service to perform this function.

The review is conducted by an informal panel of Department of Civil Service staff. The panel consists of one person from each of the following eight program areas:

Administrative Services Bureau
Classification Bureau
Compensation Programs
Equal Employment Office
Employee Benefits
Labor Relations Bureau
Legal Counsel
Selection Bureau

The process is coordinated out of the Personnel Director's Office. The individuals comprising the panel review a contract to ensure that its terms are not inconsistent with classified civil service rules governing the respective program areas. Based upon the review, a recommendation for the disposition of the contract is made to the Commission. Employee organizations are not universally pleased that Department of Civil Service staff review the contracts before they are presented to the Commission. However, these agreements are not private documents into the nature of which an inquiry cannot be made except by leave of the participants. Reviewing these contracts serves a valuable function by alerting the Commission to potential areas of concern.

It is incumbent upon the Commission to uphold its constitutional responsibility to protect the

interests of the public, management, and employees within the context of the merit system. To do this, the Commission must preserve its responsibility to evaluate collective bargaining agreements to ensure they comport with the constitution and laws of the state, and with the merit principles of the civil service system.

Vigorous review of contracts is in accord with the practice of other states. It is erroneous to suggest that in most states a contract is permitted to take effect when the negotiating parties reach agreement. None of the other states examined for purposes of this study permit contracts to become effective until they are reviewed, the review being conducted by a governmental entity distinct from that which negotiated on behalf of the state. While the agency conducting the review may vary among the states often it is the Legislature because the appropriation of money is involved the principle that contracts should be reviewed seems to be generally accepted.

The Commission has not provided any written standards to assist the review panel in its work. Standards are necessary, in part, because contracts are often submitted so late in the process that staff may not have adequate time to conduct a thorough examination. Contracts must be approved by a given date so that the results can be transmitted to the Governor, who is required by the Constitution to include such recommendations in his executive budget. (It should be pointed out, however, that the amount of time needed to conduct a thorough review of a contract decreases as the bargaining relationship of the parties lengthens. As a contract between the state and a given union is renegotiated, the parties are required to indicate what language if any is being altered. Attention can then be concentrated on the areas where changes are made.)

Nevertheless, the need for standards is of vast importance. The essence of the Michigan classified civil service system is the concept of merit. This concept, when properly understood, encompasses a state work force which is not only free from invidious political considerations, but one to which all Michigan citizens have equal access. A necessary corollary to equal access for all is preferential treatment for none. That is why the merit system is excluded from the scope of bargaining. It can be advantageous to both management and labor to confine the merit system within as narrow a boundary as possible so as to expand the scope of discretion of the parties. But whether particular language in a given contract successfully encroaches upon the merit system may not be clear.

This lack of clarity was illustrated in an initial contract entered into by the state with the United Auto Workers. The contract was for the period January 8, 1986 to December 31, 1987 and covered approximately 21,500 classified civil service employees in the administrative support and human services units. It was the first contract negotiated by the state with this union.

Article 13 of the contract governed assignments and transfers of bargaining unit membership. Section C, paragraph 4 of the article stated in pertinent part that

> [i]f the Employer decides to use a Civil Service promotional register the Employer will give primary consideration to employees in these Bargaining Units [administrative support and human services] consistent with Civil Service Commission Rules and Regulations regarding classification and selection.

Precisely what constituted "primary consideration" was not known since the contract did not define the term. At first glance, the contractual language appeared to be limited in scope. Not only did it govern transfers, an area with respect to which the Civil Service Department has traditionally provided broad discretion, but the contract stated that its terms must be "consistent with Civil Service Commission Rules and Regulations regarding classification and selection."

However, section A of article 13 of the contract defined a transfer as "either the filling of a vacancy, or a permanent change in assignment...." A vacancy could either be "resulting," that is one created by an existing employee transferring out of the position, or "initial." The latter was defined as "a **now or existing unfilled,** permanent position which the Employer seeks to fill." (Emphasis supplied.) In other words, the contract defined a transfer so as to include a new position.

Thus, if the language of section C be read literally, then the state could not fill a new classified civil service position falling within the administrative support or human services bargaining units without first giving "primary consideration" to these bargaining unit members. The union had in fact adopted this interpretation, despite the fact that new positions in the classified civil service system are supposed to be filled by appointment based upon merit demonstrated through performance upon competitive examination. There have been reported instances where an individual who was not part of the applicable bargaining units was denied a position.

Not only was such an interpretation inconsistent with Commission rules, but it appeared to be in direct conflict with Section 5 of Article 11 of the state Constitution which states in pertinent part that the Commission shall

> determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service....

Furthermore, Commission employee relations policy rule 6-9.5(l) states that many provisions contrary to the constitution, or a statute shall not become effective until such constitution, or statute is amended." In theory, however, under the terms of the contract the state could be required to choose between upholding the merit system or being charged with an unfair labor practice for not offering primary consideration as required by the contract.

This situation might have been avoided altogether. Civil Service Department staff raised concerns about the Section C language when the contract was reviewed, but the Commission approved the contract notwithstanding. There was no legitimate reason why approval of the contract could not have been held in abeyance until some consensus was reached on the meaning of the term "primary consideration."

Commission rules governing the approval of contracts are constructed so as to allow corrective action to be taken when required, but the ability to do so depends upon the willingness of civil service employees and agencies to bring violations to the attention of the Commission and its staff. In November of 1987, the Department of Civil Service issued an advisory bulletin concerning eligibility requirements governing appointments to the classified civil service, it having

been brought to the Department's attention that certain agencies had limited consideration of applicants to those who were members of a particular bargaining unit.

The bulletin noted that only when bona fide eligibility requirements had been "fully observed to determine relative employability and qualifications of eligibles is it permissible for other approved criteria such as affirmative action concerns primary consideration contract language, etc, to be taken into consideration." The effect of the bulletin was more prospective than remedial in nature. Even though it indicated that an appointment made in violation of bona fide eligibility requirements would be voided, such action would not have the effect of making whole an applicant who had been improperly denied consideration.

Those who have had an occasion to reflect upon the matter must conclude that rationality is not an inherent characteristic of collective bargaining. Negotiation is more art than sciences, involving varying shades of intransigence and compromise, which are at best difficult to quantify. Nevertheless, it should invite no controversy to suggest that the Commission embrace those adjustments which will render the state's collective bargaining process more rational, without causing undue inflexibility. Adjustments must be guided by two principles set forth previously.

The first is that the interest of the public in the preservation of the merit system is of paramount importance and must, when there is a conflict, supersede the interests of the negotiating parties. The negotiating parties each attempting to negotiate an agreement most satisfactory to its own interests — cannot be expected to advance the public interest and it would be unfair to impose such a burden upon them. Towards the advancement of that interest the people established the Commission. The second and corollary principle is that the Commission's regulation of both the collective bargaining process and the results produced by it is not an interference with that process, but rather the fulfillment of a constitutional trust.

As an initial adjustment, the Commission could lay down a rule requiring that any contract submitted for ratification be accompanied by a statement, developed by its staff, explaining the intent behind those provisions about which concerns were raised by Commission staff review. Any interpretative statement approved by the Commission would be conclusive as to the meaning of that contractual provision in any subsequent dispute. The interpretative statement requirement need not extend to every class of Commission rule. Since as was noted, it appears to be the intent of the Commission to allow the negotiating parties to alter, or negotiate away, those rules governing general conditions of employment or other matters not excluded from the scope of bargaining, the requirement might be limited to ambiguous provisions which affect merit principles, or those which were found to be arbitrary, capricious or contrary to the public interest.

The requirement that such a statement be produced would no doubt be objected to as impracticable on two grounds. First, it will be said that the meaning of a contract cannot be known fully until the parties have had an opportunity to interpret it in the course of actual circumstances. Interpretation is often rendered more difficult by the negotiating parties intentionally adopting vague or imprecise language in an attempt to facilitate agreement, the hope of each party being that in the event of a subsequent conflict over intents their particular interpretation will prevail. Nevertheless it is unlikely that either the State Employer or a union would sign an agreement

without having some idea of what the contract would do. Without knowledge of a contract's meaning, neither negotiating party would have any basis for recommending that it be approved.

A more likely basis for objection is that a party to the contract might be reluctant to openly reveal an interpretation which might limit its discretion to later argue a more favorable interpretation. While this concern is understandable from the standpoint of the parties to the contract, the Commission has the authority, and the people of Michigan the right, to know the nature of any document which they are asked to approve, notwithstanding the fact that imprecise contractual language may be of benefit to the negotiating parties, or either of them.

Secondly it will be said that the composition of an interpretative statement would place an additional burden upon the negotiating parties. That the burdens placed upon the parties not be unduly enlarged is a legitimate concern to which the employment relations framework must be responsive. This concern would be substantially met, however, by limiting interpretative statements to those contractual provisions about which concerns were raised upon review because of their potential effect upon merit principles. Furthermore, among the salutary effects flowing from the requirement would be an inducement to the negotiating parties to choose language with greater precision, since to the extent that contractual provisions are free of ambiguity, no interpretative statement would be needed.

It has been suggested that a better approach might be to have the negotiating parties, or either of them, stay in constant communication with Commission staff during the course of negotiation to inquire whether particular proposals might conflict with merit principles. However, such an approach would still require the negotiating parties to explain the intent behind the provisions in order for Commission staff to render an informed opinion. And while improving lines of communication is a worthy goal, such a suggestion might excessively entangle the Commission in actual negotiations, adding credence to the perception that the Commission is really a part of management. The Commission has heretofore recognized that its role is not to actively participate in the collective bargaining process, but rather to regulate both the process and the results produced by it.

G. Supervisory Bargaining

The Commission at its April 1987 meeting was presented with a supervisory collective bargaining proposal made by the State Police Command Officers Association. State police command officers, of which there are approximately two hundred, are those above the rank of sergeant. The proposal, which was promptly tabled, was predicated in part on the notion that the Department of State Police is a "paramilitary" organization with a unitary command structure not found in other departments. This predicate was advanced in part no doubt to persuade the Commission that it can grant collective bargaining to command officers without incurring the obligation to grant similar rights to other supervisory employees. It is doubtful however, that other supervisory employees would accept the explanation that command officers constitute a peculiar exception to a traditional exclusion.

