

MINUTES OF THE MEETING OF THE HOUSE STATE ADMINISTRATION COMMITTEE
January 10, 1983

CHAIRMAN JOE BRAND called the meeting to order at 9 a.m. in Room 129 of the Capitol. All members were present.

HOUSE BILL 67

CHAIRMAN BRAND opened the hearing on HOUSE BILL 67 by calling on the sponsor, REPRESENTATIVE HAL HARPER, who explained that the measure would correct present legislation, which has been declared unconstitutional by the District Court of Lewis and Clark County (The Montana Taxpayers' Association vs The Department of Revenue, March 18, 1982). Present legislation allows for direct repeal of administrative rules by resolution rather than bill; Harper said that House Bill 67 would reword the offensive portion of the legislation to pass constitutional muster. The bulk of the changes are reflected on page 2 of the bill, lines 16, 18 and 22, Harper said. "It would restore power that was lost through the court ruling," he said.

NO OTHER PROPONENTS OF THE BILL BEING HEARD, AND NO OPPONENTS BEING PRESENT, CHAIRMAN BRAND OPENED THE HEARING TO QUESTIONS BY THE COMMITTEE.

REPRESENTATIVE FRANCIS BARDANOUVE asked what the difference was between a resolution and a bill. Representative Harper said that a bill is a legislative tool to direct something, while a resolution is a suggestion. He said a bill requires the signature of the Governor, while a resolution does not.

REPRESENTATIVE PISTORIA asked why this bill was recommended by the Administrative Code Committee. Representative Harper said it was the only way to restore the power lost in the court ruling. "This is a mechanism to keep administrative rules in line," Harper said. Representative Pistoria asked if it was a tool to stop abuse, and Representative Harper agreed. "We never faced this problem before," Representative Harper said. Representative Pistoria said the Administrative agencies "Have too much power in rule-making. This would correct it."

Chairman Brand asked why the bill would give the Code Committee discretion about whether to use a bill or resolution, and REPRESENTATIVE McBRIDE asked if a bill repeals while a resolution changes, and whether a resolution can force change. Representative Harper said a resolution can't force change, but if an agency were to seek guidance, the resolution would be useful. "The Governor's got quite a hand with it now," Representative Harper said.

Responding to an inquiry by REPRESENTATIVE SALES, Representative Harper said it might be appropriate to add an effective date.

NO OTHER PROPONENTS OF THE BILL BEING HEARD, AND THERE BEING NO FURTHER QUESTION BY THE COMMITTEE ON HOUSE BILL 67, CHAIRMAN BRAND CLOSED THE HEARING.

HOUSE BILL 78

CHAIRMAN BRAND OPENED THE HEARING ON HOUSE BILL 78 BY CALLING ON ONE OF ITS SPONSORS, REPRESENTATIVE HAL HARPER.

Representative Harper said the bill would add a retired public employee to the Board of the Public Employees' Retirement System. Representative Harper said retirees deserve representation because they are the ones most affected by the Board's actions.

THERE BEING NO OTHER PROPONENTS PRESENT AND NO OPPONENTS BEING HEARD, CHAIRMAN BRAND OPENED THE HEARING TO QUESTIONS FROM THE COMMITTEE.

Chairman Brand asked why a retiree was not on the Board already.

LARRY NACHTSHEIM, Administrator of the PERS, was called on to answer. He stated that at present, there are three "members" (people who are paying into the system) on the Board and two representatives of the general public on the Board. He said the Governor could appoint a retiree at any time, but "it's been his prerogative never to employ one."

REPRESENTATIVE BARDANOUVE expressed reservations about the measure, saying by addition of one more member, the balance of decision-making power would be affected to allow retirees, who are not paying into the system, to decide issues that would affect those who are paying into the system. In essence, Representative Bardanouve said, the "members" on the Board in terms of the balance of power.

Representative Harper noted that he was not the chief sponsor of the bill, and suggested the hearing on the bill be deferred until its chief sponsor was present.

REPRESENTATIVE SALES asked where the Board appointees come from now. Nachtsheim said the two public members include a banker from Billings and an insurance man from Anaconda. He said ranchers and other occupational representatives have served on the Board. Representative Sales said he understood that there have been efforts in the past to have two members from outside on the Board, but this bill would make the membership 4-2 in favor of state workers. Nachtsheim said the Board does not set payment benefit levels, that is done by the Legislature. He said the Board sets administrative policy, establishes levels of review for decision making, etc., and comes up with the matters not addressed by the Legislature.

Chairman Brand asked if the bill would mean that a sixth person would be added, and the makeup of the Board would be three active members of the system and one retiree.

