

**MINUTES**

**MONTANA HOUSE OF REPRESENTATIVES  
54th LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON BUSINESS & LABOR**

**Call to Order:** By **CHAIRMAN BRUCE T. SIMON**, on January 19, 1995,  
at 8:00 AM.

**ROLL CALL**

**Members Present:**

Rep. Bruce T. Simon, Chairman (R)  
Rep. Norm Mills, Vice Chairman (Majority) (R)  
Rep. Robert J. "Bob" Pavlovich, Vice Chairman (Minority) (D)  
Rep. Vicki Cocchiarella (D)  
Rep. Charles R. Devaney (R)  
Rep. Jon Ellingson (D)  
Rep. Alvin A. Ellis, Jr. (R)  
Rep. David Ewer (D)  
Rep. Rose Forbes (R)  
Rep. Jack R. Herron (R)  
Rep. Bob Keenan (R)  
Rep. Don Larson (D)  
Rep. Rod Marshall (R)  
Rep. Jeanette S. McKee (R)  
Rep. Karl Ohs (R)  
Rep. Paul Sliter (R)  
Rep. Carley Tuss (D)  
Rep. Joe Barnett (R)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Stephen Maly, Legislative Council  
Alberta Strachan, Committee Secretary

**Please Note:** These are summary minutes. Testimony and  
discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing: HB 211, HB 243, HB 200, HB 216,  
Executive Action: SB 100, HB 66, HB 68, HB 148, HB 216, HB  
211, HB 243

**EXECUTIVE ACTION ON SB 100**

**Motion:** REP. PAVLOVICH MOVED SB 100 BE CONCURRED IN.

**Vote:** Motion passed 18-0.

CHAIRMAN SIMON requested the Chair be relinquished to REP. MILLS.

HEARING ON HB 211

Opening Statement by Sponsor:

REP. LIZ SMITH, HD 56, Powell County said this bill was an act providing that a state employee who is injured by a client or other person under state supervision as a result of aggressive behavior by the client or person is eligible to receive Workers' Compensation benefits from the date of the injury.

Proponents' Testimony:

Pete Joseph, MSP said he strongly supports this bill.

REP. RED MENEHAN said he supports this legislation.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

REP. EWER said the state for many years had not had a policy for not compensating injured workers for lost wages. Does the State Fund have a position on this exception and the precedent it sets for opening up many exceptions that may be equally justifiable and heart rendering. **Lawrence Hubbard, State Compensation Insurance Fund** said they were not standing in opposition or an opponent of this bill. There is a fiscal note on this bill but it is not through the review process. There are a total of 1456 claims by state employees in FY94. The State Fund is unable to segregate wage loss claims from this total. The Department of Corrections had 40 wage lost claims in FY94. The average wage loss benefit would have been paid out at \$200 per employee if this section had been into effect. These are the gross wages of the period. Currently, the court applies the rational basis test which scrutinizes Workers' Compensation legislation.

REP. EWER said he was very sympathetic with this bill but he was also one who spent many hours dealing with Workers' Compensation. He said he was concerned about an exemption here that may open the door for justifying a lot of other exemptions that are equally compelling. REP. SMITH said even though this appears to be an exemption, these injuries are primarily inflicted on employees who have a very minimum income to support themselves. This bill is for employees who do the hands on care.

REP. ELLINGSON asked what kinds of sick benefits do the employees have at this time. REP. SMITH said she did not know but they did have the regular state health benefits.

Closing by Sponsor:

Sponsor closes.

HEARING ON HB 243

Opening Statement by Sponsor:

REP. RED MEMEHAN, HD 57, Deer Lodge County said this bill was an act allowing licensed electricians to renew a lapsed state license without examination within 1 year of the license expiration date upon payment of renewal and delinquency fees; providing for non-applicability to certain lapsed licenses and amending sections in the bill.

Proponents' Testimony:

Michael Klinkhammer, said he was before the committee on behalf of Gordon Marcotte. A copy of the memorandum supporting petition for writ of mandamus between Mr. Marcotte and the State of Montana is EXHIBIT 1 as is a letter to REP. MENEHAN from Mr. Klinkhammer.

Charles Sweet, State Electrical Board said the board supports the idea of a one year lapsed license status for licensees. They wish, however, to see the bill amended to include language stating that it is unlawful for a licensee to work with a lapsed license and amended to eliminate the grandfather clause. EXHIBIT 2 He also supplied copies of amendments EXHIBIT 3

Karen Schreder, Licensing Technician, State Electrical Board said the board and the bureau would like this committee to clarify the intent of the grandfather clause. If it is determined that the intent is for the board to contact these people who did not renew their licenses for the past three years and let them know there is now another remedy to obtain their forfeited license, there will be a definite fiscal impact that the Board cannot absorb under their current budget. EXHIBIT 4

Ron VanDiest, International Brotherhood of Electrical Workers said he felt this is a bill which should not be here in the first place but it will be supported as amended.

Jerry Driscoll, Montana State Building Trades Association said he supports the bill with the amendment.

Darrell Holzer, Montana State AFL-CIO said supports this legislation if it contains the amendments.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

**REP. PAVLOVICH** questioned the sponsor regarding the amendment and he said that on the exclusion of the grandfather clause, he supports the remaining amendments. If someone has missed attending classes they should have the opportunity to renew because he would not want to see anyone lose their occupation because of regulations.

**REP. ELLIS** asked why the board does not advise people of the expiration of their license so action can be taken and the amount they need to submit to the licensing department. **Mr. Sweet** said there indeed was a notification process which is something the legal staff and the Department of Commerce developed. There is a notice mailed out to every license holder at their last known address.

**REP. EWER** asked how many notices a person receives. **Mr. Sweet** said one notice.

**REP. MILLS** asked who would be affected during this three year period of the grandfather clause. **Mr. Sweet** said the number would be very small. **REP. MILLS** then said this information was not stated in the bill. Does the board have this obligation? It should be a point of fairness to let everybody know that the window is open. **Mr. Sweet** said the board had tried on a consistent basis to be as fair with every license holder as possible.

**REP. MARSHALL** asked if it were cumbersome in the system they were now operating under. **Mr. Sweet** said yes and he supported the legislation. **REP. MARSHALL** then asked if licensure were granted to any other trades. **Mr. Sweet** said master electricians, journeyman electricians, residential electricians, classes of contractors in electrical construction, a limited contractor and an unlimited contractor.

**REP. ELLINGSON** asked what the other requirements were besides continuing education for renewal. **Mr. Sweet** said unless a person was under disciplinary consideration there were no other requirements. **REP. ELLINGSON** asked what the continuing education was. **Mr. Sweet** said it was 24 hours in a three year period. **REP. ELLINGSON** said that if the grandfather clause has passed the requirement for continuing education would be waived. **Mr. Sweet** said that would not be the case.

**REP. EWER** said the Department of Commerce is in the occupational licensing business which is in the business which total 34 boards. Is the integrity of the system going to be preserved by this one exemption or will there be 34 bills over the next years with all kinds of different levels. **Ms. Schroeder** said the difference in the boards is the lapsed license for a year clause or more than 30 days to renew their license. **REP. EWER** said there should be something on the record showing there is some

consistency so that the boards are doing uniform things and there are not numerous bills depending upon the occupation involved.

**Carol Grell, Legal Counsel, State Electrical Board** said the one year lapse is consistent with the other boards. In the original draft of the language it was actually based upon the pharmacy language. There is a model act being circulated in an effort to be consistent with all the boards.

