Montana Administrative/Agency Law – Some Things You Really Should Know[1]

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Introductory Comment: Montana is one of a number of states in which each agency in state government can provide its own administrative procedures and governance. Although Montana state agencies can utilize the Attorney General's Office for administrative law purposes, only a few agencies have chosen that option. As a result, there is a welter of legislative authorizations scattered all through Montana law, empowering various state agencies to develop their own administrative procedures and practices, and the various agencies have adopted varying rules addressing their administrative activities. ***You really need to know the laws, the rules, the entities and the practices involved for the particular administrative matter your client is bringing to you.***

I. Three sources of direct authority for Montana Administrative Law – YOU REALLY SHOULD KNOW THE AUTHORITY UNDER WHICH THE INVOLVED ADMINISTRATIVE ENTITY IS ACTING

A. Statutes

1. Montana Administrative Procedure Act (MAPA), enacted 1971
   - a. Intended to simply, unify and clarify administrative procedure in MT – Mont. Code Ann. §2-4-101(2)
   - b. Current: Mont. Code Ann.§§2-4-101 to 2-4-711 (2013)
     - i. Loosely based upon 1961 Revised Model State Administrative Procedure Act (the Model Act)
     - ii. The Model Act was loosely based on the federal Administrative Procedure Act (APA) originally enacted in 1946, 5 U.S.C. §§551 ***et seq.*** and 701 ***et seq.***
   - c. MAPA applies to "agencies" – government entities that, under Mont. Code Ann. §2-4-102(2):
     - i. Are instrumentalities of state government, not school districts, units of local government or other political subdivisions of the state (***see***, ***Miskovich v. Bd. of Trustees***, 170 Mont. 138, 551 P.2d 995 (1976); and
     - ii. Are not specifically exempted from MAPA and
     - iii. Have authority to make rules, decide contested cases or enter into contracts.
2. A specific Montana statute that empowers the agency action at issue for your client and may apply or exclude MAPA coverage
   - a. MAPA provides generic, default administrative procedures that apply in the absence of authorization to adopt procedures in the agency's authorizing or enabling legislation, with express exemption from MAPA coverage. ***State v. Vainio***, ¶¶34-37, 2001 MT 220, 306 Mont. 439, 35 P.3d 948.
   - b. The authority may be cited in the Notice/Letter/Decision at issue (under MAPA or not) where rights, methods and time limits within which to seek redress are stated.
   - c. Authority for action and/or redress are typically found in the Title of Montana Code that defines the particular agency's regulatory concerns, ***i.e.***

[1] Examples cited are largely from the practice experience of the author.

i. A parent served with a Department of Public Health and Human Services Notice of Fiscal Responsibility, authorized by Title 40 ("Family Law"), Chapter 5 ("Enforcement of Support"), Part 2 ("Administrative Enforcement of Support"), Section 40-5-225(2), can timely request a hearing to contest either the amount of child support shown in the notice or the establishment of a medical support order, Section 40-5-225(2)(e). [For parties who do not timely request a hearing, support, including medical support, will be ordered as declared in the notice, Section 40-5-225(2)(f).]

ii. Upon a timely request for such a hearing, a MAPA contested case telephone hearing must be held, as authorized by Title 40 ("Family Law"),Chapter 5 ("Enforcement of Support"), Part 2 ("Administrative Enforcement of Support"), Section 40-5-226(2), with subsequent proceedings and available recourse as set forth in the balance of that statute

iii. A Department of Labor and Industry finding of lack of merit and notice of dismissal of a discrimination complaint under either the Montana Human Rights Act or the Montana Governmental Code of Fair Practices, authorized by Title 49 ("Human Rights"), Chapter 2 ("Illegal Discrimination"), Part 5 ("Enforcement"), Sections 49-2-504(7)(b) and 49-2-512(1), is subject to an objection by an aggrieved party, filed with the Human Rights Commission, Section 49-2-511(1).

iv. A timely objection, considered in an informal hearing either by telephone or in person before the Commission, will result in a Commission order which can either

α. Overrule the objection and let the dismissal stand, with redress available through filing a petition for judicial review of the Commission decision or an original discrimination complaint in district court, Section 49-2-511(3)(a) and (b),

β. Sustain the objection and remand the complaint for administrative contested case hearing proceedings, Sections 49-2-511(c) and 49-2-505

v. Unemployment Insurance Division Determinations and Redeterminations of validity of a claim of Unemployment Insurance Benefits are authorized in Title 39 ("Labor"), Chapter 51 ("Unemployment Insurance"), Part 24 ("Claims for Benefits")

vi. Recourse from Unemployment Insurance Division benefit claim decisions is by appeal to an appeals referee, whose decision can be appealed to the Board of Labor Appeals authorized in Title 39 ("Labor"), Chapter 51 ("Unemployment Insurance"), Part 24 ("Claims for Benefits")

vii. Decisions on applications for reduction in property valuation are authorized for the County Tax Appeal Board in Title 15 ("Taxation"), Chapter 15 ("Property Tax Appeals"), Part 1 ("County Tax Appeal Board") and Part 2 ("Motor Vehicle Appeals")

viii. Recourse from County Tax Appeal Board decisions on requests for reduction in property valuations is by appeal to the State Tax Appeal Board, Title 15 ("Taxation"), Chapter 2 ("State Tax Appeal Board"), Part 3 ("Appeal Procedure")

d. Authorizing statutes for administrative proceedings which are not governed by MAPA typically honor the principles of administrative law, as recognized in MAPA, such as notice, opportunity to participate meaningfully (often defined within "due process") and recourse for aggrieved participants