Representative Harper said yes. Chairman Brand asked how the balance of power would be affected. Nachtsheim said that historically there has been no one group in control.

REPRESENTATIVE O'CONNELL MOVED the bill be deferred until other proponents and opponents are present.

Representative Bardanoue noted that it is unusual to have an even-numbered board.

Representative McBride suggested the Committee act on Representative O'Connell's MOTION, and the committee deferred the bill to a later, unspecified time.

CHAIRMAN BRAND CLOSED THE HEARING ON HOUSE BILL 78, SUBJECT TO RESUMING AT A LATER TIME.

HOUSE BILL 92

CHAIRMAN BRAND OPENED THE HEARING ON HOUSE BILL 92 BY CALLING ON ONE OF ITS SPONSORS, REPRESENTATIVE HAL HARPER.

Representative Harper explained that HOUSE BILL 92 would provide a means for the Administrative Code Committee to object to a proposed administrative rule or regulation, and if the agency did not make desired changes in the matter, the Committee's objection would be printed in the Montana Administrative Register and the Administrative Rules of Montana (ARM).

THERE BEING NO OTHER PROPONENTS PRESENT, CHAIRMAN BRAND OPENED THE HEARING TO QUESTIONS BY THE COMMITTEE.

REPRESENTATIVE MUELLER asked Legislative Council Attorney David Niss to explain the legal standard contemplated by the bill.

DAVID NISS said the substantial compliance standard has been in effect within the Montana Administrative Procedures Act since 1977, and the courts are comfortable with that term. He said it "gives a push" to private parties who challenge rules in court. He said it would shift the burden of proof from the plaintiff in such a lawsuit to the respondent agency, forcing the agency to show that the rule or regulation was justified. "It would allow the Committee to do more than advise," Niss said. It is not the power to repeal, he said, but it gives legal effect to the Committee's judgment.

Representative Mueller said it would open the state up to a lawsuit, and asked Niss if in his judgment it would do so.

Niss said such a determination would be hard to make. He said that would depend on the agencies, how they make rules, and how the Administrative Code Committee reacts to the rules. So far, he said, there hasn't been much opposition to rules on the level of mounting court challenges. He said there is no question that it will in some way encourage lawsuits, but it would be hard to say how many. He said it gives plaintiffs a boost.

Chairman Brand asked how many suits have been filed. Niss said he had no count, because that would require a survey of the 56 county clerks of court.

Representative McBride asked if at present, could the Code Committee object? Niss said it does not, because the only place an objection would be noted is in the minutes of the Committee and in a letter to the agency. "The Committee's authority is totally advisory," he said. At present, there is no regulation or authority to ask the Secretary of State to publish an objection, as this bill would do.

Chairman Brand asked Dan Smilie (see attached written statement) if he thought that suits would be brought because of the bill, if it is signed into law.

DAN SMILIE said the current statute has a standard of "arbitrary and capricious" for judicial review. Effects of a different standard, he said, would be fleshed out by case law. Smilie called it "dangerous and unconstitutional" to give a legislative committee veto power over an administrative agency. "That's what we have the judiciary for," Smilie said. He said the administrative agencies pay attention to the wishes of the Legislature, and the bill, if passed, "is going to cost us a lot of money." "It's a neon sign that says, 'Please sue these folks,'" Smilie said.

Representative Pistoria asked for an explanation of page 1, line 15 of the bill. "Where is the new section?" he asked. Niss was called on to answer, and handed out copies of two sections of the existing law (see attached handout from Niss). Niss said the current standard of "substantial compliance" already exists in the law. "This bill would take the same standard and apply a different procedure for that standard in judging validity of rules," he said. The first section would allow the Committee to object to agencies when they go to the Secretary of State. Objection would be by letter. After the letter is received, the agency has 14 days to respond to the Committee in writing. After the agency response, the Committee may drop its objection or revise its objection. The Committee would have two meetings, he said: one to send an objection and one to receive and consider the response. At the second meeting, the

Committee votes whether to forward the objection to the Secretary of State to have it published in the Administrative Register (if time permits) and in the Administrative Rules of Montana (ARM). Publication would be adjacent to the offensive rule.

Once the administrative rule and the objection is published, the burden shifts to the agency to justify the rule in court if a challenge is brought. Niss said the bill was written substantially from the Model State Administrative Procedure Act. Niss read from the "Administrative Code Committee Biennial Report to the 48th Legislature, December 1982," page 77 of Appendix C.

REPRESENTATIVE DRISCOLL asked if the bill becomes law, would that result in more or fewer rules. Representative Harper said it would have no effect as such, but it would provide an effect once a bill is challenged.

