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MEMORANDUM

March 18, 2004

TO: Troy Eid and Diedra Garcia

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #102, concerning reform of the state civil service system

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment appear to be:

1. To reform the state civil service system by making changes related to the state personnel system, the state personnel board, the department of personnel and state personnel director, the veterans' preference, the principal departments, and the state auditor's staff;
2. To make the following changes in the state personnel system:

- a. To require that appointments and promotions in the state personnel system be made according to merit as ascertained by comparative assessments of qualifications, instead of by competitive tests of competence;
- b. To specify that appointments and promotions in the state personnel system are to be made without regard to sex;
- c. To exempt certain persons from the state personnel system;
- d. To repeal the provision that permits a political subdivision to contract with the state personnel board for personnel services;
- e. To permit the state to use private contractors to provide state services;
- f. To repeal the "rule of 3" and instead provide for the determination by law of a limited number of qualified applicants to be considered for appointment to a position in the state personnel system;
- g. To eliminate the current exceptions to the requirement that appointees to the state personnel system reside in the state, and instead allow the general assembly to create exceptions;
- h. To eliminate provisions specifying the appointing authorities for certain employees;
- i. To modify the provision allowing persons in the state personnel system to hold their positions during efficient service or until retirement age by specifying that certified employees in the state personnel system are entitled to their positions until separation for retirement, resignation, reduction in force, or cause;
- j. To specify that certified employees that have similar duties are to receive similar salaries, as provided by law, instead of requiring that employees be graded and compensated according to standards of efficient service that are the same for all employees having like duties;
- k. To eliminate some of the circumstances under which a certified employee may be dismissed, suspended, or disciplined, and instead permit a certified employee to be disciplined as provided by law;
- l. To specify that temporary employment shall not exceed 9 months in a 12-month period, instead of 6 months, and eliminate the establishment of an eligibility list for permanent positions; and

- m. To eliminate the authority of the state personnel board to establish probationary periods for initial appointments in the state personnel system and instead specify that probationary periods are not to exceed twelve months;
3. To make the following changes in the state personnel board:
 - a. To repeal provisions concerning initial appointments to the state personnel board;
 - b. To modify the grounds for removal of members of the state personnel board; and
 - c. To modify the rule-making authority of the state personnel board;
 4. To make the following changes to the department of personnel and state personnel director:
 - a. To repeal the provision creating the department of personnel;
 - b. To modify the rule-making authority of the state personnel director;
 5. To make the following changes to the veterans' preference:
 - a. To allow an employer to use numerical or nonnumerical methods for assessing qualifications of applicants for appointment or employment in its personnel, civil service, or merit system;
 - b. To specify how the veterans' preference applies when either a numerical or nonnumerical method is used;
 6. To repeal the requirement that all but a certain number of state auditor's office staff be included in the state personnel system.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. Section 1 (8) of article V of the Colorado constitution requires all initiatives to begin as follows: "Be it Enacted by the People of the State of Colorado". Would the proponents consider adding this language to the beginning of the proposed initiative?
2. If the title board determines that the proposed initiative has a single subject, it will designate a title and submission clause for the proposed initiative. Therefore, the proponents' proposed title and

submission clause are unnecessary. Would the proponents consider removing these items?

3. After the title but before the amendments to the constitution there is a sentence that appears under the heading "Declaration". The following questions relate to this sentence:
 - a. What is the purpose of the declaration? What legal effect will it have?
 - b. Is it the intention of the proponents that the declaration be included as part of the text of the measure for purposes of publication pursuant to section 1-40-124, C.R.S., and the ballot information booklet pursuant to section 1 (7.5) of article V of the state constitution and section 1-40-124.5, C.R.S. If so, would the proponents consider adding language to clarify this intention?
 - c. As voters will not have an opportunity to vote in favor of, or against, the language of the declaration, the declaration appears to be a statement of the proponents' intent, rather than a statement of the intent of the voters. Accordingly, would the proponents consider changing the phrase "it is the intent of the people" to "it is the intent of the proponents of this initiative"?
 - d. Would the proponents consider using WHEREAS clauses to separate the independent clauses in the declaration? (For example, "WHEREAS, The purpose . . . ; and WHEREAS, It is the intent")
4. To conform to standard drafting practices regarding the form of proposed amendments to the Colorado constitution, would the proponents:
 - a. Show the existing language of each provision of the constitution that is being amended, and use strike-through type to show language that is being deleted or repealed (~~strike-through~~) and large and small capital letters to show new constitutional language (LARGE AND SMALL CAPITAL LETTERS)?
 - b. Remove provisions that are not being changed in the proposed initiative (section 13 (3) of article XII, section 14 (5) of article XII, and section 15 (2) of article XII), and change the amending clauses to read as follows:
 - i. For section 13 of article XII -- "Section 13 (1), (2), (4), (5), (6), (7), (8), (9), (10) and (11) of article XII of the constitution of the state of Colorado are amended to read:";
 - ii. For section 14 of article XII -- "Section 14 (1), (2), (3), and (4) of article XII of the constitution of the state of Colorado are amended to read:";
 - iii. For section 15 of article XII -- "Section 15 (1), (3), (4), (5), (6), and (7) of article