B. Rules

1. Statutory Authority for Rules

a. Statute Empowering Agency Action Typically Permits/Requires Rules Governing

b. Generally, MAPA, Title 2, Part 3 empowers and governs rule-making, with Part 4 providing for Legislative review of rules

c. Probably all agencies use MAPA rule-making, but there may be exceptions in Montana law – look in the Title and Chapter(s) authorizing the administrative actions, and check for non-MAPA rule-making authority (*see* I. A. 2.)

2. The Administrative Rules of Montana ("ARM", "A.R.M.", also referenced as "Admin. R. Mont.") are the published formal rules of Montana state government, divided into Title Nos. 1-44

a. Title 1 "General Contents"

i. Chapters 1 and 2 contains useful general information for new practitioners and the rest of us, too, including general and specific info about the ARMs (numbering, history, updates, rule format and other rule writing information, instructions regarding rule filing and changes, etc.)

ii. Chapter 3 contains various Model Rules, for adoption by reference and use by state agencies as each may see fit [state agencies can also write their own rules to address matters covered in the various Model Rules, and can "mix and match" by adopting some Model rules, in whole or in part, while also writing some of their own rules]

b. 20 Titles between 2-44 (the other Titles are currently not used) are assigned to cover rules for 15 state agencies and 4 elected state officers, with Title 10, "Education," encompassing another elected state officer, a Board, a Commission, a Council and a Society, all generally involved in public education

3. Agency Rules

a. Whether addressing contested cases, rule-making, constitutional rights (*see* II., *infra*), incorporation by reference of Model Rules, etc., agency rule-making itself follows the general principles applicable to agency action, such as notice, opportunity to participate meaningfully and recourse for aggrieved participants (which ordinarily leads ultimately to a petition for judicial review)

b. Negotiated Rule Making is available for controversial issues, but must be followed by MAPA's formal rule-making process, Title 2, Chapter 5, Part 1, Mont. Code Ann.

4. Outside "Rules"

a. Frequently, in areas involving overlaps between Montana and federal law and/or federal funding for state action, federal requirements may either be expressly incorporated into agency rules, or the substance of the federal requirements may simply be restated in agency rules

b. Some state agencies incorporate and apply the Montana Rules of Evidence (required by MAPA for formal hearings), but some administrative proceedings are expressly exempted from those (and other) rules governing judicial proceedings

i. Human Rights contested case hearings must be governed by agency rules adopting the appropriate portions of the Montana Rules of Evidence as well as the appropriate portions of the Montana Rules of Civil Procedure. At the same time, those contested case hearings also apply the Department and Human Rights Commission rules regarding presumptions and burdens of proof. Mont. Code Ann. §49-2-204(2)

ii. Unemployment Insurance benefit contested case hearings and appeals are governed by Department of Labor and Industry rules, whether or not those rules conform to the Montana Rules of Civil Procedure or common law or statutory rules of evidence. Mont. Code Ann. §39-51-2407(1)

5. Administrative Interpretations of Rules

a. When an agency develops and follows internal or informal interpretations of its own rules but does not modify the rules themselves to include the interpretations, it seems to defeat at least two of the major purposes for requiring rules – notice and an opportunity for meaningful participation. However, because of the time and expense involved in rule-making, agencies might develop internal or informal interpretations, considering them "agency expertise," using them and even revising them without ever putting them in their rules. WHETHER TO CHALLENGE SUCH A PRACTICE IN A GIVEN SITUATION IS ITSELF A QUESTION OF TACTICS INVOLVING, AT LEAST IN PART, WEIGHING THE REQUIRED TIME AND EXPENSE FOR YOUR CLIENT VERSUS THE LIKELY BENEFIT OF RAISING THE CHALLENGE.

b. When agency rules are applied by an internal agency hearing authority that maintains appropriate separation from the agency unit that promulgates and applies the rules in the first instance, the internal hearing authority can interpret the agency rules on a case by case adjudication basis. The agency unit promulgating

and applying the existing rules may eventually change some of its rules, to conform to or perhaps sometimes to differentiate from the hearing authority decisions. IT BEHOOVES YOU TO BECOME FAMILIAR WITH THE DECISIONS OF SUCH INTERNAL HEARING AUTHORITIES WHEN YOUR CLIENT HAS A CASE THAT MAY PROGRESS THROUGH THOSE HEARING AUTHORITIES BEFORE REACHING POTENTIAL JUDICIAL REVIEWS.