Presently, supervisors along with confidential and managerial employees, constitute a category

of non-exclusively represented employees known as "ineligible excludeds." The category is so named because the employees comprising it are excluded by the employee relations policy from bargaining due to ineligibility resulting from the type of position held. Supervisory employees constitute 7,866 of the 9,700 employees in the ineligible excluded category. (See **Table 5.1.)** In addition, an indeterminate number of employees in the business and administrative unit would likely be coded by the Civil Service Department as supervisory if that unit were to decide to engage in collective bargaining. To date, the membership of the business and administrative unit has not chosen to do so.

The precise number of employees who would be covered by supervisory bargaining cannot be determined because the Commission would be under no obligation to adhere to current definitions. However, the Commission has traditionally viewed supervisory employees as part of management rather than as part of the rank and file. So have studies which have been done of the Michigan classified civil service system. The 1975 task force appointed by the Commission excluded supervisory employees from the terms of its collective bargaining proposal. The Citizens Advisory Task Force on Civil Service Reform of 1979 also recommended that supervisory employees be excluded from collective bargaining.

The recommendations of these studies are consistent with the recent national trend toward exclusion of public-sector supervisory employee from collective bargaining. For example, the Civil Service Reform Act passed by Congress in 1978 excludes federal government supervisory employees from collective bargaining. Only one of the states (Minnesota) visited during the course of this study permitted supervisory employees the right to bargain.

Moreover, the National Labor Relations Act, which is so often relied upon by states as a model for the public sector, does not accord collective bargaining rights to private-sector supervisors. Ultimately, if the Commission has the legal authority to grant collective bargaining to supervisory employees, the decision of whether to do so is a matter of policy for the Commission to decide.

H. Summary and Conclusions

1. Approximately 72.2% (45,670 employees) of the classified civil service work force is organized for purposes of collective bargaining into ten broad occupational bargaining units. The Office of State Employer, on behalf of the Governor, negotiates collective bargaining agreements with the exclusive representatives. Matters of selection classification and subcontracting are excluded from the scope of bargaining.

2. The remaining 27.8% of the state work force (17,571 employees) are non-exclusively represented and do not engage in collective bargaining, but they are permitted to join limited recognition organizations have the right to "meet and discuss" with the employer regarding specified matters. Compensation for these employees is established by a three member Employment Relations Board appointed by the Commission. The Board also disposes of grievances on be-

half of the Commission with respect to those employees whose grievance procedure is not established by contract, and acts to resolve impasses.

3. Collective bargaining is a sharing of the power by which wages, hours and other terms and conditions of employment are determined. This sharing of power in the private sector has been accomplished by federal statutes, and in the public sector in Michigan — exclusive of the classified civil service by a combination of statute and judicial interpretations.

4. The question whether the Commission lacks authority to grant collective bargaining to classified civil service employees absent constitutional amendment has not been addressed by Michigan courts.

5. Assuming that the Commission acted within its authority in granting collective bargaining, the question remains whether the Commission has delegated so much authority to other agencies and placed such limitations upon its own discretion so as to have abrogated its duty to "regulate all conditions of employment in the classified service."

6. Current standards contained in the employee relations policy appear to adequately delineate the authority of the State Employer which was delegated to that office by the Commission. A lack of coordination between the State Employer and principal departments does not appear to stem from a deficiency of standards.

7. The review of collective bargaining contracts submitted to the Commission for ratification is conducted by an informal panel of Civil Service Department staff, but the Commission has not provided any written standards to assist the panel in its work to ensure that contracts are not violative of classified civil service rules.

8. The Commission has failed to provide written standards to govern how much weight the Employment Relations Board must accord economic and wage data presented by exclusive representatives, limited recognition organizations, individual employees, and the State Employer in support of coordinated compensation proposals. Nor is it clear to what extent the Board may rely upon economic or budgetary data not presented by the parties, but of which the Board is independently aware. In fact, neither the employee relations policy nor the Board's procedures indicate the manner by which a compensation plan is developed.

9. Departments occasionally do not respond to grievances within time limits set by the Commission, although the precise scope of the problem cannot be determined due to a lack of documentation.

I. Recommendations

The following recommendations are made with respect to the employment relations framework, which encompasses both collective bargaining and other procedures.

1. The Commission should direct the Employment Relations Board to revise its procedures to set forth in Article II thereof the types of data which the Board may consider with respect to the coordinated compensation procedure, and to require that any data relied upon to reach a decision be presented in public hearing, provided that any data presented to and relied upon by the Board subsequent to the close of hearings be appended verbatim, or incorporated by reference to the Board's recommendation to the Commission.

2. The Commission should examine whether such time limits as are presently contained in rule 8-202(l) through (4) are reasonable. It is further recommended that the Commission revise rule 8-105 of the employee relations policy to require both departments and employees to fully comply with applicable time limits governing grievance procedures for non-exclusively represented employees.

Chapter 6

The Employment Relations Provisions of Other Selected States

Introduction

In seeking to evaluate the efficacy of the employment relations framework established by the Michigan Civil Service Commission, it is profitable to examine how other major states have responded to many of the same civil service and labor relations concerns. The analysis which follows was composed by examining state constitutional provisions where applicable, statutory provisions governing both civil service and collective bargaining, and applicable case law and law review articles. In addition, Research Council staff and an official of the Michigan Department of Civil Service traveled to California, Minnesota, New Jersey, New York, and Wisconsin to meet with the officials who administer the respective programs. Description of Illinois and Ohio provisions were produced without visitation.

The civil service systems of these states may be categorized into three groups: those states such as Michigan where the legal basis is purely constitutional; those states such as California, New Jersey, New York and Ohio where the legal basis is both constitutional and statutory; and states such as Illinois, Minnesota and Wisconsin where the legal basis is statutory only. The organizational structures of the several states, as they relate to employment relations, are presented at the end of this chapter. While helpful insights may be gained from such interstate comparisons, a proper appreciation must be maintained for the particular social, political and historical features of each state in which the respective laws have developed.

Part I. California

A. Constitutional Provisions

The legal basis for the California civil service system is both constitutions and statutory. The California system developed in much the same manner and in response to many of the same concerns as did the system in Michigan. The California system began by statute in 1913, but as in Michigan, the statutory framework proved to be an inadequate defense against political pressures.

The Legislature greatly increased the number of positions which were exempted from the civil service. For examples in 1932 only 11,917 of 23,222 full-time state employees held permanent positions. Temporary appointments were abused despite the fact that such appointments were not to exceed a duration of three months. At one point, one-third of the state's work force was comprised of temporary appointments. In response to these concerns, the voters adopted a constitutional civil service system in 1934.

Section 1 of Article 7 of the California Constitution provides that

> (a) The civil service includes every officer and employee of the state except as otherwise provided in this Constitution.

(b) In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination.

Section 2 provides that

(a) There shall be a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 10-year terms and until their successors are appointed and qualified. Appointment to fill a vacancy is for the unexpired portion of the term. A member may be removed by concurrent resolution adopted by each house, two thirds of the membership of each house concurring.

(b) The board annually shall elect one of its members as presiding officer.

(c) The board shall appoint and prescribe compensation for an executive officer who shall be a member of the civil service but not a member of the board.

Section 3 provides that

(a) The board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.

(b) The executive officer shall administer the civil service statutes under rules of the board.

Section 4 exempts from civil service legislative and Judicial employees, members of boards and commissions, elected officials and those appointed by the Governor, and certain other minor offices. In addition, officers and employees of the University of California and the California State Colleges are exempt, as are the teaching staffs of schools under the jurisdiction of the Department of Education or the Superintendent of Public Instruction.

B. Statutory Provisions

Civil Service. The personnel management system is divided between two agencies, the State Personnel Board and the Department of Personnel Administration. There are approximately 130,000 classified state employees. In general, the Board retains responsibility for the state's merit system and the Department is responsible for administering the non-merit aspects of the personnel management system. Major activities of the Department include labor relations, classification and compensation, employee benefits and training. The Board is responsible for affirmative action, merit oversight, selection and employee appeals.

A comprehensive affirmative action program is monitored by the Board. Protected groups include blacks, Hispanics, Filipinos, Asians, Pacific Islanders, American Indians, women and disabled persons. Using 1980 U.S. census data for California, the general standard for protected groups is the percent of the protected group in the labor force. In some situations, occupational labor force is used in establishing a standard and the percent of Hispanic attorneys is used rather

than total work force data for the employment of attorneys in the Department of Justice. As of July 1986, based on the state standard, Hispanics, Pacific Islanders, and disabled were underrepresented. The most serious affirmative action problem relates to Hispanics. The 1980 census standard for Hispanics is 17.2 percent and Hispanic employees represented 12.6 percent of the civil service work force in 1986. In 1990, it is expected that 30 percent of the civilian work force will be Hispanic. Protected group members have established organizations to further their interests.

Any agency below parity is subjected to public scrutiny. The annual census of state employees is reported in the press. Any agency below parity must establish goals to reach the state standard within five years. Quarterly meetings are held with agencies by the Board to monitor progress. These meetings are attended by representatives of the protected group organizations and receive media attention. This system has resulted in significant progress in meeting protected group goals.

The Board recently has developed a procedure to assist agencies in reaching parity for underrepresented protected groups. This involves giving an examination for entry level positions to representatives of an underrepresented group and creating a register based on that examination. Thus, an examination is being given for auditor-Hispanic. An employing agency could use this register or the regular register. A person of Hispanic background could take both examinations and appear on two registers.

California has a classified executive service system known as career executive assignments (CEA). The program was started in 1963 and is the oldest classified executive program in the nation. There are 650 top management positions designated as CEA. CEA positions include deputy directors, division chiefs and specialists such as legislative liaison. An employee can be dismissed for any reason other than discrimination. CEA employees do have return rights to a regular civil service position. Individuals appointed to a CEA position must be in a permanent civil service position. It is not possible for a person outside the career service to take an exam in order to be placed on a CEA register.