THERE BEING NO FURTHER QUESTIONS FROM THE COMMITTEE, CHAIRMAN BRAND CLOSED THE HEARING ON HOUSE BILL 92.

HOUSE BILL 57

CHAIRMAN BRAND INTRODUCED BOB JOHNSON OF THE TEACHERS' RETIREMENT SYSTEM, TO ANSWER QUESTIONS ABOUT HOUSE BILL 57, WHICH WAS DISCUSSED IN THE PREVIOUS MEETING, FRIDAY, JANUARY 7, 1983.

Responding to questions from the Committee, Johnson said that in 1981 when a similar bill for the Teachers' Retirement System went into effect, the system had 23 teachers who earlier had purchased into the system and who therefore, got refunds of their payments under terms of the bill. "They got money back from us," Johnson said. The refunds were funded by increased employer contributions, not appropriations from the general fund. Prior to the legislation, he said, members who wanted the time in question to count, paid an amount equal to their own contributions plus the employer's contribution. Johnson said it cost each member who "purchased in" about \$5,000. He said the members had an average service time of about 2.5 years to pay for. He said about 300 members purchased in, compared to a system membership of about 14,000. He said he received no adverse comment from employers, who were school boards. "They are content with it," he said.

Responding to a question from Representative McBride, Johnson said the employer's levy was increased by three-hundredths of 1 percent.

Responding to a question from Representative Driscoll, Johnson said there is no limit for members who have low incomes.

Responding to a question from REPRESENTATIVE HAND, Johnson said it cost the system about \$1.5 million for the refunds.

Chairman Brand asked if the measure would allow veterans of future conflicts to buy in. Johnson said it would not, that those parties would have to win separate legislation.

THERE BEING NO OTHER QUESTIONS FROM THE COMMITTEE, CHAIRMAN BRAND DEFERRED HOUSE BILL 57 TO A LATER TIME SO THAT OTHER PROPONENTS AND DATA COULD BE PRESENTED TO THE COMMITTEE.

EXECUTIVE SESSION

CHAIRMAN BRAND CALLED THE COMMITTEE INTO EXECUTIVE SESSION TO TAKE ACTION ON PENDING BILLS.

HOUSE BILL 5

Chairman Brand called for action on HOUSE BILL 5, which had been re-referred to the Committee. He said its sponsor, REPRESENTATIVE REX MANUEL, said he did not expect to revive it and therefore, he (Chairman Brand) did not want it hanging in Committee.

REPRESENTATIVE PHILLIPS said the purpose of the bill was to clarify how the members of the Salary Commission would be paid (at present they are paid through an appropriation to the Legislative Council), and perhaps an amendment should be made to the bill to have the Commission members go to the Department of Administration.

Chairman Brand said he talked to Diana Dowling, Director of the Legislative Council, who told him she would continue to handle payments to the Commission members from an appropriation to the Legislative Council.

REPRESENTATIVE BLISS MOVED the bill be recommended DO NOT PASS. REPRESENTATIVE SMITH seconded. The question was called and the Committee approved the motion on a unanimous voice vote.

Representative Bardanouve noted that the Salary Commission should be attached to some agency for administrative purposes only.

HOUSE BILL 43

Chairman Brand called for action on HOUSE BILL 43. Representative Sales MOVED the bill be recommended DO NOT PASS. Representative Phillips seconded.

Representative Sales said there was no way to help the Fergus County Commissioners, whom the Committee was told, wish to be freed of the statutory obligation of making available paper ballots (see Friday, January 7, 1983), because the bill would

vest discretion in election judges at each precinct in granting paper ballots.

The question was called and the Committee approved the motion on a unanimous voice vote.

HOUSE BILL 46

Chairman Brand called for action on HOUSE BILL 46. Representative Bardanouve MOVED. Representative Sales seconded, that bill to be recommended DO PASS. The question was called and the Committee approved the motion on a unanimous voice vote.

HOUSE BILL 59

Chairman Brand called for action on HOUSE BILL 59, and said that Legislative Researcher Lois Menzies had prepared amendments for the bill in line with the sense of the Committee in discussion Friday, January 7, 1983. (See attached amendments). MENZIES said the amendments would fix the date contained within the bill to allow the Code Committee to go back prior to enactment of the Montana Administrative Procedures Act; would fix the Legislative Council bill number listed in the bill to the correct Senate Bill (33) pending in the Senate, and would insert a sponsor line.

Representative McBride said the Administrative Code Committee is prohibited from reviewing the rules of the Department of Revenue and Taxation, and asked if the bill would allow the Committee jurisdiction over those rules. Menzies said the bill is restricted to "agencies subject to MAPA."

