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Opinion No. 2

ADMINISTRATION, DEPARTMENT OF — Administrative Procedure Act, applicability to management memoranda; ADMINISTRATION, DEPARTMENT OF — Management memoranda, Administrative Procedure Act, applicability of; ADMINISTRATIVE PROCEDURE ACT — Administration, department of, management memoranda, applicability of Act to. Section 82-4202, R.C.M. 1947; Chapters 1, 19 and 33, Title 82, R.C.M. 1947.

HELD: The Administrative Procedure Act does not apply to management memoranda issued by the Department of Administration pursuant to chapters 1, 19 and 33 of Title 82, R.C.M. 1947.

January 17, 1973

Mr. Jack Crosser, Deputy Director
State Department of Administration
State Capitol
Helena, Montana 59601

Dear Mr. Crosser:

You have requested my opinion concerning the applicability of the Montana Administrative Procedure Act (sections 82-4201 through 82-4225, Revised

Codes of Montana, 1947) to management memos issued by the Department of Administration pursuant to chapters 1, 19 and 33 of Title 82, R.C.M. 1947.

To determine whether a department or board must meet the requirements of the Administrative Procedure Act, it must first be determined whether the department is an agency as defined in section 82-4202 (1), R.C.M. 1947. That section defines "agency" as:

... any board, bureau, commission, department, authority or officer of the state government **authorized by law to make rules and to determine contested cases, ...**
(Emphasis supplied)

To determine whether management memos must be published and adopted pursuant to the Administrative Procedure Act, it must be determined whether the department has authority to make rules and authority to determine contested cases. If the department has authority to carry out only one of the functions, it is not an agency as defined by the Administrative Procedure Act and is not required to comply with the provisions of the Act.

A rule is defined as:

... each agency regulation, standard or statement of general applicability that implements, interprets or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. ... Section 82-4202 (2), R.C.M. 1947.

A contested case is defined as:

... any proceeding before an agency in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing. The term includes, but is not restricted to, rate making, price fixing and licensing. Section 82-4202 (3), R.C.M. 1947.

Chapters 1, 19 and 33 of Title 82, R.C.M. 1947, all grant some rule making power to the department. In all three chapters the department can make regulations to carry out its functions. At no place in the above-mentioned chapters, however, is there authority to determine contested cases through hearings. Further, there is no general hearings requirement in Title 82A, chapter 2, which created the department of administration.

THEREFORE, IT IS MY OPINION:

That because the department of administration is not required to hold hearings before acting under Title 82, Chapters 1, 19 and 33, the department of administration, when carrying out its prescribed functions under said chapters, is not an agency as defined in section 82-4202 (1), R.C.M. 1947, and the Administrative Procedure Act requirements do not apply to its management memos.

Very truly yours,

ROBERT L. WOODAHL
Attorney General