There is a performance appraisal and bonus system that complements the CEA. The system covers 2,500 management employees including the 650 CEA employees and 500 unclassified employees. The balance, or 1,350 positions, are classified management positions outside of CEA. Employees are evaluated four times per year. State employees outside of the management area are evaluated once per year.

The bonus system has existed for two years. There is a separate state appropriation for the bonuses. The bonuses do not become part of the base salary of an employee. There is a two tier cap on bonuses awarded in a department. No more than 20 percent of the eligible employees can receive a bonus and the bonus range is $2,500 to $5,000 per employee. The agency appropriation is based on the 20 percent limitation and an average bonus of $2,500. If a department awarded all $5,000 bonuses, only 10 percent of the eligible employees could receive a bonus. At the present time, about 85 percent of the departments participate in the bonus program. All agencies must participate in the performance evaluation system.

Management of the merit principles has been decentralized by the Board. Testing and the preparation of employment lists have been decentralized to the operating departments. The Board conducts central testing for general classes (e.g. clerical) found in all state agencies. There are about 1 000 examinations in process at any one time. The principal justification for the decentralized system is to reduce the time it took to give and score an examinations and produce an employment list. Under the centralized system it took approximately nine months for the process to be completed. The key to success of a decentralized system is the ability and the desire of the Board to provide oversight and audit the activities of the operating agencies.

Personal services contracting has become a major issue with the employee organizations. In 1982, the Legislature passed a cost savings personal service contracts statute. Cost saving personal service contracts require Board review and approval. No other personal service contracts require central review or approval. There are 11 statutory requirements that cost saving personal service contracts must meet in order to obtain Board approval. The statutory provisions include requirements that contractors wages be at the industry's level, affirmative action programs not be affected adversely, and contracts must be awarded through competitive bid.

Employee organizations believe cost saving personal services contracting is an attack on the civil service system. The California State Employees, Association has initiated litigation challenging personal services contracting as a violation of the constitutional provision establishing a civil service system.

Collective Bargaining. The California Legislature in 1961 adopted the George Brown Act, which granted meet and confer rights to state personnel, as well as to a host of university and local government employees. A major strike by state employees occurred in 1972, prompting the Legislature to appoint an advisory body to make recommendations on establishing an improved labor relations framework. The advisory group recommended the adoption of a statewide law patterned after the National Labor Relations Act. In 1977, the Legislature adopted the State Employer-Employee Relations Act or SEERA, since amended by the Ralph C. Dill Act.

Section 3517 of the Annotated California Government Code imposes a mutual obligation upon the Governor, or his representative and upon representatives of recognized employee organizations to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment" and Section 3517.5 requires any agreement reached to be reduced to a written memorandum. The term meet and confer appears to have been used to indicate that no right to strike **was** being granted by implication, apparently in response to **Los Angeles Metropolitan Transit Authority** v **Brotherhood of Railroad Trainmen,** (355 P2d 905; 1960). In that cases the state Supreme Court had held that the term collective bargaining as used in the Metropolitan Transit Authority Act of 1957 implied the granting of a host of rights, including the right to strike.

The framework established by SEERA does limit the scope of the process in certain respects. Section 3516 provides in pertinent part that "the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Section 3517.6 requires that any memorandum providing for the expenditure of money not be effective unless approved by the Legislature in the annual budget. Finally, with

the exception of specific statutes which the Legislature has determined to be superceded by memoranda of understanding any memorandum which conflicts with a statute cannot take effect unless approved by the Legislature. SEERA is administered by the Public Employment Relations Board. The Board consists of three members appointed by the Governor with the advice and consent of the Senate to five year terms. The duties of the Board include holding representation elections, determining scope of representation matters, and investigating unfair labor practice charges.

A Department of Personnel Administration was established in 1981 through an executive reorganization plan. The department bargains on behalf of the state and establishes pay for managers, supervisors, confidential employees and for other civil service positions which have been excluded from the collective bargaining process. The department also administers employee benefits, training, collective bargaining contract administration and classifications.

The classification function may be viewed as having both a compensation component and a selection component. The former component was transferred from the State Personnel Board to the Department of Personnel Administration in 1981, because of the department's central role in paysetting. In 1984, the additional responsibility for the daily administration of the classification and compensation plans was also transferred from the Personnel Board to the department. Because of the board's constitutional mandate it still reviews classification decisions, but the major area of responsibility retained by the board is that of affirmative action.

C. Judicial Interpretations

In the case of **Pacific Legal Foundation** v **Brown,** (Cal 624 P2d 1215; 1981), the State Employer-Employee Labor Relations Act was challenged on grounds that it was facially unconstitutional. It was alleged that SEERA conflicted with the provisions of Article 7 of the California Constitution regarding the State Personnel Board. Specifically, it was contended that the constitutional authority of the board to prescribe classifications of necessity implied the authority to establish levels of compensation for those classifications. In a general sense the contention was that the process of collective bargaining conflicted with an appointment and promotion system based on merit.

A challenge to a statute on grounds that it is unconstitutional on its face must "demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions." (Cal 624 P2d at 1221.) The Court concluded that the Legislature had drafted SEERA with appropriate constitutional provisions firmly in mind. Secondly, it was held that the setting of salaries was an historically legislative function. it was admitted that under the 1913 statutory framework, the State Personnel Board had the power to fix rates of compensation. The Court, however, viewed this as a delegation of authority by the Legislature rather than as an inherent power of the Personnel Board.

Part II. New Jersey

A. Constitutional Provisions

The legal basis for the New Jersey civil service system is both constitutional and statutory. In additions the state's collective "negotiation" statute has a constitutional antecedent. The second paragraph of Section 1 of Article 7 of the New Jersey Constitution provides that

> appointments and promotions in the civil service of the States and of such political subdivisions as may be provided by laws shall be made according to merit and fitness to be ascertained, as far as practicable, by examinations which, as far as practicable, shall be competitive; except that preference in appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law.

Section 1 of Article 9 provides that:

> [p]ersons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

New Jersey courts generally construed the language of this section to the effect that public employees had no right to bargain collectively, absent statutory authorization.

B. Statutory Provisions

Civil Service. New Jersey's civil service act was adopted in 1909. The act was substantially revised to its present form in 1986 and is now set forth beginning at New Jersey Statutes Annotated 11A:1-1. Section 2-1 established a Department of Personnel in the executive branch. The Department consists of a Personnel Commissioner who is its chief executive, a five-member Merit System Board, one member of which is the Commissioners and various subdivisions such as that of Equal Employment Opportunity and Affirmative Action. Section 2-3 provides that the members of the Board are to be appointed by the Governor to four year terms, with the advice and consent of the Senates and may be removed for causes except that the Commissioner serves at the pleasure of the Governor.

The Merit Systems Board acts as an appellate body with respect to disciplinary matters. The Board also establishes procedures to govern transfers and reassignments and as provided in Section 3-1, assigns titles for the career, unclassified and senior executive services. The latter service includes all positions having substantial managerial or policy responsibilities, as determined by the Board. The total number of such positions is limited by the civil service act to twelve hundred. The classified service consists of approximately 62,000 employees, including employees of the State college system. There are approximately 14,000 employees in the unclassified service.

The Personnel Commissioner is required to establish and administer a compensation plan. The

Commissioner is responsible for supervising the selection process, auditing payrolls, and developing programs for employee training and development. Section 2-12 permits the Commissioner to delegate to appointing authorities the authority to classify positions and to administer examinations, provided that he not delegate duties of the Merit Systems Board. The Commissioner may assign Personnel Department employees to assist in carrying out such delegations. Delegations must be in writing and be subject to audit to ensure the proper discharge of the delegated function.

The filling of classified positions is done from a certified list of the top three examination scores, plus any tie scores. Veterans are given preference in the sense that they must be hired first from a given list. A certified list is not supplemented for affirmative action purposes should the appointing authority be deficient with respect to the hiring of a given protected group. However, affirmative action can be achieved by filling positions from employment lists comprised only of protected groups, or by use of provisional appointments. Hiring goals are generally based upon the percentage of women, minorities and handicappers in the labor force or labor market. These goals are established by the Personnel Department and enforced by the appointing authorities.

Collective Bargaining. The New Jersey Employer-Employee Relations Act was passed in 1968, amending and supplementing the former Labor Mediation Act. The act covers both private and public sector employment relations, with the latter encompassing the state and its political subdivisions. The act is set forth beginning at New Jersey Statutes Annotated 34:13A-1.

Section 5.1 establishes a Division of Public Employment Relations to determine bargaining unit compositions hold certification elections, and to settle public sector disputes. For organization purposes, the Division is within the Department of Labor and Industry, but is independent of supervision and other controls. The act is administered by the Public Employment Relations Board, within the Public Employment Relations Division. The Commission is composed of seven members (three representing the public, two representing public employers and two representing public employee organizations) appointed by the Governor with the advice and consent of the Senate to three year terms. The Commission makes policy and establishes rules and regulations with respect to dispute settlement and grievance procedures.

Section 5-3 provides for collective negotiation rather than collective bargaining, with respect to grievances and other terms and conditions of employment. The fact that the Legislature did not define what was meant by other terms and conditions of employment has led to confusion as to what subjects were intended to be encompassed. The matter has been resolved chiefly by the courts. The term "collective negotiation" was selected by the Legislature specifically to underscore the fact that public sector employees have no right to strike. The Legislature apparently sought to avoid the experience in California when that state's supreme court ruled in the **Los Angeles Metropolitan Transit Authority** case that the term collective bargaining implied the right to strike.

An Office of Employee Relations was established by executive order in 1970 to negotiate on behalf of the state. Both the Director and the Deputy Director of the Office are appointed by and serve at the pleasure of the Governor. In addition to acting as the Governor's agent for purposes

of collective negotiation, the Director is also responsible for representing the Office before boards and commissions, or the courts, in matters regarding employee relations. Collective negotiation agreements are reviewed by the Departments of Personnel and Treasury before taking effect.