Representative Bardanouve noted that the bill, by referring to the Legislative Council number (or the Senate Bill number if amended) would assume that the pending Senate legislation will be enacted. He said that was not a good idea. Menzies said the possibility of the Senate legislation failing is contemplated by another section of the bill before this Committee.

Representative Sales MOVED, Representative Mueller seconded, that the amendments be adopted as read. The Committee approved the motion on a unanimous voice vote.

Representative Smith MOVED, Representative O'Connell seconded, that the bill be held in Committee until the disposition of SENATE BILL 33 is known. The Committee approved the motion on a unanimous voice vote.

REPRESENTATIVE RYAN asked for, and received, Chairman Brand's permission to be excused from the meeting to attend another meeting.

HOUSE BILL 67

Chairman Brand called for action on HOUSE BILL 67. Representative Sales MOVED, Representative Pistoria seconded, to amend lines 20 and 21 to add an effective date on passage and approval.

Representative McBride asked if this bill would affect other administrative rules. Representative Bardanouve said he believed there would be no conflict. Responding to an inquiry by Representative McBride, Niss suggested the Legislature might wish to amend the present joint resolution to allow this bill.

The question was called and the Committee approved the motion by unanimous voice vote. Chairman Brand asked that the motion be regarded as also including a change in the title to conform to bill-drafting requirements. The Committee approved such understanding by unanimous voice vote.

Representative Phillips MOVED. Representative Sales seconded, that HOUSE BILL 67 DO PASS. The Committee approved the motion by unanimous voice vote.

HOUSE BILL 78

Chairman Brand called for action on HOUSE BILL 78. Representative O'Connell MOVED. REPRESENTATIVE HAMMOND seconded, that HOUSE BILL 78 be deferred to a later date. The Committee approved the motion by unanimous voice vote.

HOUSE BILL 92

Chairman Brand called for action on HOUSE BILL 92. Representative Sales MOVED. Representative Phillips seconded, that the bill be recommended DO PASS.

Representative Bardanouve called the bill the Lawyer's Relief Bill.

The Committee approved the motion by voice vote. Representatives Bardanouve and Pistoria cast "no" votes.

Representative O'Connell MOVED for adjournment, which was approved by unanimous voice vote.



REPRESENTATIVE JOE BRAND, Chairman

STANDING COMMITTEE REPORT

JANUARY 10,

33

19.....

MR. SPEAKER.....

We, your committee on STATE ADMINISTRATION.....

having had under consideration HOUSE..... Bill No. 92.....

first reading copy (white)

"AN ACT TO AUTHORIZE THE ADMINISTRATIVE CODE COMMITTEE TO OBJECT TO ANY RULE UPON THE GROUND THAT IT WAS ADOPTED IN SUBSTANTIAL VIOLATION OF THE PROCEDURAL OR SUBSTANTIVE AUTHORITY DELEGATED TO THE AGENCY; REQUIRING THE AGENCY, AFTER OBJECTION BY THE COMMITTEE, TO PROVE THE LAWFULNESS OF THE RULE; AWARDING COSTS AND ATTORNEY FEES AGAINST THE AGENCY IF THE RULE IS INVALIDATED BY COURT JUDGMENT; AMENDING SECTION 2-4-506, MCA."

Respectfully report as follows: That HOUSE..... Bill No. 92.....

DO PASS

STANDING COMMITTEE REPORT

JANUARY 10, 1983

MR. SPEAKER

We, your committee on STATE ADMINISTRATION

having had under consideration HOUSE Bill No. 67

first

reading only (white)
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"AN ACT TO PROVIDE FOR DIRECT REPEAL OF ADMINISTRATIVE RULES BY BILL; TO PROVIDE FOR LEGISLATIVE DIRECTION BY BILL OR LEGISLATIVE REQUEST OR ADVICE BY JOINT RESOLUTION OF AGENCY ADOPTION, AMENDMENT, OR REPEAL OF ADMINISTRATIVE RULES AND TO REQUIRE COMPLIANCE WITH THAT DIRECTION WHEN ADOPTED IN BILL FORM; AMENDING SECTION 2-4-412, MCA."

Respectfully report as follows: That HOUSE Bill No. 67

1. Title, Line 11.

Following: "MCA"

Insert: "; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

2. Page 3.

Following: Line 19

Insert: "NEW SECTION. Section 2. Effective Date. This act is effective on passage and approval."

DO PASS AS AMENDED

STANDING COMMITTEE REPORT

JANUARY 20,

1983

SPEAKER

MR.

STATE ADMINISTRATION

We, your committee on

SENATE

having had under consideration Bill No.