XII of the constitution of the state of Colorado are amended to read:";

- c. Clarify your intentions regarding section 13 (7) of article XII? If the proponents intend to repeal the language of such subsection, show the text with strike-through type. If the proponents do not intend to make any changes to such provision, follow the instructions set forth in the preceding paragraph 4.b.
5. To conform to standard grammar and punctuation rules, would the proponents:
 - a. Strike the word "in" from the phrase "students and inmates in employed" in section 13 (2) of article XII of the proposed initiative?
 - b. Strike the word "to" from the phrase "shall not to exceed nine months" in section 13 (9) of article XII of the proposed initiative?
 - c. Strike the words "but" and "to" from the phrase "initially appointed but shall not to exceed" in section 13 (10) of article XII of the proposed initiative?
 - d. Add a period after the word "system" and capitalize the first letter of the next word, "if" in section 15 (1) (a) (II) of article XII?
 6. In most cases, the proposed initiative changes the phrase "personnel system of the state" to "state personnel system", but such change is not made in the first line of section 13 (2) of article XII. Would the proponents consider making the same change in such provision? Also, if section 13 (3) of article XII remains in the proposed initiative, would the proponents consider making a similar change to such provision?

Substantive questions:

Section 13 of article XII of the state constitution (hereafter referred to as "section 13").

1. The language in section 13 (1) regarding appointments and promotions in the state personnel system was changed from being "made according to merit and fitness, to be ascertained by competitive tests of competence" to being "made according to merit, to be ascertained by comparative assessments of qualifications as provided by law". The following questions relate to this change:
 - a. Does the phrase "provided by law", as used here and elsewhere in the proposed initiative, refer to laws passed by the General Assembly? If so, is the General Assembly required to pass such laws?
 - b. Why is fitness removed as a qualification for appointments? How does the removal of the

term "fitness" effect the meaning of section 13 (1)?

- c. What are "comparative assessments of qualifications"? Are there any limitations on the discretion of the General Assembly in adopting such assessments?
 - d. How would appointments and promotions be made if the General Assembly fails to establish comparative assessments of qualifications by law?
2. The term "sex" was added to the last clause of section 13 (1), so that appointments and promotions to offices and employments in the state personnel system shall be made without regard to sex. Is it the proponents' intention that there be no exceptions to this policy? Are there any jobs in the state personnel system that require a person of a particular sex to perform it? If so, how could a state agency hire for such position without regard to sex?
3. The following questions relate to section 13 (2):
- a. Are "principal departments" the same as those that are listed in section 24-1-110, C.R.S.?
 - b. Is the "head" of a principal department the same person as the one identified in the definition established in section 24-1-103, C.R.S.?
 - c. A member of any board or commission is exempt from the state personnel system regardless of whether he or she is serving with or without compensation. So, would a member of a board or commission that is specified in the existing language of section 13 (2), which is removed in the proposed initiative, be exempt under the new general exemption relating to boards and commissions?
 - d. Under the existing language of 13 (2), the employees in the offices of the governor and the lieutenant governor were exempt only if "[his or her] functions are confined to such offices and whose duties are concerned only with the administration thereof". The proposed initiative removes this limitation. How does such change effect the exemption from the state personnel system? Would any employees not previously exempted under this clause be exempted with this new language?
 - e. The phrase "and not more than five employees in the offices of the heads of principal departments" was added to the list of persons exempt from the state personnel system.
 - i. How does this phrase relate to the offices of the governor and the lieutenant governor? If it does not relate to those offices, would the proponents consider striking the word "and" before "not" and placing a semicolon after "lieutenant governor"?
 - ii. What are the "offices of the heads of principal departments"?