C. Judicial Interpretations

In the case of **Lullo** v **International Association of Firefighters, Local 1066,** (262 A2d 681, 697; 1970), the New Jersey Supreme Court held in pertinent part that the Legislature's use of the term collective negotiation was "intended to recognize inherent limitations on the bargaining power of public employer and employee." It was further noted that salient distinctions existed "between public and private employment relations which necessarily affect the characteristics of collective bargaining in the public sector." (262 Ad2 at 698.)

It was stated previously that since the **New** Jersey Legislature did not define what matters were within the scope of negotiations resolution has been provided by the courts. In the case of **Dunellen Board of Education v Dunellen Education Association,** (311 A2d 737; 1973), the state Supreme Court held there to be two categories of subjects of bargaining: mandatorily negotiable subjects and non-negotiable subjects. Public employers were required to negotiate in good faith on mandatorily negotiable subjects, they being "matters which intimately and directly affect the work and welfare of their employees." (311 A2d at 741.) Non-negotiable subjects involved matters of governmental policy, which could not be bargained away**.**

In **Ridgefield Park Education Association** v **Ridgefield Park Board of Education,** (393 A2d 278; 1978), the Court **was** called upon to decide whether 1974 amendments to the Employer-Employee Relations Act had created a class of permissive subjects of negotiation. The Legislature had amended Section 8.1, which had read in pertinent part that "nor shall any provision hereof annul or modify any statute or statutes of this State," to read "nor shall any provision hereof annul or modify any **pension** statute or statutes of this State." The Public Employment Relations Commission had interpreted the amendment as establishing a third category **of** subjects.

The Court held that the Legislature had not intended to establish a class of permissive subjects of negotiation and reaffirmed its **Dunellon** decision that there were but two categories: mandatorily negotiable subjects and non-negotiable subjects. In reaffirming its earlier holding, the Court called into question whether the Legislature could create a class of permissive subjects over which a public employer could voluntarily bargain. The Court stated that it "would be reluctant to sanction collective agreement on matters which are essentially managerial in nature, because the true managers are the people." (393 A2d at 287.)

Part III. New York

A. Constitutional Provisions

The legal basis for the New York civil service system is both constitutional and statutory. Section 6 of Article 5 of the New York Constitution, which was adopted in 1949, provides in pertinent part that

appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained as far as practicable by examination which, as far as practicable, shall be competitive....

B. Statutory Provisions

Civil Service. A civil service system was first adopted by the New York Legislature in 1883. The current act governing state civil services entitled the Civil Service Laws was essentially adopted in 1909. It was amended and recodified in 1958.

Section 5 of the act established a Civil Service Departments the head of which is also the president of the Civil Service Commission. The three-member Commission is appointed by the Governor to six year terms of office, with the advice and consent of the Senate. The Commissioner who is designated to head the Department and to be president of the Commission, serves at the pleasure of the Governor in that dual capacity, but cannot be removed from the Commission except for cause.

It is the responsibility of the Commission, as set forth in 'Section 6' to "[p]rescribe and amend suitable rules and regulations for carrying into effect the provisions of this chapter [of the Civil Service Law] and of section six of article five of the constitution of the state of New York...." The Commission is authorized to investigate matters concerning the enforcement of the Civil Service Law.

Section 117 established a Classification and Compensation Division within the Civil Service Department. The director and staff of the Division are appointed by the Commission president. It is the responsibility of the director, consistent with rules established by the Commission, to classify or reclassify all positions in the state civil service and to ascertain the duties and responsibilities of all such positions. The Commission hears appeals relative to changes in classification and allocation of positions within the jurisdiction of the director of the Division.

The filling of classified positions is done from a certified list of the top three examination scores, plus any tie scores. Veterans are given preference credits on test scores, but no longer are given an absolute preference. A certified list is not supplemented for affirmative action purposes should the appointing authority be deficient with respect to the hiring of a given protected group. However, affirmative action can also be achieved by filling positions from employment lists comprised only of protected groups, or by use of provisional appointments. Hiring goals are generally based upon the percentage of women, minorities and handicappers in the labor force or labor market. These goals are established by the Civil Service Department and enforced by the appointing authorities.

The unclassified service consists of positions among which are elected officials, employees of the Legislature, offices filled by appointment of the Governor, heads of departments and specified educational positions connected with the state's university and community college systems. Section 40 provides for a classified service, to consist of four classes: exempt, non-competitive, labor and competitive. As of January 1986, there were approximately 188,802 employees in the

state classified service, allocated among the four classes as follows: exempt, 2,077; non-competitive, 24,733; labor, 9,818; and competitive, 152,174.

Collective Bargaining. The state's collective bargaining act, the Public Employees' Fair Employment Act (Taylor Law) was adopted in 1967 by adding Sections 200 to 214 to the Civil Service Law. The section citations given below continue to refer to the New York Civil Service Law.

Section 203 grants to public employees the right to representation and to negotiate collectively in the determination of terms and conditions of employment. Unlike New Jersey, the New York Legislature did define the term "terms and conditions of employment." It is defined in Section 201 to mean, with respect to state employees, salaries, wages, and other terms and conditions of employment. Section 204-a requires every written agreement to carry the proviso that any provision therein "requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefore shall not become effective until the appropriate legislative body has given approval."

Bargaining over public retirement benefits is specifically prohibited "and any benefits so negotiated shall be void." Local employees can bargain over agency shop fee deductions but state employees cannot. Section 210 prohibits both categories of public employees from striking. Any public employee who is absent without permission when a strike occurs is presumed to be on strike.

Section 205 established a Public Employment Relations Board, consisting of three members, appointed to six year terms by the Governor. The appointments require Senate confirmation. The Board is authorized to resolve disputes concerning the status of employee organization representation rights and to resolve impasses. The Board is required to maintain both a panel of mediators and a panel of arbitrators to assist in the resolution of impasses. An impasse may be deemed to exist when the parties have not reached agreement within 120 days of the end of the public employer's fiscal year. In general, an impasse is not declared as long as the parties continue to make progress. The Board may render mediation, fact finding or arbitration assistance upon the request of either party or upon its own motion.

The Taylor Law does not specify the state agency accorded the responsibility for bargaining on behalf of the state and no cross reference to any other statute is indicated. The agency, the Office of Employee Relations, is set forth in a separate statute, Section 650 to 654 of the Executive Law. The Office of Employee Relations **was** established in 1969. The Director of the Office is appointed by and serves at the pleasure of the Governor.

C. Judicial Interpretations

In the case of **Andresen** v **Rice,** (14 NE2d 65; 1938), the New York Court of Appeals addressed the question whether the Legislature could provide for the appointment of state police without competitive examination. The Legislature had not explicitly allocated state police to the unclassified service, nor to the exempt class within the classified service. The Legislature simply directed the Superintendent of Police to make rules and regulations according to which mental

and physical examination of applicants would be conducted.

The Court noted that the Legislature had given effect to Section 6 of Article 5 of the state Constitutions which requires "merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive," by enacting the Civil Service Law. However, the Civil Service Commission was but a legislatively created means of implementing the section. "In other words, the latter body [the Legislature] is always free, so long as it carries out the spirit of the Constitution, to provide examinations or competitive examinations by others than the Civil Service Commission." (14 NE2d at 67.) The Legislature could direct any appropriate agency to administer the civil service system, or could administer the system itself, provided appointment and promotion therein was according to merit and fitness determined by competitive examination unless impracticable.

The court noted that noncompetitive appointments were intended to be the exception rather than the rule. It further noted that the duties of state police were not different in kind from those of municipal police, for which competitive examinations were conducted. Thus, the Court concluded

> The Legislature has sought to place the whole state police force in the noncompetitive or unclassified service, exempting them all from competitive examinations and leaving their selection to the superintendent of police according to such rules and regulations as he may adopt. This wholesale classification en masse of an entire force, in view of past experience with such offices and positions, is contrary to the Constitution. (14 NE2d at 69.)

The phrase "in view of past experience with such offices and positions" referred to the fact that no evidence had been presented to show that competitive examinations would be impracticable. The Court prospectively ordered competitive examinations to be administered, noting however, that they need not be administered by the Civil Service Commission, but could in fact be administered by the superintendent.

The Court of Appeals held in **Rankin** v **Shanker,** (242 NE2d 802; 1968), that **a** legislative classification which differentiated between the private and public sectors, by prohibiting strikes only in the latter did not violate the constitutional guarantee of equal protection of the **law.** Such a distinction could be reasonably related to a legitimate governmental purpose.

Shortly after **Rankin,** in **City of Now York** v **De Luryt** (243 NE2d 128; 1968), the New York Court held that the Taylor Law's prohibition against strikes violated neither the due process clause of the federal constitution nor that of the New York Constitution. The Court noted that "the State, in governing its internal affairs, had the power to prohibit **any** strike if the prohibition was reasonably calculated to achieve a valid State policy in an area which was open to State regulation." (243 NE2d at 131; emphasis in original.)

Part IV. Ohio

A. Constitutional Provisions

The legal basis for the Ohio civil service system is both constitutional and statutory. The constitutional provision was adopted in 1912. Section 10 of Article XV of the Ohio Constitution provides that:

> Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.

B. Statutory Provisions

Civil Service. Originally the civil service function was administered by a commission, but a 1983 law, Ohio revised code section 124.02, places in the Director of the Department of Administrative Services "all functions, powers, and duties that formerly were by law devolved upon the state civil service commission and the officers and members and upon their employees, agents, and representatives." Elected officials, members of boards and commissions, heads of principal departments, employees in the Governor's office, up to twenty positions at each institution operated by the Department of Mental Health, and various other enumerated personnel are part of the unclassified service.

Section 124.03 provides for a State Personnel Board of Review to hear appeals from final determinations by appointing authorities or the director of Administrative Services with respect to pay reductions, job abolition, layoffs, suspensions and so forth. The board consists of three members, appointed to six year terms by the Governor, with the advice and consent of the Senate. No more than two members may belong to the same political party.