**REP. BARNETT** questioned the title. **Ms. Grell** said the title would also include the amendment.

**CHAIRMAN SIMON** asked if it were unlawful for someone to practice electrical work in the state without a license. Also, he asked if a license were granted to anyone who refuses to pay or fails to pay the fees. **Ms. Grell** said a person cannot work without a license and since this is a nonrenewal situation. They have forfeited their license. **CHAIRMAN SIMON** said amendment 1 seems to be self evident. If fees are not paid there is no license and if the person does not have a license the person cannot practice. **Ms. Grell** said there were a lot of situations that arise. The people fail to renew for whatever reason and they are within the one year grace period and the question always arises as to what they are supposed to be doing. During the one year, the license is not gone it is in a lapsed status. A lapsed license is not something that allows an electrician to work.

**CHAIRMAN SIMON** said if there was that type of contact with someone and they paid their fees then they would be licensed. He said he did not see how this language changes anything. If they refused to pay their license then the license is not there. **Ms. Grell** said she agreed. The amendment is an effort to make that clear to the licensees as well as the attorneys who appear to challenge the board.

**Closing by Sponsor:**

Sponsor closes.

**HEARING ON HB 200**

**Opening Statement by Sponsor:**

**REP. ELLEN BERGMAN, HD 4, Custer County** said this bill was an act generally revising the Workers' Compensation Act and the Occupation Disease Act of Montana; which added definition; exempted corporate officers and managers of limited liability companies from coverage unless the employer elects to cover the officer or manager and the insurer allows the election; it clarifies prohibitions regarding medical provider self referral; it authorizes the Department of Labor and Industry to conduct hearings and appeals by telephone or video conference; it clarifies the status of limited liability companies; it clarifies the liability of an employer who contracts work out; it clarifies

the department's responsibility in approving the group purchase of WC insurance; it requires the investment income of the uninsured employers' fund to be deposited in the fund; it removes the limit on an uninsured employer's liability for claims; it increases the authority to file cease and exist orders to include persons, businesses, and entities that have contracted with uninsured employers and providing for penalties; it provides a district court with the option to request the WC judge to determine the amount of recoverable damages due to an injured uninsured worker; it removes the references to wage supplement; it required the Board of Investments to invest certain money in the subsequent injury fund and requires the investment income to be deposited into the fund and it reduces the time period allowed for a party to respond to a WC mediator's recommendation.

**Proponents' Testimony:**

**Chuck Hunter, Department of Labor and Industry** said most of the things in the bill are on a regulatory role. There are comments from insurers, claimants, employers, medical providers about the problems in the existing law. He then gave a section synopsis regarding the changes in the legislation. **EXHIBIT 5**

**George Wood, Montana Self Insurers Association** said they supported the bill.

**Jacqueline Lenmark, American Insurance Association** supports this bill.

**Chris Racicot, Executive Director, Montana Building Industry Association** said he supported this bill with the amendments plus some amendments pending.

**Carl Schweitzer, Montana Contractors Association** said he supports the bill. One concern, however, is there are many contractors who in turn have sub-contractors and they may hire sub-contractors on a daily basis. Many times the general contractor does not know that the subs have the proper Workers' Compensation insurance.

**Lawrence Hubbard, State Compensation Insurance Fund** said there was a reservation regarding Section 405. The liability incurred is for the immediate sub-contractor.

**Don Allen, Coalition for Workers' Compensation Improvement** said he was in support of the bill.

**Opponents' Testimony:**

None.

Questions From Committee Members and Responses:

REP. ELLIS questioned the liability to the prime contractor. He questioned the testimony relating to the fact that all of the subs that are responsible to the contractor are covered. These sub-contractors in turn must cover their sub-contractors. Mr. Hunter said this was correct. REP. ELLIS then questioned Section 11. Mr. Hunter said it was only the uninsured employers who would pay the benefits. REP. ELLIS then questioned a company that was liable. Mr. Hunter said if there were coverage there it would be the insurance company who would be paying the full amount of that claim.

## TAPE 1, SIDE B

REP. COCCHIARELLA said in her employment position she discovered after a stream of young men come to request independent contractor exemptions they were working for a sub-contractor. The prime contractor had proof that the sub-contractors had Workers' Compensation but the sub had sent these people to get exemptions. He was not taking on any insurance for any employees. He covered himself as the sole proprietor in a partnership. He had Workers' Compensation but all the people working for him were uncovered. She asked what happened under this new law if someone was hurt. How would the insurance company know about that? Mr. Hubbard said if the second tier of these employees are involved, and they are true contractors, then the sub-contractor would have the responsibility under Section 405 to insure they had Workers' Compensation coverage. In that sense if they are true independent contractors this law would have an effect in essence to require that sub-contractor to require of his sub-contractor coverage of Workers' Compensation.

Closing by Sponsor:

Sponsor closes.

HEARING ON HB 216Opening Statement by Sponsor:

REP. VICKI COCCHIARELLA, HD 64, Missoula County said this bill was an act exempting employment of an employer's spouse for whom an exemption based on marital status may be claimed under federal tax law from coverage under the Workers' Compensation Act unless coverage is elected.

Proponents' Testimony:

Mr. Hubbard said the State Fund supports this bill.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

None.

Closing by Sponsor:

Sponsor closes.

EXECUTIVE ACTION ON HB 66

Motion: REP. HERRON MOVED DO PASS ON HB 66.

Discussion:

REP. HERRON discussed the sub-committee report. All of the working of HB 66 has been included in HB 68. The licensing goes to the commercial department and the regulations and inspections stay with the Department of Labor. In HB 66 he discussed the amendments.

REP. LARSON said there was much language in the amendment shifting duties to the Department of Commerce and all of the regulations to the Department of Labor. The regulatory duties will remain in the respective agencies.

REP. EWER asked if both of the departments were agreeable with the changes and the answer was yes.

Motion/Vote: REP. HERRON MOVED TO ADOPT THE AMENDMENTS. Motion passed 18-0.

Vote: MOTION THAT HB 66 DO PASS AS AMENDED. Motion carried 18-0.

EXECUTIVE ACTION ON HB 68

Motion: REP. HERRON MOVED DO PASS ON HB 68. REP. HERRON ALSO MOVED THE AMENDMENTS ON HB 68.

Motion/Vote: REP. HERRON MOVED DO PASS AS AMENDED ON HB 68. Motion carried 18-0.

EXECUTIVE ACTION ON HB 148

Motion: REP. ELLIS MOVED DO PASS ON HB 148.



Motion/Vote: REP. COCCHIARELLA MOVED TO ADOPT THE AMENDMENTS ON HB 148. Motion carried 18-0.

Vote: REP. ELLIS MOVED DO PASS AS AMENDED ON HB 148. Motion carried 18-0.

EXECUTIVE ACTION ON HB 216

Motion/Vote: REP. ELLIS MOVED DO PASS ON HB 216. Motion carried 18-0.

EXECUTIVE ACTION ON HB 211

Motion: REP. PAVLOVICH MOVED DO PASS ON HB 211.

Discussion:

REP. COCCHIARELLA said she was opposed to the bill because the integrity of the changes made in the Workers' Compensation system needs to be maintained. This bill provides for a discriminatory exemption or exception to the Workers' Compensation way of doing business that could begin to erode that integrity. State employees would like to be held out as different than any other group of employees. It is not fair that other people doing similar kinds of work in the private sector would be treated differently and there would be a court challenge to this provision.

REP. ELLIS said these people have 12 days sick leave in their contract which means they are actually paid until this happens twice provided they do not have another sickness or injury.

REP. BARNETT said if a person had already used up his sick leave and then receive an injury there is no recourse. They do not have that sick leave to fall back on. He believes in the integrity of the system that the committee was granting an exception.

Motion/Vote: REP. ELLIS MOVED TO TABLE HB 211. Motion carried 17-1 with REP. PAVLOVICH voting no.

EXECUTIVE ACTION ON HB 243

Motion: REP. PAVLOVICH MOVED DO PASS ON HB 243. REP. PAVLOVICH MOVED THE AMENDMENTS TO HB 243.

Discussion:

REP. EWER said the amendment was important to the bill.

CHAIRMAN SIMON said he also supported the amendment however amendment #1 is repeating what is obviously already in the law.