- iii. Who designates which five employees will be exempt? Would proponents consider clarifying who makes such designation?
 - f. "[O]ther officers of principal departments, as provided by law" are exempted from the state personnel system. Who are "other officers of principal departments"? Does the General Assembly establish who such officers are? Is there any limitation on the number of officers that the General Assembly can exempt from the state personnel system?
 - g. Who is an "officer" in an educational institution? Who is an "officer" in a department that is not reformatory or charitable in character? Does the exemption relating to "other officers of principal departments" in the prior clause cover the same people?
 - h. Does the change in the exemption relating to the attorney general increase or decrease the number of persons exempted from the state personnel system?
4. The following questions relate to section 13 (4):
- a. Was it the proponents' intention to eliminate the ability of a political subdivision to contract with the state personnel system for personnel services?
 - b. What does "state" mean? Does it include political subdivisions? Does it include parts of the state that are exempted from the state personnel system?
 - c. How does this provision relate to "the reform of the state civil service system"?
 - d. Section 13 (4) begins with the phrase "Notwithstanding any other provision of this section". To which specific provisions is this phrase referring?
 - e. How does the proposed change modify existing law? Could the state currently use private contractors to provide state services?
 - f. Could the state replace all of the employees in a department with employees of private contractors, assuming that such action was provided by law? What is to prevent such action?
5. The following questions relate to section 13 (5), which is commonly referred to as the "rule of three":
- a. Would the "comparative assessments of qualifications" required in section 13 (1) be used to determine who the "qualified applicants" are?
 - b. In light of the use of the plural "applicants", is it correct to say that the General Assembly can establish anywhere between two and ten qualified applicants under this provision?

- c. How will the appointing authority select which of the limited number of qualified applicants shall be appointed to a position?
 - d. Will the comparative assessments of qualifications always yield the exact number of qualified applicants as provided by law? Is it possible that there will be more qualified applicants than the limited number provided by law pursuant to section 13 (5)? If so, how would the appointing authority select the pool of qualified applicants from which the appointment will be made?
6. The following questions relate to section 13 (6), which was changed to eliminate a specific exception to the requirement that all appointees shall reside in the state "except as otherwise provided by law":
- a. Are there any limitations on the power to create exceptions pursuant to this provision? Could the General Assembly create an exception that exempts all appointees from residing in the state?
 - b. Are there any persons who are currently in the state personnel system who reside outside of the state? If so, how will they be affected by this change?
7. Assuming that it is the proponents' intention to repeal section 13 (7), the following questions relate to such subsection: (See technical question 4.c.)
- a. Who shall be the appointing authority for the employees of the office of the head of a principal department and for heads of divisions ranking next below the head of such department?
 - b. Who shall be the appointing authority for all positions in the personnel system within a respective division?
8. The following questions relate to section 13 (8):
- a. Who are "certified employees"?
 - b. Who determines that a reduction in force is necessary?
 - c. What does "separation for cause" mean?
 - d. Are leaves of absence permitted under the state personnel system? If so, would a person hold his or her position while on a leave of absence?
 - e. In the first sentence of section 13 (8) (a), does the phrase "as provided by law" refer only to "separation for cause" or does it refer to the preceding four reasons for separation listed in the sentence?

- f. The proposed language allows an employee to be "disciplined as provided by law". What does "disciplined" mean? Can it include termination? Could the General Assembly permit each head of a principal department to establish his or her own types of discipline? What happens if the General Assembly fails to enact any laws related to this provision?
 - g. The existing language of section 13 (8) requires persons in the personnel system to be "graded . . . according to standards of efficient service". Does removing this phrase eliminate the power of the state to grade persons in the personnel system?
 - h. Section 13 (8) (b) relates to the right of an appeal for disciplining. Is there a similar right of appeal for persons who are separated for cause?
9. The following questions relate to section 13 (9):
- a. What does the first sentence of section 13 (9) mean? (See technical question 5.b.)
 - b. Are temporary employment positions outside of the state personnel system?
 - c. The current language of section 13 (9) permits the state personnel director to authorize temporary employment, but that language is deleted in the proposed initiative. Who will authorize the temporary employment in the proposed initiative?
 - d. Is there any limit on the number of temporary employees?
10. The following questions relate to section 13 (10):
- a. What does the first sentence of section 13 (10) mean? (See technical question 5c.)
 - b. Does the probationary period apply to all persons in the state personnel system? Does it apply to people outside of the state personnel system?
 - c. The phrase "shall not exceed . . . twelve months" implies that the probationary period may be any length of time less than twelve months. Is this correct? If so, who decides what the length of the probationary period will be? Is there any limit on how short such period can be?
 - d. What does the phrase "applicable classification within the state personnel system" mean?
 - e. Assuming that a person performs unsatisfactorily during a probationary period, who will be entitled to dismiss such person?
11. The language of section 13 (11) requires that "employees in the state personnel system prior to, on, or after July 1, 2005, shall be subject to the provisions of this section on or after such date." Would any provisions of section 13 apply to a person who was employed by the state prior to July

1, 2005, but not on July 1, 2005? How does the phrase "prior to" add to the meaning of the sentence?