Collective Bargaining. The Ohio Legislature did not adopt collective bargaining for public employees, including state employees until 1983. Prior to 1983, collective bargaining took place on an informal basis and without color of statutory authority. Public sector labor relations were essentially governed by two acts. The Ferguson Act, which was repealed in 1983, prohibited strikes by public employees and imposed sanctions for striking. The Ferguson Act was similar to and passed in the same year as Michigan's Hutchinson Act. Another section of the Ohio revised code adopted in 1959 authorized the collection of dues through voluntary checkoff procedures.

The Public Employees Collective Bargaining Act, hereinafter the 1983 act, superimposed collective bargaining upon the civil service system in a manner not precisely clear due to its recent enactment. The act al so granted the right to strike to public employees, except certain enumerated classes among which are local police and fire personnel, highway patrol officers and emergency medical services personnel. It thus prohibits the right to strike to those employees who, because of the important nature of their work, could strike most effectively, while granting the right to those employees whose services could most easily be done without.

Section 4117.01(G) of the 1983 act defines the duty to bargain collectively as

> the mutual obligation of the public employer by its representative, and the representative of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, and other terms and conditions of employment and the continuation, modifications or deletion of an existing provision of a collective bargaining agreement.…

The duty to bargain language is similar to that of Michigan and other states, and mirrors that found in the National Labor Relations Act. The term "public employer" is defined as "the state or any political subdivision located entirely within the state," including schools, special districts and institutions of higher learning. Municipalities with a population of under five thousand are excluded. A public employer is required to submit an agreement to the appropriate legislative body where an appropriation is necessary, or for approval of any other matter requiring legislative authorization.

Section 4117.02 created a State Employment Relations Boards consisting of three members appointed to six year terms by the Governors with the advice and consent of the Senate. The State Personnel Board of Review which hears civil service appeals was transferred out of the Department of Administrative Services and made a part of the State Employment Relations Board, making the latter board the dominant body with respect to personnel matters. The 1983 act also created within the Department of Administrative Services an Office of Collective Bargaining. This Office in effect acts as the state employer and bargains on behalf of state agencies, departments, boards and commissions. The staff of the Office of Collective Bargaining are part of the unclassified service.

The powers of the State Employment Relations Board are considerable, a fact which has puzzled some legal commentators who believe that the statute was substantially written by the state's labor unions. The Board determines bargaining unit composition and certifies exclusive representatives. It engages in fact finding and mediation with respect to the resolution of impasses. It also has the authority to police the content of certain agreements and to ensure that the collective bargaining process is discharged in good faith. Finally, with respect to public sector strikes, the Board controls the circumstances under which access may be had to courts of equity for purposes of injunctive relief.

C. Judicial Interpretations

In the case of **Hagerman** v **City of Dayton,** (71 NE2d 246; 1947)p the Ohio Supreme Court placed substantial limitations upon the scope of public sector collective bargaining in that state. The **Hagerman** case involved a voluntary dues checkoff agreement between the City of Dayton and the Dayton Public Services Union. The city passed an ordinance authorizing its finance director to collect dues from union members who signed written authorizations and to monthly remit collections to the union.

Hagerman, the city's finance director, sought a declaratory judgment as to whether he **was** authorized to use the city's personnel and resources to collect union dues, there being no benefit

to the city. This particular concern was addressed by the city while the case was on appeal. The city passed a second ordinance stating that the cost to the city of collecting union dues was five percent of the amount collected. This amount was to be deducted by the finance director before remittance to the union.

The Supreme Court addressed the larger question, whether the city could lawfully enter into such an agreement with **a** union. The Court concluded that the city was without authority. After citing the civil service provision of the state Constitution, the Court observed that "[u]nder this section of the Constitution and the laws enacted pursuant thereto, labor unions have no function which they may discharge in connection with civil service appointees." (71 NE2d at 254.)

The Court in effect concluded that civil service and collective bargaining were incompatible. Furthermore, even a voluntary agreement such as that entered into by the City of Dayton constituted, in the view of the Court, an unlawful delegation of authority. The Court held that

There is no authority for the delegation either by the municipality or the civil service appointees of any functions to any organization of any kind. Each tub must stand on its bottom. The law provides for the election and appointment of officials whose duties would be interfered with by the intrusion of outside organizations. (71 NE2d at 254.)

The **Hagerman** decision stood for approximately thirty years. In 1975, the state Supreme Court ruled in **Dayton Classroom Teachers Association** v **Dayton Board of Education,** (323 NE2d 714; 1975)p that a school board had discretionary authority to enter into a collective bargaining agreement. The school board had for eight years entered into agreements, the most recent of which contained a four-step grievance procedure culminating in binding arbitration. When the union filed complaints which the school board thought were not covered by the agreement, the school board contended that it had lacked the authority to enter into the agreement in the first instance.

The Court examined the statutory authority of school boards and found that "a board of education has been granted broad discretionary powers in its dual role of manager of schools and employer of teachers." (323 NE2d at 717.) Among the discretionary authority granted was that "to enter into a collective bargaining agreement with its employees." Id. The Court made no mention of the **Hagerman** case.

The basis of the decision in the **Dayton Teachers** case was the statutory authority accorded school boards. The following years in the case of **Malone** v **Court of Common Pleas,** (344 NE2d 126; 1976), the Court made clear that the authority of a public employer to enter into a collective bargaining agreement was statutory rather than inherent.

Part V. Illinois

A. Statutory Provisions

Civil Service. The legal basis for the Illinois civil service system is statutory only. The State Civil Service Act was first adopted in 1905 and extended only to employment in charitable

institutions. The act was modeled after the City Civil Service Act which had been passed in 1895. Provisions of the state system are presently set forth in a personnel code.

The purpose of the code "is to establish for the government of the state of Illinois a system of personnel administration under the Governor, based on merit principles and scientific methods." This code is administered by the Director of the Central Management Services Department. A three-member Civil Service Commission acts as an adjudicatory body with respect to appeals from personnel decisions. The members of the Commission are appointed to 6 year terms by the Governor with the advice and consent of the Senate. Section 63blO8 of Chapter 127 of the Illinois statutes requires the Director to prepare and submit to the Commission "proposed rules for all positions and employees subject to this act."

The personnel code extends to all positions in the service of the state except those which are specifically exempted among which are all elected officers of the state, positions under the Lieutenant Governor, Secretary of State, State Treasurer, State Comptroller, State Board of Education, the Clerk of the Supreme Court, and Attorney General. Legislative personnel and teaching and administrative personnel at the state's colleges and universities are also exempt from the state civil service.

Collective Bargaining. Illinois' civil service system has coexisted with collective bargaining for some time. The state has engaged in collective bargaining with several unions for decades, but without any legal duty to do so. In September of 1973, the Governor issued an executive order requiring the state to bargain with its employees. The executive order established an Office of Collective Bargaining to negotiate on behalf of the state.

The executive order lacked the force of law in some respects, however. For example, contracts negotiated under the executive order often contained provisions that grievances be decided through binding arbitration. The state Attorney General ruled that an arbitrator had no authority to decide with finality matters properly committed to the civil service system. These matters included layoffs, discharges demotions and geographical transfers of personnel. The Attorney General ruled that an arbitrator's decision seeking to bind the state with respect to such matters was a nullity.

In 1984 the Illinois Legislature passed the Illinois Public Labor Relations Act, providing statutorily for collective bargaining for the majority of the state's public employees. The purpose of the act was "to regulate labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements." The act is set forth beginning at Section 1601 of chapter 48 of the Illinois statutes.

The act formalized collective bargaining practices which had existed through executive order and expanded the scope of coverage. Approximately 45,000 of 60,000 executive branch employees are covered. The act's definition of "employer" covers the state and local governmental units, although employers with less than twenty-five employees are exempt and educational employers are covered by a separate act. The act did not cover local police, firefighters and

emergency medical services personnel, which continued to be governed by case law. Local police and firefighters have since been brought in by amendment.

The Director of the Central Management Services Department acts as the state employer and bargains on behalf of the state. Central Management Services is also responsible for setting the compensation for civil service employees not covered by collective bargaining agreements. Section 1615 (a) and (b) of the act makes clear that the statute, as well as collective bargaining agreements negotiated thereunder, takes precedence over any other laws executive order or administrative regulation with respect to wages, hours and conditions of employment.

Section 1605 of the act created a three-member State Labor Relations Board to act as a neutral body. The Board holds representation elections, handles charges of unfair labor practices and administers various impasse resolution procedures. The Board has jurisdiction over public sector labor relations matters involving the state, the Regional Transportation Authority and local units of government with a population not exceeding one million. A separate local board has jurisdiction over local units of government with a population in excess of one million (Cook County and Chicago).

B. Judicial Interpretations

The case of **People ex rel Gullett et al** v **McCullough,** (98 NE 156; 1912), concerned the question whether the civil service system interfered with the constitutional operation of the executive branch. In that case, the Auditor of Public Accounts had refused to issue warrants to certain individuals for services rendered by them while in the employ of the Secretary of State until approval was given by the state Civil Service Commission. The Secretary of State contended that the Commission's approval was unnecessary and that in any events the State Civil Service Act was unconstitutional because it interfered with the operation of the executive branch.

The Court disagreed. It held that the Legislature could validly adopt an act requiring officers of the executive branch to follow certain procedures when appointing employees. Said the Court, the Civil Service Act was

based on the principle that positions in the public service are not the personal political perquisites of any officer or party, and ought not be divided, after a political campaigns as so much loot of actual warfare, but that competency merit, and fitness ought to be the standard for all appointments or promotions in the public service. (98 NE at 161.)

In the case of **County of Kane** v **Carlson,** (489 NE2d 467; 1986), the county brought an action seeking to enjoin the State Labor Relations Board from proceeding on a representation petition filed by the American Federation of State, County and Municipal Employees (AFSCME). AFSCME was seeking to represent deputy circuit clerks in the county's circuit court. The county contended the Board lacked jurisdiction because deputy circuit clerks were appointees and not employees. Secondly, it was contended that deputy circuit clerks did not work for a "public employer." The Appellate Court of Illinois did not agree.