6. Judicial Consideration of Administrative Rules

   a. Courts either leave intact or invalidate the rule or portions of one or more rules presented for review

   b. Very rarely a court, while leaving the rule intact, may express concerns about validity of the rule in the future (perhaps in some different fact scenario) – YOU SHOULD KNOW ABOUT SUCH CASES REGARDING RULES THAT COULD APPLY TO YOUR CLIENT'S CASE, TO USE OR TO DISTINGUISH THEM

7. Secondary Source – "Montana Administrative Law Practice: 41 Years After the Enactment of the Montana Administrative Procedure Act," 73 Mont. L. Rev. 339, William L. Corbett (Summer 2012)

C. Courts

1. The Montana Supreme Court will weigh in on administrative law questions necessary to resolve an appeal and YOU SHOULD KNOW ABOUT SUCH CASES ON ISSUES INVOLVED IN YOUR CLIENT'S CASE

2. Two Examples

   a. In Unemployment Insurance benefits cases, in appeals referee contested case hearings, where the Montana Rules of Evidence do not apply, the due process principles of those rules DO apply, to preclude reliance upon hearsay evidence as the sole basis for deciding an issue in the case. ***Bean v. Board of Labor Appeals***, 1998 MT. 222, 290 Mont. 496, 965 P.2d 256.

   b. In Human Rights Act contested case proceedings before either an administrative tribunal or court, department investigative findings about discrimination in the particular case are inadmissible hearsay, Rule 803(8)(iv) M.R.E., and inadmissible opinions about ultimate issues of fact. ***Mahan v. Farmers Union Central Exchange, Inc.*** (1989), 235 Mont. 410, 768 P.2d 850, 858-59; and ***Crockett v. City of Billings*** (1988), 234 Mont. 87, 761 P.2d 813, 820. Final investigative reports are admissible to prove when they issued and what they said, rather than to prove the truth of what they said, and are appropriate documents to consider in deciding what claims are involved in this contested case. ***Strong v. State*** (1979), 183 Mont. 410, 600 P.2d 191, 192-93. NOTE: Portions of a Human Rights Bureau final investigative report might be admissible pursuant to other provisions of the hearsay rules, to impeach, to rebut, to refresh recollection, to rehabilitate, as prior statements (consistent or inconsistent), as statements of a party-opponent, etc.

II. Public Participation and Privacy

1. Constitutional Interests

   a. Public Participation, Art. II, Sec. 8, 1972 Mont. Con.: Governmental agencies to afford such reasonable

opportunities, before agency final decision, for citizen participation as may be provided by law.

b. Right to Know, Art. II, Sec. 9, 1972 Mont. Const.: No person shall be deprived of right to examine documents or to observe deliberations of all public bodies or agencies of state government and its subdivisions, <u>except</u> when the demand of individual privacy clearly exceeds the merits of public disclosure

c. Privacy Right, Art. II, Sec. 10, 1972 Mont. Con.: Right of individual privacy is essential to well-being of free society and shall not be infringed without showing of compelling state interest

2. Statutory Directives

a. Title 2, Chapter 3, "The Montana Public Participation in Governmental Operations Act," addresses notice and the opportunity to be heard (Part 1) and open meetings (Part 2), defining participation as provided by law.

b. Title 2, Chapter 6 ("Public Records") addresses what documents in possession of state government are "public writings," and how and to what extent (the greatest extent possible, consistent with constitutional individual privacy interests individual or public safety) public writings are available to the public.

3. Judicial Decisions

a. Conflict between the public's right to know and the individual's right to privacy requires agency "to balance the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Under this standard, the right to know may outweigh the right of individual privacy, depending on the facts." ***Missoulian v. Board of Regents*** (1984), 207 Mont. 513, 675 P.2d 962, 971.

a. State administrative agency has power to examine records in its possession and determine if privacy rights outweigh the right to review and inspect those records. ***City of Billings Police Dept. v. Owen***, ¶30, 2006 MT 16, 331 Mont. 10, 127 P.3d 1044

4. Secondary Source – ***Montana Constitutional Convention***, Vols. III through VII, Verbatim Transcript (Color World of Mont., Inc., 1981). CHECK INDEX VOLUME FOR CROSS REFERENCES.

III. Agency Contested Case Proceedings

A. Authorizing statutes, applicable rules and court decisions define the conduct of contested cases before any particular administrative tribunal

B. Reading the prior decisions of the administrative tribunal will provide additional information about procedure and formatting of filings

C. READ THE ORDERS AND NOTICES IN YOUR CLIENT'S CASE, AS THEY COME IN, AND PAY ATTENTION TO THE BOILERPLATE. YOU NEED TO KNOW THESE THINGS.

D. IF YOU HAVE QUESTIONS AFTER REVIEWING THE RESOURCES IN III. A., B. AND C., CALL THE OFFICE OF THE ADMINISTRATIVE TRIBUNAL AND ASK THOSE QUESTIONS OF A STAFF MEMBER

1. Ex parte consultation with the Hearing Officer is improper

2. **Staff in the offices of administrative tribunals are generally helpful and friendly – do reveal your lack of knowledge and ask for help**

D. IF YOU HAVE ACCESS TO A COLLEAGUE WHO PRACTICES BEFORE THE TRIBUNAL INVOLVED, ASK HER OR HIM YOUR QUESTIONS

GOOD LUCK AND BEST WISHES!