46

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
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"AN ACT TO REQUIRE THE GOVERNOR TO TRANSMIT A COPY OF EACH
VETO MESSAGE TO THE LEGISLATIVE COUNCIL; CLARIFYING THOSE STATE
AND FEDERAL AGENCIES ENTITLED TO RECEIVE COPIES OF THE MONTANA
SESSION LAWS; REPEALING THE REQUIREMENT FOR THE PUBLICATION
OF NAME CHANGES IN THE SESSION LAWS; AMENDING SECTION 5-11-203,
MCA; REPEALING SECTION 27-31-205, MCA; AND PROVIDING AN
IMMEDIATE EFFECTIVE DATE."

Respectfully report as follows: That Bill No.

SENATE

46

DO PASS

STANDING COMMITTEE REPORT

JANUARY 10, 19 83

MR. **SPEAKER**

We, your committee on **STATE ADMINISTRATION**

having had under consideration **HOUSE** Bill No. **43**

first reading (white)

**"AN ACT TO GIVE ELECTION JUDGES DISCRETION IN PROVIDING
PAPER BALLOTS TO ELECTORS; AMENDING SECTION 13-17-305."**

Respectfully report as follows: That **HOUSE** Bill No. **43**

DO ~~PASS~~ NOT PASS

STANDING COMMITTEE REPORT

January 10,

19.....

SPEAKER

MR.

STATE ADMINISTRATION

We, your committee on

HOUSE

having had under consideration Bill No. **5**

first

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"AN ACT TO PROVIDE THAT THE MEMBERS OF THE SALARY COMMISSION
SHALL BE REIMBURSED FOR THEIR TRAVEL EXPENSES FROM AN APPROPRIATION
FOR THAT PURPOSE; AMENDING SECTION 2-16-401, MCA."

HOUSE

Respectfully report as follows: That Bill No. **5**

AND AS AMENDED
DO PASS
XXXX NOT PASS

WITNESS STATEMENT

NAME DAL Smilie BILL No. HB 92

ADDRESS 1127 5th Ave Helena DATE 1/10/93

WHOM DO YOU REPRESENT SPS

SUPPORT _____ OPPOSE ☒ _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

DEPARTMENT OF
SOCIAL AND REHABILITATION SERVICES



TED SCHWINDEN, GOVERNOR

P.O. BOX 4210

STATE OF MONTANA

HELENA, MONTANA 59604

January 11, 1983

To: House Committee on State Administration

From: Dal Smilie, SRS DS

Re: HB 92

SRS must oppose HB 92. Section 2-4-506, MCA currently allows the Administrative Code Committee to object to an agency rule that was adopted with arbitrary or capricious disregard of authority. Such an objection by the Committee put the burden of proof on the agency to show the rule was not adopted with an arbitrary and capricious disregard of authority.

HB 92 goes farther and provides a functional veto of proposed or current administrative rules by a standing legislative committee. HB 92 provides that notice of the Committee's objections be placed in the ARM beside the rule. That notice by the Committee is notice that a lawsuit is proper and will, in the Committee's mind be successful.

The executive branch agencies are usually more than willing to comply with requests by the Code Committee to modify rules on technical legal grounds. In those cases where there is disagreement on legal grounds it does not best serve state interests to invite the public at large to sue the state.

DS/rr

rule may be effective for a period not longer than 120 days, but the adoption of an identical rule under 2-4-302 is not precluded.

(2) The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review.

History: En. Sec. 4, Ch. 2, Ex. L. 1971; amd. Sec. 5, Ch. 410, L. 1975; amd. Sec. 1, Ch. 482, L. 1975; amd. Sec. 8, Ch. 285, L. 1977; R.C.M. 1947, 82-4204(2); amd. Sec. 5, Ch. 243, L. 1979.

2-4-304. Informal conferences and committees. (1) An agency may use informal conferences and consultations as a means of obtaining the viewpoints and advice of interested persons with respect to contemplated rulemaking.

(2) An agency may also appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rulemaking. The powers of the committees shall be advisory only.

(3) Nothing herein shall relieve the agency from following rulemaking procedures required by this chapter.

History: En. Sec. 4, Ch. 2, Ex. L. 1971; amd. Sec. 5, Ch. 410, L. 1975; amd. Sec. 1, Ch. 482, L. 1975; amd. Sec. 8, Ch. 285, L. 1977; R.C.M. 1947, 82-4204(4).

2-4-305. Requisites for validity — authority and statement of reasons. (1) The agency shall consider fully written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption. If substantial differences exist between the rule as proposed and as adopted and the differences have not been described or set forth in the adopted rule as that rule is printed in the Montana administrative register, the differences must be described in the statement of reasons for and against agency action. When no written or oral submissions have been received, an agency may omit the statement of reasons.