Part of the statutory definition of "public employer" contained in Section 1603(n) includes "any person acting within the scope of his or her authority, express or implied on behalf of [enumer-

ated government units] in dealing with its employees…." The Court concluded that "…to the extent that the Chief Judge or the Circuit Clerk may be employers of the deputy circuit clerks, they are public employers and the deputy circuit clerks public employees under PLRA, " (489 NE2d at 471,) The Court declined to consider whether under the act there might be multiple employers with respect to a given group of employees.

Secondly, the Court held that the collective bargaining act did not violate the separation of powers provision of the state Constitution. Because deputy circuit clerks were nonjudicial officers, "[t]here would appear to be no constitutional impediment to the legislature's providing by law that deputy circuit clerks' salaries be determined by a process including collective bargaining." (489 NE2d at 471.)

The **County of Kane** case was appealed to the Illinois Supreme Court. In February of 1987t the Court held that the circuit clerk was the employer of deputy circuit clerks for purposes of the act. The Court further held that the mere inclusion of judicial employees within the scope of the act did not violate the separation of powers principle of the Illinois Constitution.

Part VI. Minnesota

A. Statutory Provisions

Civil Service. The legal basis for the Minnesota civil service system is statutory only. Both the civil service and collective bargaining systems are administered out of a single agency, the Department of Employee Relations. The department is headed by a Commissioner, who is appointed by the Governor. There are two bureaus within the department, each headed by a Deputy Commissioner. The Bureau of Personnel administers the merit system, while the Labor Relations Bureau oversees the collective bargaining system. Both Deputy Commissioners are part of the unclassified service, and are appointed by and serve at the pleasure of the Commissioner.

The provisions of the civil service system are set forth at Sections 43A.01 to 43A.44 of the Minnesota Statutes Annotated. Section 4 notes that "[t]he commissioner shall be the chief personnel and labor relations manager of the civil service in the executive branch." In practice, however, the Deputy Commissioners administer their respective bureaus, while the Commissioner sets the overall policy for the Employee Relations Department.

Section 5 states that the Commissioners working through the Personnel Bureau, has the responsibility for the maintenance of a compensation plan, the assignment of all positions in the classified service to job classes, preparation of examinations, performance appraisals, training and affirmative action. Classified positions are defined as all those in the civil service which are not specifically designated as unclassified. The latter include the usual panoply of positions, such as elected officials, heads of agencies appointed by the Governor, employees of the legislative and judicial branches, and academic and administrative personnel employed by the state's university system. There are approximately 24,000 classified employees and 12,050 unclassified employees.

Section 14 states that even though appointments to the classified service are to be based on merit and ability, with respect to employees covered by collective bargaining agreements, appoint-

ments are to be made in accordance with applicable provisions contained in the agreements. For example with respect to the filling of certain blue collar positions, a list of eligibles is certified by the Bureau of Personnel. However, the appointing authority is then required by collective bargaining agreement to select from the list the person with the most seniority in state service.

Generally, the filling of classified positions is done from a certified list of the top twenty scores, plus any tie scores. With respect to promotions, the list certified contains the top ten scores, plus any tie scores. In either case, the list may be supplemented for purposes of affirmative action where the appointing authority is underrepresented with respect to a given group. This is done by adding to the list the two highest scoring applicants from the applicable protected group.

The enforcement of affirmative action goals — which are based upon labor force and labor market percentages — is done in the operating departments. Agency heads are required by Section 19 of the statute to submit annual progress reports. This section also requires the Commissioner to adopt a statewide affirmative action program, the preparation and administration of which may be delegated to a state director of equal employment opportunity designated by the Commissioner. The Commissioner can recommend penalties for continued noncompliance by appointing authorities.

Collective Bargaining. The Minnesota collective bargaining statute, the Public Employment Labor Relations Act, was enacted in 1971 and was amended extensive**ly** to its present form in 1980. As noted, the act is administered by the Deputy Commissioner of the Labor Relations Bureau in the Employee Relations Department. The Deputy Commissioner, also referred to as the State Labor Negotiator, bargains on behalf of the state.

The provisions of the act are set forth at Sections 179A.01 to 179A.25. Section 1 of the act requires "public employers to meet and negotiate with public employees in an appropriate bargaining unit and… [provides] that the result of bargaining be in written agreements …. it Public employers under the terms of the act are the state, the University of Minnesota, and political subdivisions when dealing with their respective employees. Terms and conditions of employment include hours of employment, compensation and personnel policies affecting work conditions. The statute also specifies bargaining units, which are occupationally based and cross departmental boundaries.

Section 7 enumerates a non-exhaustive list of management rights over which the employer need not bargain. These rights include functions and programs organizational structure, selection of personnel, and direction and number of personnel employed. Furthermore, the employer is prohibited from entering into an agreement requiring the use of seniority, or otherwise limiting the employer's right to select supervisory and managerial personnel. Supervisory employees are permitted to bargain, but confidential and managerial personnel cannot. While job classifications are not bargainable, the state does bargain over the pay rates assigned to the classifications.

A Director of Mediation Services is responsible for conducting representation elections and determining bargaining unit composition, while unfair labor practices are resolved by the Minnesota courts. Mediation Services provides staff to a five-member Public Employment Relations Board, which hears appeals from decisions made by the director. The Board also has the

responsibility to maintain a panel of arbitrators to decide impasses. Nonessential state employees have a limited right to strike where legislative approval of a negotiated collective bargaining agreement has not occurred within thirty days of receipt. Essential state employees have no right to strike, but do have a right to binding arbitration. Five of the state's sixteen bargaining units fall within this category, one of them being the supervisory unit. Both collective bargaining agreements and arbitration awards are subject to review and approval by the Legislative Commission on Employee Relations.

B. Judicial Interpretation

In the case of **International Union of Operating Engineers Local No. 49** v **City of Minneapolis,** (233 NW2d 748; 1975), the union challenged the validity of a civil service promotional examination. The union sought the test questions and answers, and information on how long each affected employee had worked for the supervisor who had rated his or her performance. The Civil Service Commission agreed to supply the answers to eleven questions to which specific objection had been raised, but declined to release the entire examination.

The state Supreme Court held that the Minnesota collective bargaining act placed a duty on the employer to release such information to the union. The Court likened the state act to the National Labor Relations Act, with respect to which it has been held that an employer must reveal upon request information peculiarly accessible to the employer and peculiarly inaccessible to the union. The Court also noted that promotions are a mandatory subject of bargaining under the federal act. A mandatory subject of bargaining is one upon which, when brought up by either party, both parties are obligated to bargain. The failure to bargain in good faith upon a mandatory subject of bargaining constitutes an unfair labor practice.

The Commission also contended that the selection of personnel was exempt from the scope of the state collective bargaining act as a matter of "inherent managerial policy. "The Court concluded that this contention was misplaced because the union was not challenging the decision to administer competitive examinations, a matter which the Court readily admitted was not subject to negotiation. "Rather [the challenge] relates to the fairness of a specific given examination, and as such it is a dispute involving terms and conditions of employment and subject to negotiation under the PELRA and not a matter of inherent managerial policy." (233 NW2d at 754.)

In **Minnesota Education Association and Minnesota Community College Faculty Association** v **State of Minnesota,** (282 NW2d 915; 1979), it was held that the state Legislature reserved the right to modify an otherwise binding arbitration award. In that case, an arbitrator had awarded community college faculty members an eighteen percent salary increase for the 1977 to 1979 fiscal years. The Legislature reviewed the award and reduced the increase to fourteen percent, the same increase granted to state university faculty members.

The union charged the state with an unfair labor practice, contending the Legislature's authority to accept, reject or modify an "agreement" did not extend to an arbitration award. "The claim [of the union] is that arbitration awards, far from being 'agreements,' result from an inability to agree." (282 NW2d at 917.) The Minnesota Supreme Court rejected this line of reasoning.

The Court held that arbitration awards were routinely incorporated into written contracts which clearly constituted agreements. More importantly, "the intent of the Legislature was to reserve the right to review all salary provisions of contracts with state employees, however arrived at." (282 NW2d at 918.)

It is interesting to note that the legislative bodies of local governments do not have such review authority with respect to arbitration awards covering their employees. **City of Richfield** v **Local 1215 International Association of Firefighters,** (276 NW2d 42; 1979.) Nor may the executive branch of the state review arbitration awards. In short, public employers, whether at the state or local level, are bound by an arbitration award, but the Legislature excluded itself from the definition of "public employer" contained in the Minnesota Public Employment Labor Relations Act.

A second contention raised by the union in the **Minnesota Education Association** case was that state employees were denied equal protection of the laws when compared to other public employees, since the Legislature claimed the right to review and modify arbitration awards covering the former class of employees. The state Supreme Court rejected this contention through use of the "rational basis" test.

This judicial test which is essentially limited to economic rights, permits differential treatment of given classes of individuals provided the basis for doing so is rationally related to a legitimate governmental end. The Court found a rational basis in the sovereign nature of the Legislature. "As the source of sovereign governmental power, the Legislature is able to bind all other groups except a subsequent legislature and for this reason must necessarily reserve the right to review future arbitration awards of state employees." (282 NW2d at 919.)

Part VII. Wisconsin

A. Statutory Provisions

Civil Service. The legal basis for the Wisconsin civil service system is statutory only. Wisconsin first adopted a civil service law at the state level in 1905. The acts which provided for a three-member Commission appointed by the Governor, extended to recruitment and appointment based on merit. However, the act gave the Commission little authority over the reasons for which an employee could be discharged. The act was amended in 1929 to replace the Commission with a Personnel Board and to provide for a Personnel Director.

The civil service provisions are presently set forth in chapter 230 of the Wisconsin Statutes Annotated, hereinafter WSA. The Wisconsin state personnel system, including civil service and collective bargaining, is administered by a Department of Employment Relations. This department has several divisions, one of which**,** the Division of Merit, Recruitment and Selection, administers the merit system. WSA 230.08 provides for an unclassified and a classified service. The former consists of all elected state officials, all positions appointed by the Governor, judicial and legislative employees, various division administrators of enumerated boards and commissions, and faculty and academic staff of the "university of Wisconsin system."