REP. ELLIS said this amendment was necessary.

REP. BARNETT said he opposed the amendment because of extending the window of opportunity to those who are not covered by the grandfather clause.

REP. MILLS said he supports the bill without the amendment.

MOTION/Vote: REP. PAVLOVICH moved to adopt the amendment. A roll call vote was taken. Motion carried 14-4 with REPS. MILLS, BARNETT, COCCHIARELLA and KEENAN voting no.

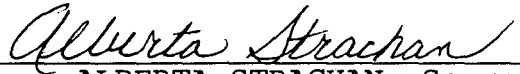
Vote: REP. PAVLOVICH MOVED DO PASS AS AMENDED ON HB 243. Motion carried 17-1 with REP. MILLS voting no.

ADJOURNMENT

Adjournment: 10:20



BRUCE T. SIMON, Chairman



ALBERTA STRACHAN, Secretary

BTS/ajs

**HOUSE OF REPRESENTATIVES**  
**BUSINESS AND LABOR COMMITTEE**

ROLL CALL

DATE 1-19-95

| NAME                                 | PRESENT | ABSENT | EXCUSED |
|--------------------------------------|---------|--------|---------|
| Rep. Bruce Simon, Chairman           | X       |        |         |
| Rep. Norm Mills, Vice Chair, Maj.    | X       |        |         |
| Rep. Bob Pavlovich, Vice Chair, Min. | X       |        |         |
| Rep. Joe Barnett                     | X       |        |         |
| Rep. Vicki Cocchiarella              | X       |        |         |
| Rep. Charles Devaney                 | X       |        |         |
| Rep. Jon Ellingson                   | X       |        |         |
| Rep. Alvin Ellis, Jr.                | X       |        |         |
| Rep. David Ewer                      | X       |        |         |
| Rep. Rose Forbes                     | X       |        |         |
| Rep. Jack Herron                     | X       |        |         |
| Rep. Bob Keenan                      | X       |        |         |
| Rep. Don Larson                      | X       |        |         |
| Rep. Rod Marshall                    | X       |        |         |
| Rep. Jeanette McKee                  | X       |        |         |
| Rep. Karl Ohs                        | X       |        |         |
| Rep. Paul Sliter                     | X       |        |         |
| Rep. Carley Tuss                     | X       |        |         |
|                                      |         |        |         |
|                                      |         |        |         |
|                                      |         |        |         |



## HOUSE STANDING COMMITTEE REPORT

January 31, 1995

Page 1 of 2

Mr. Speaker: We, the committee on **Business and Labor** report that **House Bill 100** (first reading copy -- white) do pass as amended.

Signed: \_\_\_\_\_

*Bruce Simon*  
Bruce Simon, Chair

And, that such amendments read:

1. Title, line 15.

Following: "VIDEOCONFERENCE"

Insert: ", WITH THE CONSENT OF BOTH PARTIES; PROVIDING THAT THE  
REDUCTION IN BENEFITS REQUIREMENT DOES NOT APPLY TO A  
PENSION COVERED BY SECTION 501(C) (9) OF THE INTERNAL REVENUE  
CODE;"

2. Title, line 18.

Following: "DATES"

Strike: "AND"

Insert: ", "

Following: "APPLICABILITY DATE"

Insert: ", AND A CONTINGENT TERMINATION DATE"

3. Page 16, line 14.

Following: line 13

Insert: "(3) The reduction required by subsection (1) does not  
apply to a pension covered by section 501(c) (9) of the  
Internal Revenue Code."

4. Page 17, lines 1, 12, and 24.

Following: "videoconference"

Insert: ", with the consent of both parties"

11/31  
Committee Vote:

Yes X, No O.

261600SC.Hdh

5. Page 18, line 11.

Following: "Effective dates. (1)"

Insert: "[Section 1] is effective January 1, 1996. (2)".

Following: "[Sections"

Strike: "1"

Insert: "2"

Following: "19"

Insert: ",21,"

Renumber: subsequent subsection

6. Page 18, following line 13.

Insert: "NEW SECTION. Section 21. Contingent termination. If 26

U.S.C. 3304 is amended to no longer require that election  
judges receive unemployment insurance coverage, then

[section 1 of this act] terminates on the date on which the  
U.S.C. amendment is effective."

-END-



## HOUSE STANDING COMMITTEE REPORT

January 19, 1995

Page 1 of 2

Mr. Speaker: We, the committee on **Business and Labor** report that **House Bill 68** (first reading copy -- white) **do pass as amended.**

Signed:   
Bruce Simon, Chair

**And, that such amendments read:**

1. Title, line 8.

Following: "BOILER"

Strike: "ENGINEER LICENSE FEE SCHEDULES"

Following: second "SCHEDULES"

Strike: ", AND APPROPRIATE"

2. Title, line 9.

Strike: "TRAINING COURSES"

3. Title, line 10.

Strike: "CLARIFYING BOILER ENGINEER EXPERIENCE REQUIREMENTS;"

4. Title, line 12.

Strike: line 12 in its entirety

5. Title, line 13.

Strike: "TONNAGE RATING;"

6. Title, line 14.

Strike: "50-74-304,"

Committee Vote:

Yes X, No O.

161200SC.Hdh

Insert: "AND"  
Following: "50-74-305,"  
Strike: "50-74-309, AND 50-76-103,"

7. Page 1, line 29.  
Following: "employer"  
Insert: "and an employee representative"

8. Page 2, line 19.  
Following: "rules"  
Strike: ":",

9. Page 2, line 20.  
Strike: line 20 in its entirety

10. Page 2, line 21.  
Strike: "(b)"  
Following: "inspections"  
Insert: "."  
Strike: "; and"

11. Page 2, line 22.  
Strike: line 22 in its entirety

12. Page 2, line 30 through page 4, line 10.  
Strike: **Section 5** in its entirety  
Renumber: subsequent sections

13. Page 4, line 30 through page 6, line 13.  
Strike: **Sections 7 and 8** in their entirety

-END-



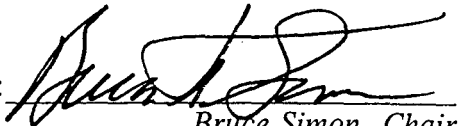


## HOUSE STANDING COMMITTEE REPORT

January 19, 1995

Page 1 of 5

Mr. Speaker: We, the committee on Business and Labor report that House Bill 66 (first reading copy -- white) do pass as amended.

Signed:   
Bruce Simon, Chair

And, that such amendments read:

1. Title, line 8.

Following: "INDUSTRY;

Insert: "AUTHORIZING THE DEPARTMENT TO ESTABLISH BY  
ADMINISTRATIVE RULE BOILER ENGINEER LICENSE FEE SCHEDULES  
AND APPROPRIATE TRAINING COURSES; CLARIFYING BOILER ENGINEER  
EXPERIENCE REQUIREMENTS; ESTABLISHING A NEW CLASS OF LICENSE  
FOR SEASONAL AGRICULTURAL PURPOSES; MODIFYING HOISTING  
ENGINEER LICENSE STANDARDS TO INCLUDE EITHER CRANE BOOM  
LENGTH OR TONNAGE RATING;"

2. Title, line 8.

Following: "37-72-101,"

Insert: "39-71-201, 50-74-303,"

Following: "50-74-308,"

Insert: "50-74-309,"

3. Page 2.

Following line 4:

Insert: "Section 2. Section 39-71-201, MCA, is amended to read:

"39-71-201. Administration fund. (1) A workers'  
compensation administration fund is established out of which all  
costs of administering the Workers' Compensation and Occupational  
Disease Acts and the various occupational safety acts the  
department must administer, with the exception of the subsequent

Committee Vote:

Yes 18, No 0.

