

VOLUME NO. 40

OPINION NO. 50

ADMINISTRATIVE LAW - Validity of rules;
LICENSES, OCCUPATIONAL AND PROFESSIONAL - Validity of
rules;

RULES AND REGULATIONS - Validity of rules;

ADMINISTRATIVE RULES OF MONTANA - Sections 8.56.402(3),
8.56.405, 8.56.406, 8.56.412(1)(c);

MONTANA CODE ANNOTATED - Sections 2-4-305(6), 37-14-102,
37-14-202, 37-14-303, 37-14-305, 37-14-306.

HELD: Rules promulgated by the Board of Radiologic
Technologists which require applicants for
permits under section 37-14-306, MCA, to take
a 24-hour course, to be employed, to have six
months' experience, and to pass a permit
examination are void and unenforceable.

3 May 1984

Geoffrey L. Brazier
Board of Radiologic Technologists
Department of Commerce
1424 Ninth Avenue
Helena MT 59620

Dear Mr. Brazier:

You have requested my opinion on the validity of certain rules adopted by the Board of Radiologic Technologists. The rules in question concern the standards to be met by persons applying for temporary permits pursuant to section 37-14-306, MCA. In particular, the rules require an applicant for a permit to prove that he has taken a 24-hour x-ray course approved by the board, that he is employed, and that he has at least six months' practical experience in the x-ray profession. Further, the board rules require the applicant for a permit to pay a \$65 examination fee and to pass a permit examination covering basic procedures and radiation protection. §§ 8.56.402(3), 8.56.405, 8.56.406, ARM. In cases of regional hardship or emergency, an applicant may be granted a permit if he shows good cause why he is unable to take the permit examination. § 8.56.412(1)(c), ARM.

The board is authorized by section 37-14-202, MCA, to promulgate rules necessary to carry out the provisions of Title 37, chapter 14, MCA. However, no rule adopted is valid unless it is consistent and not in conflict with the enabling legislation, and unless it is reasonably necessary to effectuate the purpose of the statute. § 2-4-305(6), MCA. The Montana Supreme Court has held that rules are not reasonably necessary and are therefore invalid if the rules "engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature," even though the rules may appear to be consistent with the purposes of the enabling act. Board of Barbers v. Big Sky College, 38 St. Rptr. 621, 626 P.2d 1269 (1981); Bell v. Department of Licensing, 182 Mont. 21, 594 P.2d 331 (1979). The rules and statutes must be examined according to the foregoing principles.

A permit is defined as "an authorization which may be granted by the board to apply x-ray radiation to persons when the applicant's qualifications do not meet standards required for the issuance of a license."

§ 37-14-102(5), MCA. An applicant for a permit must submit a nonrefundable license fee. § 37-14-305, MCA. The statute defines three separate classes of applicants for permits. The first class consists of applicants who do not qualify for the issuance of a license, but who have demonstrated to the satisfaction of a physician specializing in radiology and approved by the board that they are capable of performing high quality x-ray examinations without endangering the public health and safety. § 37-14-306(1), MCA. The second class of applicants consists of persons who meet the minimum qualifications for a license, but who have not yet taken the license examination. § 37-14-306(2), MCA. The third class consists of persons who have not been licensed, but who can present adequate evidence that a permit is necessary because of regional hardship or emergency and that such persons are capable of performing x-ray examinations without endangering public health and safety. § 37-14-306(3), MCA. All three classes of permits are temporary in nature.

The board's rules do not distinguish among the three classes of permit applicants, but rather require all applicants to complete the 24-hour course, to be employed, to have six months' experience, and to pass the permit examination. None of these additional requirements were envisioned by the Legislature for permit applicants. The statutes do not refer to a permit examination. The sole reference to an examination is contained in section 37-14-303, MCA, which deals exclusively with examination for licensure as a radiologic technologist. The additional training and experience are not required by section 37-14-306, MCA, nor by any other portion of the enabling act. Class one applicants need only show that a physician approved by the board has been satisfied with their performance. Class two applicants have already successfully completed two years of training and are otherwise qualified for licensure, but are awaiting the next license examination. Class three applicants must show the existence of a regional hardship or emergency and must present "adequate evidence" that they are capable of performing x-ray examinations without endangering public health and safety. The term "adequate evidence" indicates that the board must evaluate class three applicants on a case-by-case basis. Had the Legislature intended these applicants to meet

specific training and experience requirements and to pass an examination, it would have so stated.

THEREFORE, IT IS MY OPINION:

Rules promulgated by the Board of Radiologic Technologists which require applicants for permits under section 37-14-306, MCA, to take a 24-hour course, to be employed, to have six months' experience, and to pass a permit examination are void and unenforceable.

Very truly yours,

MIKE GREELY
Attorney General