(2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting the language, the reference shall clearly indicate that portion of the language which is statutory and the portion which is amplification of the language.

(3) Each proposed and adopted rule shall include a citation to the specific grant of rulemaking authority pursuant to which it or any part thereof is adopted. In addition, each proposed and adopted rule shall include a citation to the specific section or sections in the Montana Code Annotated which the rule purports to implement.

(4) Each rule proposed and adopted by an agency implementing a policy of a governing board or commission must include a citation to and description of the policy implemented. Each agency rule implementing a policy, as used in the definition set forth in 2-4-102(10), and the policy itself must be based on legal authority and otherwise comply with the requisites for validity of rules established by this chapter.

(5) 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.

(6) 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.

(7) No rule is valid unless adopted in substantial compliance with 2-4-302 or 2-4-303 and this section and unless notice of adoption thereof is published within 6 months of the publishing of notice of the proposed rule. If an amended or supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit must be determined with reference to the latest notice in all cases.

History: App. Sec. 4, Ch. 2, Ex. L. 1971; amd. Sec. 5, Ch. 410, L. 1975; amd. Sec. 1, Ch. 482, L. 1975; amd. Sec. 8, Ch. 285, L. 1977; Sec. 82-4204, R.C.M. 1947; App. 82-4204.1 by Sec. 9, Ch. 285, L. 1977; Sec. 82-4204.1, R.C.M. 1947; R.C.M. 1947, 82-4204(part), 82-4204.1(part); amd. Sec. 6, Ch. 243, L. 1979; amd. Sec. 2, Ch. 381, L. 1981.

Compiler's Comments

1981 Amendment: Inserted the provision relating to substantial differences between the proposed and adopted rule, which must be described in an agency's statement of reasons, in (1); inserted "proposed and adopted" before

"rule" in two places in (3); added subsection (4); added the last sentence concerning the 6-month limit as to notice to (7).

Severability: Section 8, Ch. 381, L. 1981, was a severability section.

2-4-306. Filing, format, and effective date — dissemination of emergency rules. (1) Each agency shall file with the secretary of state a copy of each rule adopted by it.

(2) The secretary of state may prescribe a format, style, and arrangement for notices and rules which are filed pursuant to this chapter and may refuse to accept the filing of any notice or rule that is not in compliance therewith. He shall keep and maintain a permanent register of all notices and rules filed, including superseded and repealed rules, which shall be open to public inspection and shall provide copies of any notice or rule upon request of any person. Unless otherwise provided by statute, the secretary of state may require the payment of the cost of providing such copies.

(3) In the event that the administrative code committee has conducted a poll of the legislature in accordance with 2-4-403 or the revenue oversight committee has conducted a poll in accordance with 5-18-109, the results of the poll shall be published with the rule.

(4) Each rule shall become effective after publication in the register as provided in 2-4-312, except that:

(a) if a later date is required by statute or specified in the rule, the later date shall be the effective date;

(b) subject to applicable constitutional or statutory provisions, an emergency rule shall become effective immediately upon filing with the secretary of state or at a stated date following publication in the register if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to every person who may be affected by them.

History: En. Sec. 5, Ch. 2, Ex. L. 1971; amd. Sec. 10, Ch. 285, L. 1977; amd. Sec. 2, Ch. 561, L. 1977; R.C.M. 1947, 82-4205(part); amd. Sec. 7, Ch. 243, L. 1979; amd. Sec. 12, Ch. 268, L. 1979.

VISITORS' REGISTER

HOUSE COMMITTEE

BILL HB 92

Date _____

SPONSOR _____

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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INTRODUCED BY *House Bill No. 92*
BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE *Patricia Hardy Schutt, Mayor*

A BILL FOR AN ACT ENTITLED: "AN ACT TO AUTHORIZE THE ADMINISTRATIVE CODE COMMITTEE TO OBJECT TO ANY RULE UPON THE GROUND THAT IT WAS ADOPTED IN SUBSTANTIAL VIOLATION OF THE PROCEDURAL OR SUBSTANTIVE AUTHORITY DELEGATED TO THE AGENCY; REQUIRING THE AGENCY, AFTER OBJECTION BY THE COMMITTEE, TO PROVE THE LAWFULNESS OF THE RULE; AWARDING COSTS AND ATTORNEY FEES AGAINST THE AGENCY IF THE RULE IS INVALIDATED BY COURT JUDGMENT; AMENDING SECTION 2-4-506, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Committee objection to violation of authority for rule -- effect. (1) If the administrative code committee objects to all or some portion of a proposed or adopted rule because the committee considers it not to have been proposed or adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, the committee shall send a written objection to the agency which promulgated the rule. The objection must contain a concise statement of the committee's reasons for its action.