161154SC.Hdh

injury fund, as provided for in 39-71-907, and the uninsured employers' fund, are to be paid upon lawful appropriation. The following money collected by the department must be deposited in the state treasury to the credit of the workers' compensation administrative fund and must be used for the administrative expenses of the department:

(a) all fees and penalties provided in 39-71-205 and 39-71-304;

(b) all fees paid for inspection of boilers and ~~issuance of licenses to operating engineers~~ as required by law;

(c) all fees paid from an assessment on each plan No. 1 employer, plan No. 2 insurer, and plan No. 3, the state fund. The assessments must be levied against the preceding calendar year's gross annual payroll of the plan No. 1 employers and the gross annual direct premiums collected in Montana on the policies of the plan No. 2 insurers, insuring employers covered under the chapter, during the preceding calendar year. However, an assessment of the plan No. 1 employer or plan No. 2 insurer may not be less than \$200. If at any time during the fiscal year a plan No. 1 employer is granted permission to self-insure or a plan No. 2 insurer is authorized to insure employers under this chapter, that plan No. 1 employer or plan No. 2 insurer is subject to assessment. The assessments must be sufficient to fund the direct costs identified to the three plans and an equitable portion of the indirect costs based on the ratio of the preceding fiscal year's indirect costs distributed to the plans, using proper accounting and cost allocation procedures. Plan No. 3 must be assessed an amount sufficient to fund the direct costs and an equitable portion of the indirect costs of regulating plan No. 3. Other sources of revenue, including unexpended funds from the preceding fiscal year, must be used to reduce the costs before levying the assessments.

(2) The administration fund must be debited with expenses incurred by the department in the general administration of the provisions of this chapter, including the salaries of its members, officers, and employees and the travel expenses of the members, officers, and employees, as provided for in 2-18-501 through 2-18-503, as amended, incurred while on the business of the department either within or without the state.

(3) Disbursements from the administration money must be made after being approved by the department upon claim therefor."

"Section 3. Section 50-74-303, MCA, is amended to read:

"50-74-303. **Engineer's license classifications.** (1) Engineers entrusted with the operation, care, and management of steam or water boilers and steam machinery, as specified in 50-74-302, are divided into ~~four~~ five classes, namely: first-class engineers, second-class engineers, third-class

engineers, agricultural-class engineers and low-pressure engineers.

(2) Licenses for the operation of steam or water boilers and steam machinery are divided into ~~four~~ five classifications in accordance with the following schedule:

(a) First-class engineers are licensed to operate all classes, pressures, and temperatures of steam and water boilers and steam-driven machinery with the exception of traction and hoisting engines.

(b) Second-class engineers are licensed to operate steam boilers operating not in excess of 250 pounds per square inch gauge saturated steam pressure, water boilers operating not in excess of 375 pounds per square inch gauge pressure and 450 degrees F temperature, and steam-driven machinery not to exceed 100 horsepower per unit, with the exception of traction and hoisting engines.

(c) Third-class engineers are licensed to operate steam boilers operating not in excess of 100 pounds per square inch gauge saturated steam pressure and water boilers operating not in excess of 160 pounds per square inch gauge pressure and 350 degrees F temperature.

(d) Agricultural-class engineers are licensed to operate steam boilers that operate not in excess of 150 pounds per square inch saturated steam pressure and that:

(i) are not operated for more than 6 months of the year; and  
(ii) are not operated for purposes other than the harvesting or processing of agricultural products.

(e) Low-pressure engineers are licensed to operate steam boilers operating not in excess of 15 pounds per square inch gauge pressure and water boilers operating not in excess of 50 pounds per square inch gauge pressure and 250 degrees F temperature.""

Renumber: subsequent sections

4. Page 2, line 10.

Page 2, line 15.

Page 2, line 20.

Page 3, line 2.

Page 7, line 2.

Page 7, lines 13 and 14.

Strike: "over 18 years of age"

Insert: "18 years of age or older"

5. Page 2, line 10.

Following: "for"

Strike: "a"

Insert: "an agricultural-class engineer's license or a"

6. Page 2, line 11.

Following: "a boiler in"

Strike: "this"

Insert: "the appropriate"

7. Page 4, following line 17.

Insert: "Section 8. Section 50-74-309, MCA, is amended to read:

"50-74-309. License fees. ~~Applicants~~ (1) An applicant for an engineer's license shall pay ~~fees~~ a fee according to the class of license for which application is made, as specified ~~in the following schedule:~~

~~(1) first class ————— \$30~~

~~(2) second class ————— \$20~~

~~(3) third class ————— \$12~~

~~(4) low pressure ————— \$ 8~~

~~(5) traction ————— \$12~~

~~(6) renewal of license ————— \$ 4~~

~~(7) replacement of lost certificate ————— \$ 2 by department rule.~~

(2) The fee is subject to the provisions of 37-1-134 and must be deposited in the state special revenue fund for the use of the department of commerce."

Renumber: subsequent sections

8. Page 5, line 26.

Strike: "over"

Following: "age"

Insert: "or older"

9. Page 6, line 24.

Following: "rating of"

Strike: "above"

Insert: "more than"

Following: "tons"

Strike: "and"

Insert: "or"

10. Page 7, line 11.

Following: "6 tons"

Strike: "and"

Insert: "or"

11. Page 7, lines 25 and 26.

Strike: "over" on line 25

Following: "age" on line 26

Insert: "or older"

12. Page 8, line 3.

Following: "commerce"

Strike: "in the same and the"

Insert: "and submitted with the appropriate fee that is set  
commensurate with the cost of administering this program, to  
be deposited in the state special revenue fund for use by  
the department. The"

-END-



## HOUSE STANDING COMMITTEE REPORT

January 19, 1995

Page 1 of 1

Mr. Speaker: We, the committee on **Business and Labor** report that **House Bill 148** (first reading copy -- white) **do pass as amended.**

Signed: \_\_\_\_\_

  
Bruce Simon, Chair

And, that such amendments read:

1. Page 8, line 3.  
Following: "~~qualify~~"  
Strike: "shall"

-END-

Committee Vote:  
Yes 18, No 0.

161205SC.Hdh



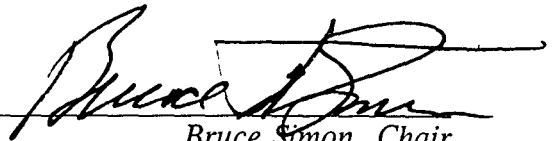
## HOUSE STANDING COMMITTEE REPORT

January 19, 1995

Page 1 of 1

Mr. Speaker: We, the committee on **Business and Labor** report that **House Bill 216** (first reading copy -- white) **do pass**.

Signed: \_\_\_\_\_

  
Bruce Simon, Chair

Committee Vote:  
Yes 18, No 0.

161208SC.Hdh



## HOUSE STANDING COMMITTEE REPORT

January 19, 1995

Page 1 of 1

Mr. Speaker: We, the committee on Business and Labor report that House Bill 243 (first reading copy -- white) do pass as amended.

Signed: \_\_\_\_\_

*Bruce Simon, Chair*

And, that such amendments read:

1. Title, line 6 and line 7.

Following: "DELINQUENCY FEES;" on line 6

Strike: "PROVIDING FOR NONAPPLICABILITY TO CERTAIN LAPSED  
LICENSES;"

2. Page 1, line 20.

Following: "~~for original licenses.~~"

Insert: "It is unlawful for a person who refuses or fails to pay  
the renewal fee to practice electrical work in this state."

3. Page 1, line 26 through line 27.

Strike: section 2 in its entirety

Renumber: subsequent section

-END-

Committee Vote:

Yes 17, No 1.

