

VOLUME NO. 37

OPINION NO. 39

ADMINISTRATIVE LAW - Applicability of rules of evidence to a contested case - referee bound by rules of evidence in an aftercare hearing, held pursuant to section 80-1414.1, R.C.M. 1947; DEPARTMENT OF INSTITUTIONS - Applicability of rules of evidence to a contested case - referee bound by rules of evidence in an aftercare hearing, held pursuant to section 80-1414.1, R.C.M. 1947; JUVENILES - Applicability of rules of evidence to a contested case - referee bound by rules of evidence in an aftercare hearing, held pursuant to section 80-1414.1, R.C.M. 1947. REVISED CODES OF MONTANA, 1947 - Sections 80-1401, 80-1414, 82-4202, 82-4210.

HELD: A referee appointed by the Department of Institutions to conduct a hearing on an alleged violation of an aftercare agreement, pursuant to section 80-1414.1, R.C.M. 1947, is bound by the common law and statutory rules of evidence.

1 July 1977

Robert F. James, Esq.
Deputy County Attorney
Cascade County Courthouse
Great Falls, Montana 59401

Dear Mr. James:

You have requested my opinion concerning the interpretation of section 80-1414.1, R.C.M. 1947, in relation to the following question:

Whether a referee is bound to follow the rules of evidence in a hearing on an alleged violation of an aftercare agreement.

To begin answering your question, I direct your attention to section 82-4210(1), R.C.M. 1947, of the Montana Administrative Procedure Act (MAPA), section 82-4201 et seq., R.C.M. 1947, which states in reference to contested cases before an agency:

Except as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence. Objection to evidentiary offers may be made and shall be noted in the record ...

An "agency" is defined by section 82-4202(1), R.C.M. 1947, as:

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

In conjunction, section 82-4202(3), R.C.M. 1947, states:

"Contested case" means 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.

Turning to the aftercare situation, section 80-1414.1(3), R.C.M. 1947, authorizes the Department of Institutions to appoint a referee to conduct the hearing on an alleged violation of an aftercare agreement and to adopt rules and regulations governing the procedure of such a hearing. Furthermore, the purpose of this hearing is to determine if the youth has violated his aftercare agreement and whether he should be returned to the juvenile facility from which he was released. Section 80-1414.1(1), R.C.M. 1947.

Therefore, a hearing on an alleged violation of an aftercare agreement is a contested case before an agency, and as such is governed by section 82-4210, R.C.M. 1947, providing for applicability of the rules of evidence. As stated before, section 82-4210, R.C.M. 1947, requires an agency to be bound by the common law and statutory rules of evidence, unless

otherwise provided by statute relating directly to the agency. An examination of the statutes relating directly to the department, section 80-1401 et seq., R.C.M. 1947, reveals that the department is not statutorily exempted from section 82-4210, R.C.M. 1947.

It may be argued that MAPA does not apply to the aftercare violation hearing since section 82-4202(1), R.C.M. 1947, listing some specific exceptions to the MAPA states:

(f) the supervisions and administration of any penal, mental, medical or eleemosynary institution with regard to the admission, release, institutional supervisions, custody, care or treatment of inmates, prisoners or patients;... (Emphasis added.)

However, this provision does not exempt all activities of the Department of Institutions, but concerns the administration and supervision of custodial institutions, which do not directly concern us here. An aftercare situation arises subsequent to release from an institution. At this stage a youth is within the care, control and supervision of the department, but the custodial institution has been divested of any custody, supervision, or control of the youth, as prescribed by the statutes governing aftercare.

Section 80-1414, R.C.M. 1947, states:

A youth released by the department from one of the state juvenile facilities to the supervision, custody and control of the department shall, before his release, sign an aftercare agreement ... (Emphasis added.)

Additionally, section 80-1414.1, R.C.M. 1947, governing the hearing on an alleged violation of an aftercare agreement, refers a number of times to the phrase "the juvenile facility from which he was released;" and section 80-1415, R.C.M. 1947, states:

The department has control over a child released under section 80-1414 until he attains the age of twenty-one (21) years, subject, however, to the general jurisdiction of the various courts of Montana for acts committed by the child while under the control of the department. (Emphasis added.)

Consequently, the aftercare hearing is separate and apart from the release of the youth from one of the state's juvenile correctional facilities, and as such is not exempt from the MAPA, and section 82-4210, R.C.M. 1947.

THEREFORE, IT IS MY OPINION:

A referee appointed by the Department of Institutions to conduct a hearing on an alleged violation of an aftercare agreement, pursuant to section 80-1414.1, R.C.M. 1947, is bound by the common law and statutory rules of evidence.

Very truly yours,

MIKE GREELY
Attorney General