(2) Within 14 days after the mailing of a committee objection to a rule, the agency promulgating the rule shall

respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

(3) If the committee fails to withdraw or substantially modify its objection to a rule, it may vote to send the objection to the secretary of state, who shall, upon receipt thereof, publish the objection in the Montana Administrative Register adjacent to any notice of adoption of the rule and in the ARM adjacent to the rule. Costs of publication of the objection shall be borne by the committee.

(4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305. If a rule is invalidated by court judgment because the agency failed to meet its burden of proof imposed by this subsection, the court shall award costs and reasonable attorney fees against the agency.

Section 2. Section 2-4-506, MCA, is amended to read: "2-4-506. Declaratory judgments on validity or application of rules. (1) A rule may be declared invalid or inapplicable in an action for declaratory judgment if it is

HB 92

1 found that the rule or its threatened application interferes
 2 with or impairs or threatens to interfere with or impair the
 3 legal rights or privileges of the plaintiff.

4 (2) A rule may also be declared invalid in such an
 5 action on the grounds that the rule was not adopted with--on
 6 arbitrary--or capricious disregard for the purpose of
 7 authorizing statutes as evidenced by documented legislative
 8 intent in substantial compliance with 2-4-302, 2-4-303, and
 9 2-4-305.

10 ~~(3) If the administrative code committee has objected~~
 11 ~~to the adoption or amendment of a rule on the grounds set~~
 12 ~~forth in subsection (2), the agency bears the burden in any~~
 13 ~~action brought under this section of proving that its rule~~
 14 ~~was not adopted with an arbitrary or capricious disregard~~
 15 ~~for the purpose of the authorizing statute.~~

16 ~~(4)(3)~~ A declaratory judgment may be rendered whether
 17 or not the plaintiff has requested the agency to pass upon
 18 the validity or applicability of the rule in question.

19 ~~(5)(4)~~ The action may be brought in the district court
 20 for the county in which the plaintiff resides or has his
 21 principal place of business or in which the agency maintains
 22 its principal office. The agency shall be made a party to
 23 the action."

24 NEW SECTION, Section 3. Codification instruction.
 25 Section 1 is intended to be codified as an integral part of

1 Title 2, chapter 4, part 4, and the provisions of Title 2,
 2 chapter 4, apply to section 1.

--End--

STATE OF MONTANA

REQUEST NO. 055-83

FISCAL NOTE

Form BD-15

In compliance with a written request received January 6, , 19 83 , there is hereby submitted a Fiscal Note for House Bill 92 pursuant to Title 5, Chapter 4, Part 2 of the Montana Code Annotated (MCA).

Background information used in developing this Fiscal Note is available from the Office of Budget and Program Planning, to members of the Legislature upon request.

DESCRIPTION OF PROPOSED LEGISLATION:

House Bill 92 gives the Administrative Code Committee the authority to object to rules proposed or adopted in violation of the requirements of the Administrative Procedure Act, and places upon the promulgating agency, the burden of proof, in any subsequent legal challenge to the rule, to prove that the rule was in fact adopted in compliance with the act.

ASSUMPTIONS:

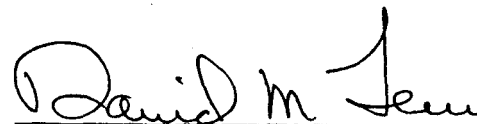
The fiscal impact of HB 92 depends upon:

- 1) The number of rules objected to by the committee;
- 2) The response of agencies to committee objections and committee responses thereto;
- 3) The number of law suits brought challenging administrative rules objected to by the committee;
- 4) The holding of the Court; and
- 5) The substance of the rule.

FISCAL IMPACT:

Impossible to determine.