161210SC.Hdh



# HOUSE OF REPRESENTATIVES

## BUSINESS AND LABOR COMMITTEE

### ROLL CALL VOTE

DATE 1-19-95 BILL NO. HB 243 NUMBER \_\_\_\_\_

MOTION: AMENDMENTS

| NAME                                 | AYE | NO |
|--------------------------------------|-----|----|
| Rep. Bruce Simon, Chairman           | X   |    |
| Rep. Norm Mills, Vice Chair, Maj.    |     | X  |
| Rep. Bob Pavlovich, Vice Chair, Min. | X   |    |
| Rep. Joe Barnett                     |     | X  |
| Rep. Vicki Cocchiarella              |     | X  |
| Rep. Charles Devaney                 | X   |    |
| Rep. Jon Ellingson                   | X   |    |
| Rep. Alvin Ellis, Jr.                | X   |    |
| Rep. David Ewer                      | X   |    |
| Rep. Rose Forbes                     | X   |    |
| Rep. Jack Herron                     | X   |    |
| Rep. Bob Keenan                      |     | X  |
| Rep. Don Larson                      | X   |    |
| Rep. Rod Marshall                    | X   |    |
| Rep. Jeanette McKee                  | X   |    |
| Rep. Karl Ohs                        | X   |    |
| Rep. Paul Sliter                     | X   |    |
| Rep. Carley Tuss                     | ✓   |    |

EXHIBIT 1  
DATE 1-19-95  
HB 243

October 18, 1994

William (Red) Menahan  
1304 W. 5th  
Anaconda MT 59711

RE: GORDON MARCOTTE

Dear Red:

According to Gordon's request, I am enclosing a copy of the Memorandum submitted regarding Gordon's Petition for Writ of Mandamus filed for his Master Electrician and Electrical Contractor's License. The Memorandum discusses the many problems Master Electrician's such as Gordon face with the Electrical Board.

The first issue is *notice*. The Board needs direction on this issue. First, the Board needs direction on *notice* that it can and should perform in the accomplishment of its duties in implementing the license renewal statute.

Here, as the license renewal deadline is stated in statute, the Board needs direction on providing notice of the license renewal date and the amount of the license renewal fee. Without such notice, individual's such as Gordon have to look at the statute for the renewal deadline, then look to the Administrative Rules of Montana for agency changes and finally look to the Administrative Rules of Montana for the correct fees to pay. Of course, looking to the Administrative Rules of Montana assumes the person could and did obtain an current issue as the Rules as they may change quarterly and not all libraries maintain current sets despite best efforts.

After such notice, the Board needs to provide a second notice. This is because the license renewal statute provides a one month grace period if the individual fails to pay his license fee by July 15th of the year in question. The individual has until August 15th to pay the license renewal fees and *an additional prescribed fee*. The August 15th date is only found in statute. The additional prescribed fee is only found in the Administrative Rules of Montana. Consequently, without this notice, a Master Electrician who inadvertently misses paying by July 15th will also miss his opportunity to preserve his license without having to pay the penalty of taking the Master Electrician License

Examination.

Third, as you will note in the Memorandum, the taking of a license such as a Master Electrician License and imposing a regulatory penalty creates a situation falling under Montana's Administrative Procedure Act and Contested Case provisions of that Act. *These provisions also require notice.* The affected party must be told of his right to hearing and afforded an opportunity to request that hearing before default on the contested issue is taken. If the person elects to take advantage of the opportunity for hearing, two things happen.

First, the affected individual does not lose his license *up to and until his last opportunity for judicial review and may maintain his license through judicial review with court approval.* It was this lack of notice, especially the contested case notice and maintenance of license during contested case proceedings that was so devastating to Gordon. It may cost person over a hundred thousand dollars in lost business to potentially the entire value of his or her professional career.

Second, the Montana Electrical Board needs direction that although the licensing renewal statute speaks in terms of revocation upon not making the required payment, that not making the required payment is not conclusive that the person intended to actually make a forfeiture. In the Board's opinion, the way the license renewal statute reads, the legislature left them no choice in this matter. Of course, as you read the Memorandum, this viewpoint is very selective when you consider the administrative actions they have taken by Administrative Rule.

This issue goes to the constitutionality of the license renewal statute. In order for the "forfeiture" provision, to meet the legislative intent and meet constitutional safeguards of due process, the Montana Electrical Board must be granted authority to hear whether the person actually intended to forfeit his or her license. The failing to make payment by the August 15th date should only be evidence from which the Board may infer the person intended to make the forfeiture. Otherwise, the license renewal statute is unconstitutional as it imposes an arbitrary, capricious, harsh and unreasonable penalty for the mere failure to pay the license fee in a timely manner.

Finally on this issue, without appropriate direction, the Board would simply hold at such hearing that the license was forfeited as the license renewal statute from the Legislature left them no alternative but to find a forfeiture.

To benefit Gordon, I suggest legislation such as the following [See pp. 16, 17 of Gordon's Memorandum for an illustration of proper notices].

37-68-310. License renewal every three years.

(1)(a) License(s) of residential electricians, journeyman electricians, or master electricians, unless

they have been suspended or revoked by the board, must be renewed for a three (3) year period by the department on application for renewal made to the department on or before July 15th of the year in which the prior license expires. In making application for renewal of said license, the licensee shall include payment of the renewal fee as prescribed by the board.

(1)(b) If application for renewal is not on or before July 15th, an applicant for renewal must pay any additional prescribed fee, along with the application for renewal and the renewal fee on or before August 15th of the year in which the license expires.

(1)(c) Upon the failure of any licensee to make timely application within the these provisions, the licensee's failure is evidence of the licensee's intent to forfeit his or her license(s) and, upon failure of the licensee to avail him or herself of the notice and opportunity as provided by the board under the Montana Administrative Procedures Act and Attorney General's Model Rules, the inference of forfeiture of license(s) shall be deemed conclusive and the license(s) forfeited.

(1)(d) Upon conclusive forfeiture, the licensee loses his or her former position for renewal and must meet the State of Montana licensing requirements for any subsequent license the individual seeks including the taking of the applicable licensing examination.

(2)(a) The board shall provide adequate prior notice of (i) the licensee's renewal application obligation including the July 15th renewal date and renewal fee; and

(ii) In the event the licensee fails to make the July 15th license fee renewal application, the board shall provide a subsequent notice of the licensee's opportunity to make renewal application by August 15th. This notice shall specify the renewal fee and any additional prescribed fee; and

(iii) In the event the licensee fails to make appropriate renewal application after the second notice, the board shall provide the licensee notice and opportunity for hearing under the Montana Administrative Procedure Act and Attorney General's Model Rules where the applicant is afforded due process of law and the opportunity to demonstrate that the applicant did not intend such forfeiture. Upon such showing, the board shall permit the licensee to renew said license(s) upon making appropriate application, including payment of license renewal fees and prescribed additional fees.

(iv) the board shall not take the licensee's license(s) under the forfeiture provision of this renewal statute until either the licensee fails to avail him or herself

of the contested case provisions available under the Montana Administrative Procedure Act and the Attorney General's Model Rules or, upon availing him or herself of the contested case provision, the licensee fails to provide evidence that he or she did not intend the forfeiture. Evidence the licensee did not intend the forfeiture shall include but not be limited to failure to receive notice of the obligation, financial hardship or other reason(s) preventing timely renewal application.

(3) Licensees whose licenses were affected by the lack of inclusion of such forfeiture provisions in the 1993 enactment are afforded opportunity, after notice by the board, for reinstatement of their licenses, upon payment of the then effective license renewal fee and additional prescribed fees, for renewal and reinstatement of the licensees licenses without the required taking of the licensing examination. The board's notice to this effect shall permit sixty (60) days for renewal application under this provision.

Red, if you have any questions or comments, please let me know. On behalf of Gordon, I would enjoy working with you on this project. If needed, I beleive testimony is available for committee hearings.

Thank you for your help.

