

VOLUME NO. 38

OPINION NO. 92

ACCOUNTANTS AND ACCOUNTANCY - Validity of late renewal fee for license;
ADMINISTRATIVE LAW - Validity of rule imposing late renewal fee for license;
BOARD OF PUBLIC ACCOUNTANTS - Authority to impose late renewal fee for license;
FEES - Late renewal fee for license;
FINES - Late renewal of license;
LICENSE FEES - Late renewal fee;
RULES AND REGULATIONS - Validity of rule imposing late renewal fee for license;
MONTANA CODE ANNOTATED - Sections 2-4-305(4), 2-4-305(5), 37-50-201(2), 37-50-314.

HELD: Prior to July 1, 1979, the Board of Public Accountants did not have the authority to impose a 100 per cent late renewal fee in addition to the \$25 annual renewal fee for licenses to engage in the practice of public accounting in Montana. The Board of Public Accountants may now impose a late renewal fee, not to exceed the added administrative costs incurred by failure to renew on time. However, the Board may not impose a penalty or fine for late renewal that exceeds administrative costs.

18 July 1980

Ed Carney, Director
Department of Professional
and Occupational Licensing
42½ North Last Chance Gulch
Helena, Montana 59601

Dear Mr. Carney:

You requested an opinion concerning the following question:

Does the Montana Board of Public Accountants have the authority, statutory or implied, to impose a late renewal fee for late renewal of the annual license to practice the profession of a public accountant in the State of Montana?

I understand that the Legislative Auditor's office has already considered this question and determined that in the absence of specific statutory authority, the board does not have the power to assess such a fine. I concur with that determination.

Your question concerns the validity of the portion of ARM 40.52.411(3) (formerly ARM 40-3.94(6)-594090(3)) that states:

If renewal is not made on or before February 28, then any renewal thereafter shall be assessed in addition to the renewal fee 100% of the amount of the annual license to practice.

This rule was adopted by the Board of Public Accountants pursuant to its general rulemaking authority, contained in section 37-50-201(2), MCA, which states:

The board may adopt rules for the conduct of its affairs and the administration of [chapter 50 of Title 37, MCA, concerning accountants].

The general tests for determining the validity of the rule in question are set forth in the Montana Administrative Procedure Act as follows:

(4) To be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

(5) Whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, no rule adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

§ 2-4-305(4), (5), MCA.

In Bell v. State, ___ Mont. ___, 594 P.2d 331, 333 (1979), the Montana Supreme Court provided these guidelines for the determination of whether rules come within the scope of a broad grant of rulemaking authority similar to section 37-50-201(2), MCA:

[A]dministrative regulations are "out of harmony" with legislative guidelines if they: (1) "engraft additional and contradictory requirements on the statute;" State of Montana ex rel...Swart v. ...Casne (1977), ___ Mont. ___, 564 P.2d 983, 34 St. Rep. 394, 399; or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature; Arizona State Board of Funeral Directors v. Perlman (1972), 108 Ariz. 33, 492 P.2d 694.

The legislative guidelines for the Board's rule concerning a fine for late renewal are contained in section 37-50-314, MCA, concerning annual certification or licensure of public accountants. That statute was amended, effective July 1, 1979. Because the question you have submitted arose prior to the amendment, I will address the authority of the Board of Public Accountants to adopt a rule imposing a late renewal fee under both versions of the statute.

Prior to July 1, 1979, the statute expressly authorized the Board to determine the amount of an annual license fee, not to exceed \$25 for all or part of a year. The Board set the fee at the maximum allowable level of \$25. ARM 40.52.410(4) and (5) (formerly ARM 40-3.94(6)-S94070(4) and (5)). The operative statute expressly limited the maximum fee amount for one year to \$25, and eliminated the possibility of power to assess a higher fee under any circumstances. The additional late renewal fee of 100 percent of the license amount added to the annual renewal fee was inconsistent with section 37-50-314, MCA, and was therefore invalid.

Furthermore, the fine for late renewal was not "necessary to effectuate the purpose of the statute." The Legislature expressly provided a method of assuring compliance with the license requirement. Section 37-50-314(2), MCA, provided that a licensee's failure to renew within three years of the license's expiration date deprived him of the right to renew. The power to assess fines in excess of \$25 per year cannot be implied as an administrative detail which the Legislature intended to leave to the discretion of the Board.

Under the present amended statute, no maximum fee amount is fixed. The statement of intent attached to Senate Bill 489 (1979 Mont. Laws, ch. 684) reveals the legislative intent to allow the Board to prescribe a reasonable annual renewal fee, not to exceed an amount necessary to meet administrative costs. The amended statute provides more flexibility for the Board in determining a reasonable annual renewal fee. If an increased renewal fee is necessary to meet the added administrative costs incurred by failure to renew on time, the Board may be able to pass the added cost on to the licensee.

However, the Board may not assess a fine or penalty for late renewal that exceeds the added administrative costs. Section 37-50-314(2), MCA, requires a person who fails to renew his license to surrender it to the Board upon request. The board is thus given power to assure compliance with the licensing procedure. A fine is not "reasonably necessary" to give effect to the legislative purposes. See § 2-4-305(5), MCA.

THEREFORE, IT IS MY OPINION:

Prior to July 1, 1979, the Board of Public Accountants did not have the authority to impose a 100 percent late renewal fee in addition to the \$25 annual renewal fee for licenses to engage in the practice of public accounting in Montana. The Board of Public Accountants may now impose a late renewal fee, not to exceed the added administrative costs incurred by failure to renew on time. However, the Board may not impose a penalty or fine for late renewal that exceeds administrative costs.

Very truly yours,

MIKE GREELY
Attorney General