FISCAL1:X/1



BUDGET DIRECTOR

Office of Budget and Program Planning

Date: 1-7-83

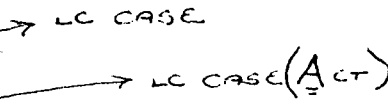
House State Administration Committee

Bill Summaries

January 10, 1983

- HB 52 (Shontz) This bill requires the election administrator to oversee the conduct of elections. It further requires the Commissioner of Political Practices to investigate complaints made by an unsuccessful candidate for national, state, or local office. If the Commissioner determines that an election administrator has failed or neglected to perform his duty, the administrator may be fined \$500 per violation. If the Commissioner finds that the candidate is at fault, the candidate may be fined the same amount.
- HB 67 (Harper) Requested by the Administrative Code Committee, this bill provides that legislative requests or advice for rulemaking action be accomplished by joint resolution and that legislative direction, having the force and effect of law, for rulemaking action be accomplished by bill only.
- HB 78 (Harper) Currently, the Public Employees' Retirement Board consists of five members appointed by the Governor: three public employees and two members at large. HB 78 adds a sixth member to the Board who must be a retired member of the Public Employees' Retirement System.
- HB 92 (Stobie) Requested by the Administrative Code Committee, this bill requires the Administrative Code Committee to send a written objection to an agency if the Committee objects to a proposed or adopted rule. The agency must respond to the objection within 14 days. The Committee then may vote to send the objection to the Secretary of State who must publish the objection in the Montana Administrative Register. If the objection has been published and the rule is challenged in court, the agency must prove the lawfulness of the rule. If the court invalidates the rule, the agency must pay costs and attorney fees.

~~PROPOSED~~ AMENDMENTS TO HB 59 (ADOPTED 1/10)

1. Page 1.
Following: sponsor line
Insert: "BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE"
2. Title, line 5.
Following: "ADOPTED"
Insert: "BY CERTAIN AGENCIES"
3. Page 1, lines 14 and 15.
Following: "adopted" on line 14
Strike: "UNDER" through "ACT" on line 15.

4. Page 1, line 15.
Following: "1975"
Insert: "by agencies subject to the provisions of the Montana Administrative Procedures Act"
5. Page 2, line 1.
Following: "by"
Strike: " " through "]"
Insert: "~~SB 33~~" "SENATE BILL No. 33"
6. Page 2, line 2.
Following: "by"
Strike: " " through "]"
Insert: "~~SB 33~~" "SENATE BILL No. 33"

intended 1-10 but bill held
back pending Senate action
on SB 33.

HOUSE BILL NO. 59
HARPER

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT TO REQUIRE THE ADMINISTRATIVE CODE COMMITTEE TO REVIEW ALL RULES ADOPTED PRIOR TO APRIL 14, 1975, FOR COMPLIANCE WITH SECTION 2-4-305, MCA; PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A TERMINATION DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Review of existing rules required. Notwithstanding the provisions of 2-4-402, the administrative code committee shall review all administrative rules adopted under the Montana Administrative Procedure Act prior to April 14, 1975. The committee shall review the rules to determine whether agencies have substantially complied with subsections (5) and (6) of 2-4-305, as that section read on November 18, 1982.

Section 2. Power of the committee. (1) If the committee determines that a rule violates 2-4-305(5) or 2-4-305(6), as that section read on November 18, 1982, it may:

- (a) take those steps authorized by 2-4-402(3)(a); or
- (b) poll the legislature in accordance with 2-4-403,

as that section may be amended by ^{Sen.} Bill No. 53 [LC 10]. If 2-4-403 is not amended by ^{Sen.} Bill No. 53 [LC 10], no poll of the legislature may be taken by the committee on any rule reviewed pursuant to [section 1].

(2) The committee may advise an agency concerning such matters as clarity, form, style, grammar, punctuation, and spelling with respect to any rule reviewed under [section 1].

Section 3. Committee to report to legislature. Prior to January 1, 1987, the committee shall prepare a report of its activities and any recommendations to be submitted to the legislature.

Section 4. Effective date -- termination. This act is effective on passage and approval and terminates January 1, 1987.

-End-

VISITORS' REGISTER

HOUSE State Admin

COMMITTEE

BILL HB 59

Date 1-7-83

SPONSOR _____

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

HOUSE BILL NO. 46

INTRODUCED BY STOBIE

BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT TO ELIMINATE THE REQUIREMENT THAT AGENCIES REPORT TO THE ADMINISTRATIVE CODE COMMITTEE THEIR RECOMMENDATIONS FOR LEGISLATION CLARIFYING GRANTS OF RULEMAKING AUTHORITY; AMENDING SECTION 2-4-314, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 2-4-314, MCA, is amended to read:
"2-4-314. Biennial review by agencies -- report recommendations by committee. (1) Each agency shall at least biennially review its rules to determine if any new rule should be adopted or any existing rule should be modified or repealed."

(2) Prior to October 1, 1989, and prior to October 1 of each even-numbered year thereafter, each agency shall prepare and submit a report to the administrative code committee in tabular or other form indicating the agency's recommendations for legislation which will clarify existing grants of rulemaking authority and grant or eliminate rulemaking authority as necessary.

(3) The committee may recommend to the legislature

1 those modifications, additions, or deletions of agency
2 rulemaking authority which the committee considers
3 necessary."

-End-

INTRODUCED BILL

HB 46

HOUSE

COMMITTEE

BILLS

4346

Date

1-7-83

SPONSOR

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE

State Admin

COMMITTEE

BILL

HB 67

Date _____

1-10-83

SPONSOR

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.