Best Regards,

Michael Klinkhammer

cc: Gordon Marcotte

EXHIBIT 1

DATE 1-19-95

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Michael Klinkhammer  
Attorney at Law  
Brolin & Klinkhammer Law Offices  
One Ten West Park Avenue  
Anaconda MT 59711-1397  
Telephone: (406)563-8412  
Attorney for Petitioner

FILED Oct. 5 1994  
Theresa Orrino  
THERESA ORRINO, CLERK

MONTANA THIRD JUDICIAL DISTRICT COURT, DEER LODGE COUNTY

GORDON MARCOTTE,

Petitioner,

and

STATE OF MONTANA, DEPARTMENT  
OF COMMERCE, STATE ELECTRICAL  
BOARD, NAMELY CHARLES SWEET,  
CHAIRMAN STATE ELECTRICAL  
BOARD, GENE KOLSTAD, PUBLIC  
MEMBER, TODD STODDARD,  
JOURNEYMAN ELECTRICIAN MEMBER,  
LOUISE GLIMM, PUBLIC MEMBER,  
RON VANDIEST, JOURNEYMAN  
ELECTRICIAN MEMBER,

Respondents.

CAUSE NO. DV-94-133

MEMORANDUM SUPPORTING  
PETITION FOR WRIT  
OF MANDAMUS

\* \* \* \* \*

COMES NOW, the Petitioner, GORDON MARCOTTE, by and through  
his attorney, files the following Memorandum Supporting Petition  
For Writ of Mandamus.

STATE OF FACTS

From the inception of the State of Montana, Department of  
Commerce, Electrical Board, Petitioner [Gordon] carried on  
business as a Master Electrician and Electrical Contractor in  
the State of Montana under a license duly issued by the  
Respondent.

1 Through diligence, industry, and the faithful performance  
2 of his contracts and obligations, Gordon acquired and  
3 established for himself a reputation of honesty, fair dealings,  
4 and integrity, gaining the good will of a great number of  
5 customers and of the public at large. Gordon's reputation and  
6 good will are of great value to him. Gordon has a vested  
7 property right to his business reputation, customers and their  
8 good will.

9 On or about February of 1993, the Respondents notified  
10 Gordon that Respondents withdrew his State of Montana Master  
11 Electrician license and Electrical Contractor license for  
12 failure to pay the appropriate licensing fees within the  
13 statutorily provided time period. Respondents took Gordon's  
14 licenses, without due process of law, for an indefinite time.

15 Respondents', in a Twenty-seven year practice, provided  
16 licensees notice of their obligations to pay their license fee.  
17 Prior to the taking of Gordon's State of Montana Master  
18 Electrician License and Electrical Contractor license,  
19 Respondents did not provide Gordon notice of his obligation to  
20 pay the license fees within the statutorily provided time period  
21 and ensuing penalties for such failure.

22 Before restoring Gordon his State of Montana Master  
23 Electrician license and Electrical Contractor license, the  
24 Respondents require, in addition to the payment of the licensing  
25 fees, that Gordon successfully take the State of Montana Master  
Electrician Licensing Examination.

1 Except for taking the license examination, Gordon met  
2 Respondents licensing requirements, including payment of license  
3 fees. Respondent returned his check for the license fees.

4 Respondents' unlawful action, exceeded their authority by  
5 depriving Gordon of his State of Montana Master Electrician and  
6 Electrical Contractor licenses without due process of law. By  
7 this action, not only did Respondents' cause Gordon substantial  
8 financial and professional loss since February 1993,  
9 Respondents' deprived Gordon the ability to earn his livelihood  
10 as an electrician in any capacity.

11 Gordon's experience, qualifications, past successful taking  
12 of the Master Electrician License Examination, along with  
13 payment of the required license fee, absent a showing Gordon is  
14 otherwise unfit for licensing as a Master Electrician and/or  
15 Electrical Contractor, is legally sufficient for restoration of  
16 his State of Montana Master Electrician license and Electrical  
17 Contractor license

18 Gordon cannot carry on his business as a Master Electrician  
19 and Electrical Contractor unless his licenses are restored.  
20 Consequently, unless Respondents are commanded to refrain from  
21 this unlawful action exceeding Respondents lawful authority,  
22 Gordon will suffer irreparable injury.

23 ARGUMENT

24 I. MONTANA'S THIRD JUDICIAL DISTRICT COURT, DEER LODGE COUNTY,  
25 HAS JURISDICTION AND VENUE OVER THE ABOVE-CAPTIONED MATTER.

At all times herein, Gordon was a resident of Anaconda,



1 Deer Lodge County, Montana, licensed under the laws of the State  
2 of Montana by the State of Montana, Department of Commerce,  
3 Electrical Board to do business as a Master Electrician and  
4 Electrical Contractor and has been doing business in this  
5 capacity continuously for approximately the past Forty-two (42)  
6 years.

7 At all times herein, Montana's Department of Commerce,  
8 Electrical Board was and is a statewide administrative agency  
9 created under and existing by virtue of the provisions of Mont  
10 Code Ann. §2-15-1874 as allocated to the State of Montana  
11 Department of Commerce under Mont. Code Ann. §2-15-121 and  
12 governed by the provisions of the Montana Administrative  
13 Procedures Act [M.A.P.A.], Montana Codes Annotated, Title 2,  
14 Chapter 4, as specifically provided for under Mont. Code Ann.  
15 §2-4-631 (1993) and Respondents are the duly appointed and  
16 qualified members of the Board and other responsible  
17 governmental authority.

18 Mont. Code Ann. §25-2-126 provides that the proper place of  
19 trial for an action against the State is either the county in  
20 which the claim arose, or Lewis and Clark County, or, in an  
21 action brought by a resident of the State of Montana, the county  
22 of his or her residence.

23 Applying the above facts and law, the Third Judicial  
24 District Court, Deer Lodge County, Montana, properly has venue  
25 over this matter.

The petitioned for Writ of Mandamus may issue from

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1 Montana's Supreme Court or any District Court to any inferior  
2 tribunal, corporation, board or person to compel the performance  
3 of an act which the law specially enjoins as a duty resulting  
4 from an office, trust, or station from which a person was  
5 unlawfully precluded by such inferior tribunal, corporation,  
6 board of person. Mont. Code Ann. §27-26-102 (1993).

7 As the parties and issues meet the statutory requirements,  
8 the Court properly has jurisdiction over this matter.

9 II. AS RESPONDENT'S UNLAWFULLY EXCEEDED THEIR AUTHORITY  
10 DEPRIVING GORDON OF HIS MASTER ELECTRICIAN LICENSE AND  
11 ELECTRICAL CONTRACTOR LICENSE WITHOUT REQUIRED DUE PROCESS OF  
12 LAW AND IN VIOLATION OF LAW REQUIRING RESPONDENTS TO PROVIDE  
13 GORDON HIS MASTER ELECTRICIAN LICENSE AND ELECTRICAL CONTRACTOR  
14 LICENSE DURING STATUTORILY PROVIDED CONTESTED CASE PROCEEDINGS,  
15 INCLUDING APPEAL, THE DISTRICT COURT SHOULD ORDER THE  
16 RESPONDENTS TO MEET THEIR NON-DISCRETIONARY DUTY OF PROVIDING  
17 PETITIONER HIS MASTER ELECTRICIAN LICENSE AND ELECTRICAL  
18 CONTRACTOR LICENSE, UPON PAYMENT OF THE LICENSE FEES, PENDING  
19 AND DURING PROCEEDINGS BEFORE THIS COURT.

20 Respondents' demanded Gordon not only pay the license tax  
21 for restoration of his Montana Master Electrician license,  
22 Respondent required Gordon to successfully retake the Montana  
23 Master Electrician License Examination. As such, Respondents'  
24 action involves a regulatory action, not simply a licensing tax  
25 action Brackman v. Kruse, 122 Mont. 91,104, 199 P.2d 971,\_\_\_\_  
(Mont. 1948).

1 Respondents adopted and incorporated the organizational  
2 rules of the Department of Commerce. Mont. Admin. R.  
3 §8.18.101(1) (1993). Respondents further adopted and  
4 incorporated the procedural rules of the Department of Commerce.  
5 Mont. Admin. R. §8.18.201 (1993).