Sections 10 and 12 provide for a compensation plan for classified employees not covered by a collective bargaining agreement. This compensation plan is developed by the head of the Department of Employment Relations with assistance from the Division of Classification and Compensation. The language of Section 10 is worded in such a manner as to prevent employees who are covered by a collective bargaining agreement from claiming compensation under the plan after their collective bargaining agreement expires. The plan is subject to approval by a Joint Legislative Committee on Employment Relations. A three member State Personnel Commission acts as an adjudicatory body to handle appeals from decisions with respect to classification, promotion and the like. The Commissioners are appointed by the Governor and serve full-time.

Generally, the filling of classified positions is done from a certified list of the top ten percent of scores, with a minimum of five and a maximum of 10 applicants. The list is supplemented with the three top scoring veterans and handicappers respectively, and for purposes of, affirmative action, with the three highest scoring applicants from any protected group with respect to which the appointing authority is underrepresented. Utilization standards, which are developed by the Employment Relations Department, are based on a weighting scheme that is specific to each type of job.

Collective Bargaining. In 1971 the Wisconsin Legislature adopted the State Employment Labor Relations Acts, which is set forth at WSA 111.80 to 111.97. The act's "declaration of policy" provision "recognizes that there are three major interests involved [in the public sector collective bargaining process]: that of the publics, that of the state employee and that of the state as an employer." The act substantially modified a 1966 act which had permitted classified employees to bargain with departments upon hours and working conditions.

Section 91 of the act extends collective bargaining to wage rates related to general salary scheduled adjustments, and upon hours and conditions of employment. However, the state need not bargain over enumerated management rights set forth in Section 90. Furthermore, Section 91(2) prohibits the state from bargaining over the mission and goals of state agencies or the civil service merit system, including classification, appointments and promotions. Section 93(3) of the act provides that a collective bargaining agreement supercedes other statutes the subject matter of which deal with wages, hours, and conditions of employment. Collective bargaining agreements must also be approved by the Joint Legislative Committee on Employment Relations if a change in state law would be required.

The Division of Collective Bargaining, within the Department of Employment Relations, bargains with employee organizations on behalf of the state. *A* Wisconsin Employment Relations Commission, which constitutes a separate department, holds representation elections and decides unfair labor practices. The Commission consists of three members who are appointed to six-year overlapping terms by the Governor.

B. Judicial Interpretations

In the case of **State of Wisconsin & Department of Administration** v **Wisconsin Employment Relations Commission,** (280 NW2d 150; 1979), the state Supreme Court affirmed a ruling by the Commission that the effective date of a collective bargaining agreement is a mandatory

subject of bargaining under the State Employment Labor Relations Act. Collective bargaining agreements with the state of Wisconsin generally expire on June 30. In this cases the Department of Administration and the Wisconsin State Employees Union, AFL-CIO did not reach agreement until August 30, 1974 and the agreement did not receive legislative approval until September 12, 1974. The union sought to negotiate an effective date which would be retroactive to the expiration of the old agreement, but the department refused.

The department contended that Section 28 of Article 4 of the state Constitution, which prohibits the granting of extra compensation for services already performed would be violated by a retroactive effective date. The Court disagreed and held that "[t]he constitutional provision here under consideration does not prohibit payment of wages after services have been performed. In fact, as we understand it, most all state payroll payments are made after the work is performed." (280 NW2d at 153.) The Court then examined the public policy underlying the act concluding that 11[I]f the effective date of newly negotiated wage rates is not negotiable the state would, in effects have the unilateral power to set the effective date of any agreement. Such an interpretation of the statute would, in our opinions contravene the expressed purpose of SELRA." (280 NW2d at 155.)

In **State of Wisconsin, Department of Employment Relations v Wisconsin Employment Relations Commission,** (361 NW2d 660; 1985), the state Supreme Court affirmed the use of the "in part" test with respect to the discharge of a state employee covered by the State Employment Labor Relations Act. Under the test, where an employee is discharged "in part**,** for union activity, the discharge will not be upheld even if the employer can prove that the employee would have been discharged in any event. In short, "… an employee may not be fired when one of the motivating factors is his union activity, no matter how many other valid reasons exist for the firing." (361 NW2d at 664, quoting from **Muskego-Norway Consolidated Schools Joint School District** v **Wisconsin Employment Relations Commissions** (151 NW2d 617; 1967.))

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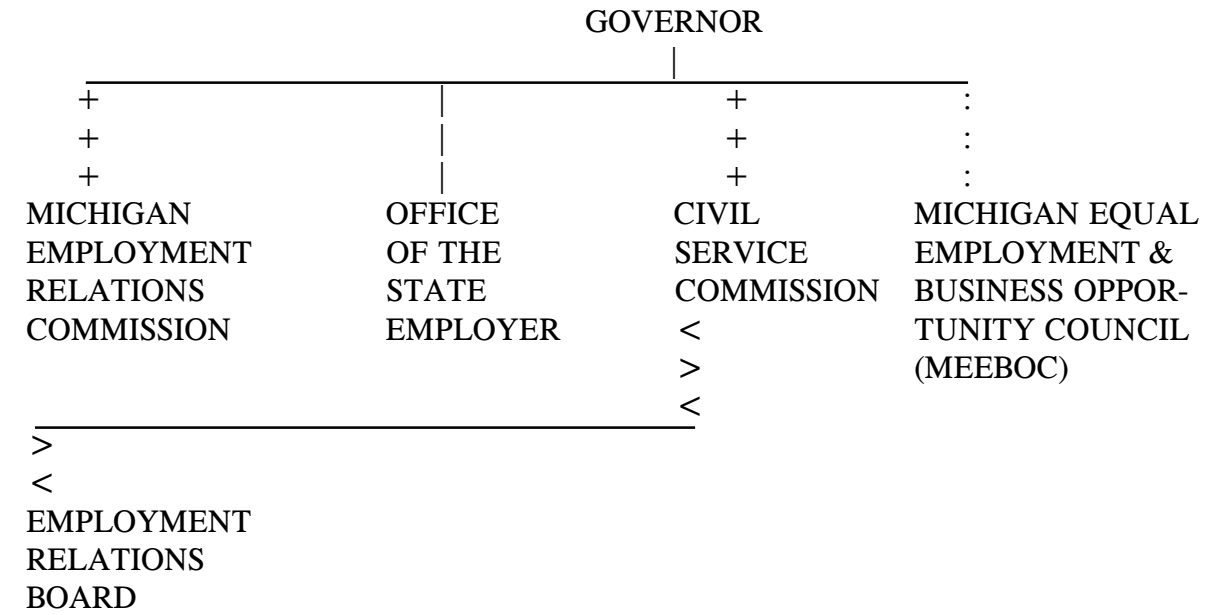

KEY:

\+ Executive agency headed by board or commission appointed by the governor.

| Executive agency headed by gubernatorial appointee.

: Executive agency headed by ex officio board or commission.

< Subordinate organization within an executive agency.

FUNCTION	**ADMINISTRATIVE AGENCY**
Labor Relations:	
Neutral Functions	Employment Relations Board Michigan Employment Relations Commission (State Police impasses only)
Negotiations	Office of the State Employer
Classified Executive Service	Civil Service Commission
Employee Training	Civil Service Commission/Departments/Office of the State Employer (for labor relations)
Fringe Benefits Administration	Civil Service Commission
Merit System:	
Selection and Classification	Civil Service Commission
Affirmative Action	Civil Service Commission/MEEBOC

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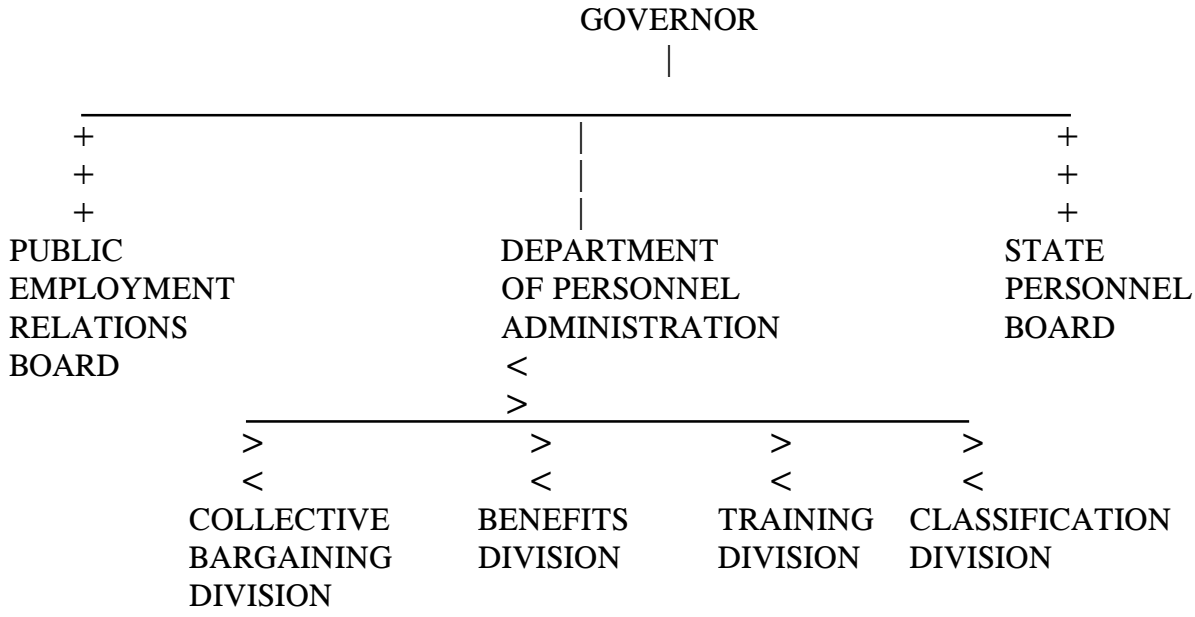