Section 14 of article XII of the state constitution (hereafter referred to as "section 14").

12. The following questions relate to section 14 (1):
 - a. The phrase "to classes and positions" was removed from the first sentence of section 14 (1). How does this change the meaning of the sentence?
 - b. The current language of section 14 (1) permits a member of the state personnel board to "succeed himself". Could a person "succeed himself" more than one time under existing language of this provision? If yes, then is the new language in the second sentence of subsection (1) of section 14 simply rephrasing the existing language?
13. The following questions relate to section 14 (2):
 - a. Does the removal of the term "willful" mean that a member of the board's unintentional or negligent "failure or inability to perform" could warrant removal of a member of the state personnel board by the governor?
 - b. Do the proponents intend that the governor be granted authority to remove members of the personnel board for conviction of any offense?
 - c. What does the phrase "as provided by law" mean in this context? Does it relate only to "any other offense" or something else?
14. The following questions relate to section 14 (3) and (4):
 - a. How does the change to section 14 (3) change the state personnel board's authority to make rules?
 - b. If there is a provision in sections 13 through 15 of article XII that is not the subject of a law, is the state personnel board or state personnel director prohibited from establishing any rules related to such constitutional provisions?
 - c. What happens to rules related to the state personnel system enacted prior to the effective date of the proposed initiative?
 - d. Both the state personnel board and the state personnel director "shall adopt rules to implement the laws enacted". Are the board and the director required to adopt rules on all the same subjects? If so, what happens if there is a conflict between the two sets of rules? Is the state personnel board permitted to enact rules related to the areas set forth in the last clause of section 14 (4)?

- e. The language creating the department of personnel is struck in section 14 (4). Does that eliminate the department of personnel? What will happen to it?
- f. After the change to section 14 (4), is the state personnel director in a particular principal department? Is he or she required to be the head of a particular department?
- g. The state personnel director is required to adopt rules to implement laws enacted to implement sections 13 through 15 of article XII, including rules concerning "appointments and promotions, standardization of positions, compensation, standards of performance, grievance procedures, discipline, and separations." What provisions of sections 13 through 15 relate to standards of performance or to grievances?

Section 15 of article XII of the state constitution (hereafter referred to as "section 15").

- 15. The following questions relate to section 15 (1):
 - a. What are "minimum requirements for each assessment of qualifications"? How does it relate to section 13 (1)? Is a person who meets the minimum requirements considered a "qualified applicant" as used in section 13 (5)? If so, how will you limit the number of persons who are qualified applicants?
 - b. What is a "comparable personnel system"? Is a home rule city required to have a comparable civil service, personnel, or merit system?
 - c. Section 15 (1) requires all applicants entitled to a preference under such subsection to be given an interview. What happens if the applicant is not one of the limited number of qualified applicants set forth in section 13 (5)? Would he or she still be required to receive an interview, even though he or she is not eligible to be appointed to the job?
- 16. Section 15 (4) has similar language to section 15 (1), insofar as each generally references "a civil service or merit system of any agency of the state or any political subdivision of the state [thereof]". In section 15 (1), the term "personnel" was added to the clause, but a similar change was not made in section 15 (4). Was this intentional?

Section 22 of article IV of the state constitution (hereafter referred to as "section 22").

- 17. The second sentence of the existing language of section 22 reads as follows: "Subsequently, all new powers or functions shall be assigned to departments, divisions, sections, or units in such manner as will tend to provide an orderly arrangement in the administrative organization of state government." This sentence is deleted in the proposed initiative. What is the effect of removing this sentence?

18. While the last clause of section 22 that exempts the heads of principal departments from the classified civil service was removed, those same persons are specifically exempted from the state personnel system under the language of section 13 (2), correct?

Section 49 (3) of article V of the state constitution (hereafter referred to as "section 49").

19. Currently section 49 requires not more than three members of the staff of the state auditor to be exempt from the state personnel system. Does repealing this provision have the effect of making all of the staff of the state auditor part of the state personnel system, except as otherwise provided in sections 13 through 15 of article XII?