6 Under Mont. Admin. R. §8.1.101 (1993), Montana's Electrical  
7 Board is established and administered within the Department of  
8 Commerce's authority. As the Department of Commerce adopted and  
9 incorporated the Attorney General's Model Rules by reference,  
10 did Montana's Electrical Board. Mont. Admin. R. §8.2.101 (1993).

11 The Attorney General's Model Rules adopts and liberally  
12 expands upon the MAPA. Mont. Admin. R. §1.3.102 (1993) et. seq.  
13 Consequently, Respondents adopted the following provisions  
14 governing their actions.

15 First, generally, a contested case involves an agency  
16 determination applicable to a specifically named party. Second,  
17 contested cases are more specifically defined as:

18 "Contested case" means a proceeding before an agency  
19 in which a determination of legal rights, duties, or  
20 privileges of a party is required by law to be made  
21 after an opportunity for hearing. The term includes  
but is not restricted to ratemaking, price fixing, and  
*licensing*.

22 Mont. Admin. R. §2.4.102(4) (1993); Mont. Code Ann. §2-4-102(4)  
(1993) [Emphasis added].

23 The term license means:

24 "License" includes the whole or part of any agency  
25 permit, certificate, approval, registration, charter,  
or other form of permission required by law *but does*  
*not including a license required solely for revenue*  
*purposes*.

1 Mont. Admin. R. §2.4.102(5) (19931); Mont. Code Ann §2-4-102(5)  
2 (1993) [Emphasis added].

3 The term "licensing" means:

4 "Licensing" includes any agency process respecting  
5 the grant, denial, *renewal*, revocation, suspension,  
6 annulment, *withdrawal*, limitation, transfer, or  
7 amendment of a license.

8 Mont. Admin. R. §2-4-102(6) (1991), Mont. Code Ann. §2-4-102(6)  
9 (1993).

10 Applying the above statutory and administrative authority,  
11 M.A.P.A.'s contested case provisions, as incorporated in the  
12 Attorney General's Model Rules apply to this case.

13 Gordon is a party within the meaning of the M.A.P.A.

14 While licensing proceedings for revenue purposes are excluded,  
15 regulatory licensing action, as is at issue in this case,  
16 including the renewal and withdrawal of licenses, is  
17 specifically included within the M.A.P.A.'s contested case  
18 provisions and the Attorney General's Model Rules.

19 Here, Respondents' withdrew Gordon's license. After demand,  
20 Respondent's refused to restore Gordon's licenses. Respondents  
21 insisted, as a regulatory penalty condition precedent, Gordon  
22 successfully retake the Master Electrician Licensing Examination  
23 prior to restoration of his licenses. This regulatory penalty  
24 was inflicted upon Gordon, without notice of obligation and  
25 penalty for failure, for the mere failure to pay \$60.00 in a  
timely manner. As such, M.A.P.A.'s contested case proceedings  
and the Attorney General's Model Rules apply to this case. The  
matter before the Court is a contested case within the meaning  
of the M.A.P.A.

1 M.A.P.A.'s contested case provisions provide a statement of  
2 a party's due process rights to which a party is statutorily  
3 entitled to prior to the taking of a valuable property or right.  
4 By denying Gordon his rights under M.A.P.A.'s contested case  
5 provisions, Respondents denied Gordon the following:

6 **Notice.** (1) In a contested case, all parties must be  
7 afforded an opportunity for hearing after reasonable  
notice.

8 \* \* \* \* \*

(2) The notice must include:

9 (a) a statement of the time, place and nature of the  
hearing;

10 (b) a statement of the legal authority and  
jurisdiction under which the hearing is to be held;

11 (c) a reference to the particular sections of the  
statutes and rules involved;

12 (d) a short and plain statement of the matters  
asserted. If the agency or other party is unable to  
13 state the matters in detail at the time the notice is  
served, the initial notice may be limited to a  
14 statement of the issues involved. Thereafter, upon  
application, a more definite and detailed statement  
must be furnished.

15 e) a statement that a formal proceeding may be waived  
16 pursuant to 2-4-603;

17 **Mont. Code Ann. §2-4-601 (1993)**

18 Consequently, Respondents denied Gordon his rights to: 1) a  
19 statement of the intended agency action; 2) a statement of the  
20 matters asserted; 3) a statement of the supporting legal  
21 authority; 4) a statement of his right to hearing; and 5) a  
22 statement of the time, place and nature of the hearing.

23 Respondent denied Gordon these rights which Respondents were  
24 legally required to provide Gordon prior to the taking of  
25 Gordon's Master Electrician and Electrical Contractor licenses  
and imposition of the regulatory penalty as a condition  
precedent to restoration of his licenses.

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1 In addition to the above stated due process rights,  
2 M.A.P.A.'s contested case provisions also statutorily assure  
3 Gordon the following due process rights prior to the taking of  
4 his property and rights:

5 1) to a Hearing conducted by a Hearing Examiner [Mont. Code  
6 Ann. §2-4-611(1)]; and

7 2) for legally sufficient reasons, to move for  
8 disqualification of a Hearing Examiner [Mont. Code Ann. §2-4-  
9 611(4)]; and

10 3) to provide and receive sworn testimony and the issuance  
11 of subpoenas to obtain sworn testimony [Mont. Code Ann. §2-4-  
12 611(3)]; and

13 4) to discovery by deposition [Mont. Code Ann. 2-4-611(3)];  
14 and

15 5) to the regulated course of hearings including the  
16 setting of time and place for continued hearings, fixed timing  
17 for filing of briefs and other documents, and directions to  
18 parties to meet and confer to consider simplification of the  
19 issues by agreement of the parties [Mont. Code Ann. §2-4-  
20 611(3)]; and

21 6) to the opportunity at the Hearing to respond and present  
22 evidence and argument on all issues involved [Mont. Code Ann. §2-  
23 4-612(1)]; and

24 7) to the benefit of common law and statutory rules of  
25 evidence [Mont. Code Ann. §2-4-612(2)]; and

8) to copies of documentary evidence submitted [Mont. Code

1 Ann. §2-4-612(3)]; and

2 9) to the right to conduct cross-examination required for  
3 full and true disclosure of truth, including the right to cross  
4 examine the author of any document prepared by or on behalf of  
5 for the use of the agency and offered in evidence [Mont. Code  
6 Ann. §2-4-612(5)]

7 10) to the right to judicial notice of judicially  
8 cognizable facts [Mont. Code Ann. §2-4-612(6)]; and

9 11) to protection from findings of fact and conclusions of  
10 law after ex parte consultations [Mont. Code Ann. §2-4-613]; and

11 12) to the right to a record and transcription in contested  
12 case proceedings which must include:

13 (1) all pleading, motions and intermediate rulings  
14 [Mont. Code Ann. §2-4-614(1)(a)],

15 and

16 (2) all evidence received or considered, including  
17 stenographic record of oral proceedings when  
18 demanded by a party [Mont. Code Ann. §2-4-614(1)(b)],

19 and

20 (3) a statement of matters officially noted [Mont.  
21 Code Ann. §2-4-614(1)(c)], and

22 (4) questions and offers of proof, objections and  
23 rulings thereon [Mont Code Ann. §2-4-614(1)(d)], and

24 (5) proposed findings and exceptions [Mont. Code An  
25 §2-4-614(1)(e)], and

(6) any decision, opinion, or report by the hearing

1 examiner or agency member presiding at the  
2 hearing [Mont. Code Ann. §2-4-614(1)(f)], and  
3 (7) all staff memoranda or data submitted to the  
4 hearing examiner or members of the agency as  
5 evidence in connection with their consideration  
6 of the case [Mont. Code Ann. §2-4-614(1)(g)]; and

7 13) to the right to a transcription of the stenographic  
8 record of oral proceedings or any part thereof [Mont. Code  
9 Ann. §2-4-614(2)]; and