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FUNCTION	**ADMINISTRATIVE AGENCY**
Labor Relations:	
Neutral Functions	Public Employment Relations Board
Negotiations	Department of Personnel Administration
Classified Executive Service	Department of Personnel Administration
Employee Training	Department of Personnel Administration/Departments
Fringe Benefits Administration	Department of Personnel Administration/Public Employees Retirement System
Merit System:	
Selection	State Personnel Board/Departments
Classification	State Personnel Board/Department of Personnel Administration/Departments
Affirmative Action	State Personnel Board/Departments

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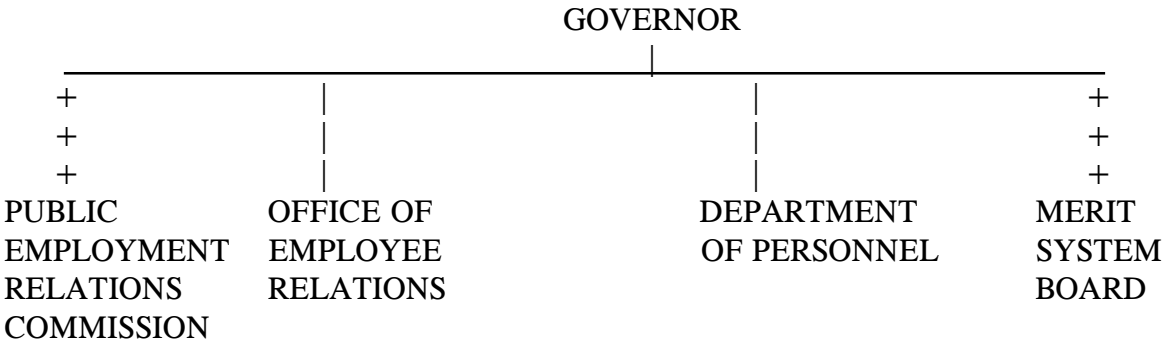

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FUNCTION	**ADMINISTRATIVE AGENCY**
Labor Relations:	
Neutral Functions	Public Employment Relations Commission
Negotiations	Office of Employee Relations
Classified Executive Service	Department of Personnel
Employee Training	Department of Personnel/Departments
Fringe Benefits Administration	Department of Treasury, Retirement Division
Merit System:	
Selection and Classification	Merit System Board/Department of Personnel
Affirmative Action	Department of Personnel/Departments

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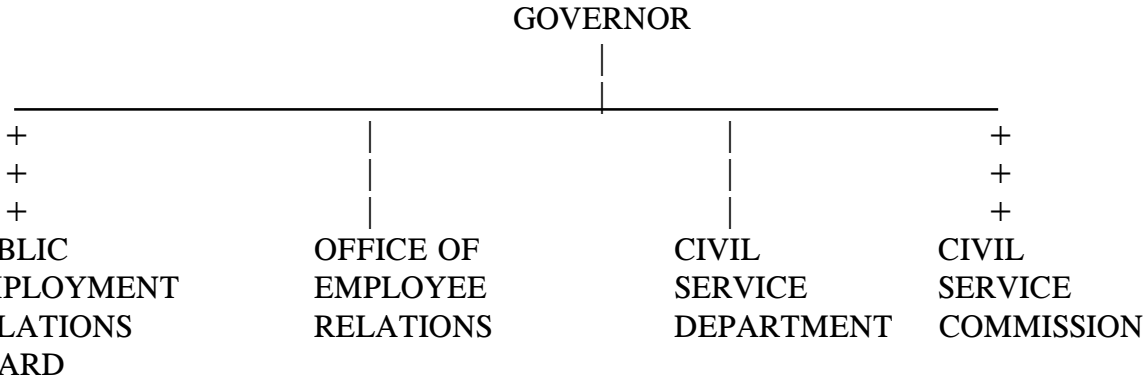

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FUNCTION	**ADMINISTRATIVE AGENCY**
Labor Relations:	
Neutral Functions	Public Employment Relations Board
Negotiations	Office of Employee Relations
Classified Executive Service	(none)
Employee Training	Office of Employee Relations/Joint Labor-Management Committees
Fringe Benefits Administration	Civil Service Department
Merit System:	
Selection and Classification	Civil Service Commission/Civil Service Department
Affirmative Action	Civil Service Department

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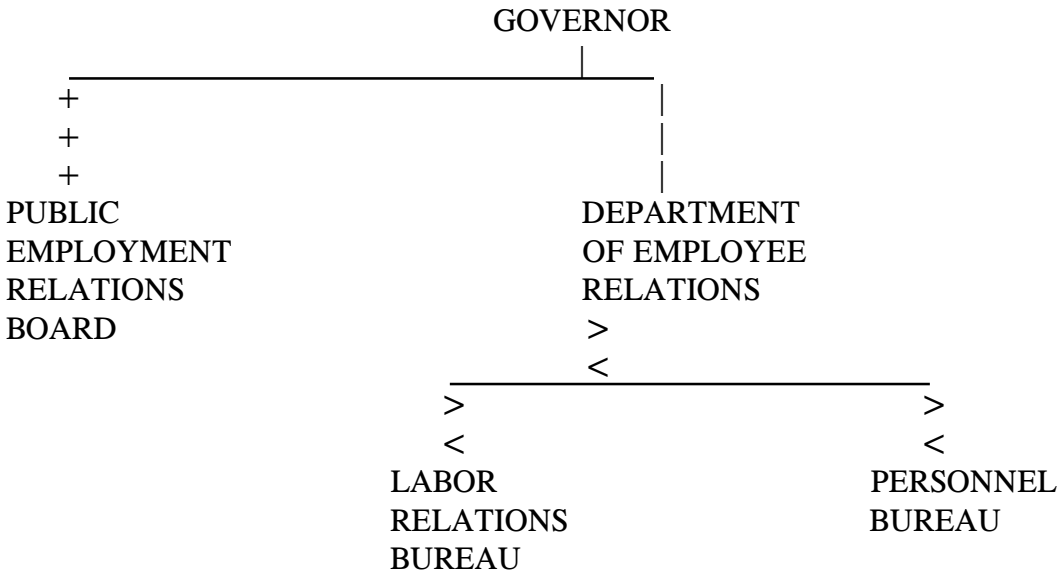

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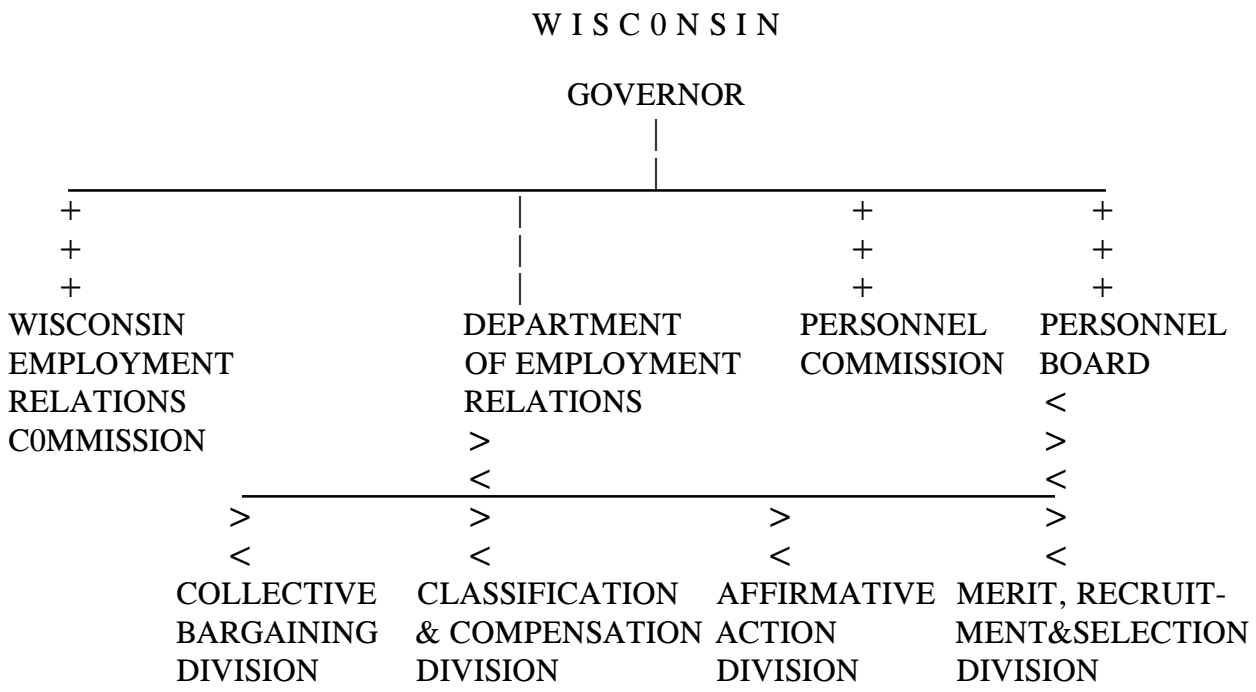
FUNCTION	**ADMINISTRATIVE AGENCY**
Labor Relations:	
Neutral Functions	Public Employment Relations Board
Negotiations	Department of Employee Relations
Classified Executive Service	Department of Employee Relations
Employee Training	Department of Employee Relations/Departments
Fringe Benefits Administration	Department of Employee Relations
Merit System:	
Selection and Classification	Department of Employee Relations
Affirmative Action	Department of Employee Relations/Departments



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FUNCTION	**ADMINISTRATIVE AGENCY**
Labor Relations:	
Neutral Functions	Wisconsin Employment Relations Commission
Negotiations	Department of Employment Relations
Classified Executive Service	Department of Employment Relations
Employee Training	Department of Employment Relations/Departments
Fringe Benefits Administration	Department of Administration
Merit System:	
Selection and Classification	Department of Employment Relations/Merit, Recruitment &Selection Division
Affirmative Action	Department of Employment Relations/Departments