10 14) where a decision, if adverse to party other than the  
11 agency, is made without the hearing conducted by a majority of  
12 the agency board members, to the right to appeal the Hearing  
13 Examiner's proposed Findings of Facts and Conclusions of Law and  
14 opportunity to provide Proposed Findings of Facts,  
15 Conclusions of Law, Briefs and Oral Arguments to the Agency  
16 Board [Mont. Code Ann. §2-4-621]; and

17 15) to the right to review and modification in whole or in  
18 part of agency decisions, even of proposed findings of fact upon  
19 complete review of the record [Mont. Code Ann. §2-4-621(3)]; and

20 16) if adverse to a party other than the agency, to a  
21 *final written order* including Findings of Fact and Conclusions  
22 of Law separately stated, based upon evidence and matters  
23 judicially noticed, with each conclusion of law supported by  
24 authority or a reasoned opinion [Mont. Code Ann. §2-4-623(1),(2)  
25 and (3)]; and

17) where a party submitted proposed findings of fact, to a



1 written final decision ruling upon each proposed finding of fact  
2 [Mont. Code Ann. §2-4-623(4)]; and

3 18) to the right to notification, personally or by mail  
4 of any decision or order made under the M.A.P.A. contested case  
5 provisions, and, upon request, a copy of such decision or order  
6 to the party and his attorney of record [Mont. Code Ann. §2-4-  
7 623(5)]; and

8 19) to the right that no final decision or order made in  
9 accordance with the provisions of these sections is valid or  
10 effective against such person unless the agency meets its  
11 indexing and recording responsibilities for public inspection  
12 unless the affected person has actual knowledge the agency made  
13 a final decision or order in accordance with the M.A.P.A.  
14 contested case provisions [Mont. Code Ann. §2-4-623(6)]; and

15 20) to the right to judicial review of agency action in  
16 contested cases according to the provisions of Mont. Code Ann.  
17 §2-4-701 et.seq.].

18 As such, Respondent's denied Gordon the fundamental,  
19 encompassing provisions of United States Constitutional Due  
20 Process Rights and State of Montana Constitutional Due Process  
21 Rights which Montana's Legislature specifically enacted to the  
22 protect individuals such as Gordon from loss of property and  
23 rights of great value to them by actions of the State. In this  
24 case, to protect Gordon and Gordon's property of great value  
25 his State of Montana Master Electrician license and Electrical  
Contractor license - and to protect Gordon from damages the

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1 injury a wrongful taking of this property would cause him -  
2 losing his means of livelihood.

3 In so doing, Respondents caused Gordon immediate injury,  
4 approximately \$50,000.00 in lost earnings, and potentially  
5 irreparable future damage in lost contractor's who utilize his  
6 services, valued at approximately \$500,000.00. While Gordon does  
7 not argue for these economic damages, they are a significant  
8 factor of consideration.

9 Respondents' caused this loss by unlawfully depriving  
10 Gordon the opportunity to maintain his Montana Master  
11 Electrician license and Electrical Contractor license pending  
12 and during M.A.P.A. contested case proceedings, up to and  
13 including the last available date to seek judicial review of the  
14 Respondents' actions. The supporting authority is as follows:

15 Licenses. (1) When the grant, denial, renewal,  
16 revocation, suspension, annulment, withdrawal,  
17 limitation, transfer, or amendment of a license is  
18 required by law to be preceded by notice and  
opportunity for hearing, the provisions of this  
chapter concerning contested cases apply.

19 (2) When a licensee has made a timely and sufficient  
20 application for renewal of a license or for a new  
21 license with reference to any activity of a continuing  
22 nature, the existing license does not expire until the  
23 application has been finally determined by the agency  
24 and, in case the application has been finally  
determined by the agency and, in case the application  
is denied or the terms of the new license limited,  
until the last day for seeking review of the agency  
order or a later date fixed by order of the reviewing  
court.

25 (3) Whenever notice is required, no revocation,  
suspension, annulment, withdrawal, or amendment of any  
license is lawful unless the agency gave notice by  
mail to the licensee of facts or conduct which warrant  
the intended action. If the agency finds that public

1 health, safety, or welfare imperatively requires  
2 emergency action and incorporates a finding of fact to  
3 that effect in its order, summary suspension of a  
4 license may be ordered pending proceedings for  
revocation or other action. These proceedings shall be  
promptly instituted and determined.

5 Mont. Admin. R. §2-4-631(1),(2) and (3) (1987); Mont. Code Ann.  
6 §2-4-631(1),(2) and (3) (1993).

7 As a regulatory action applying to the renewal, withdrawal  
8 and limitation of Gordon's license, both administrative rule and  
9 Montana statute required Respondent to provide Gordon  
10 opportunity for hearing and reasonable notice of such hearing  
11 under M.A.P.A.'s contested case provisions before taking such  
12 action. Mont. Admin. R. §2-4-631(1) (1987); Mont. Code Ann. §2-  
13 4-631(1) (1993). *Where, as here, notice is required, no*  
14 *revocation, suspension, annulment, withdrawal, or amendment of*  
15 *any license is lawful unless the agency gave notice by mail to*  
16 *the licensee of facts or conduct which warrant the intended*  
17 *action. Mont. Admin. R. §2-4-631(3) (1987); Mont. Code Ann. §2-*  
18 *4-631(3) (1993). Facts or conduct warranting such emergency*  
19 *action, summarily suspending a license are the public's health,*  
20 *safety and welfare. Mont. Admin. R. §2-4-631(3) (1987); Mont.*  
21 *Code Ann. §2-4-631(3) (1993).*

22 Applying statutory authority, Respondents' action exceeded  
23 their lawful authority. Respondents wrongfully withdrew Gordon's  
24 licenses. Consequently, the Court should grant Gordon's Petition  
25 compelling Respondent restore Gordon his licenses pending these  
proceedings.

Assuming Respondents argued Mont. Admin. R. §2-4-631(2) and

1 Mont. Code Ann. §2-4-631(2) affected this action, the  
2 appropriate statutory construction is as follows.

3 First, where a licensee made timely application for renewal  
4 of a license, licensee's license remains in effect through the  
5 described proceedings.

6 Second, in any event, where the licensing agency revokes,  
7 suspends, annuls, withdraws or amends a license, M.A..P.A.'s  
8 contested case provisions apply - including the right to hearing  
9 and reasonable notice of hearing.

10 Third, whenever notice is required, no such revocation,  
11 suspension, annulment, withdrawal or amendment of the license is  
12 effective unless (1) the licensing agency provided notice as  
13 required by M.A.P.A.'s contested case provisions or (2) provided  
14 the licensee notice by mail of facts or conduct, that for the  
15 public's health, safety or welfare, warrant the immediate,  
16 emergency revocation, suspension, withdrawal, annulment or  
17 limitation of the licensee's license.

18 Applying the law to the facts, Gordon received no written  
19 notice of Respondents' action whatsoever. All Gordon received  
20 was a telephone call in January or February of 1994 telling him  
21 he no longer had a Master Electrician and Electrical Contractor  
22 license. Consequently, Respondents exceeded their lawful  
23 authority by wrongfully withdrawing Gordon's licenses without  
24 notice by mail of the action and facts warranting, for reasons  
25 of the public's health, safety and welfare, the emergency,  
immediate taking of his licenses without the benefit of

1 M.A.P.A.'s contested case provisions.

2 Respondents should have done the following. Respondents  
3 should have followed their Twenty-seven year policy and sent  
4 Gordon a letter providing adequate notice of his obligation to  
5 pay his license fees by the July 15, 1993 renewal date.

6 If Gordon failed to pay his license fee by the July 15th  
7 date, Respondents should have sent Gordon a follow up notice  
8 notifying Gordon that in order to maintain his licenses, he not  
9 not only needed to pay his license fees by no later than August  
10 15, 1993, he must also accompany his license fee payment with an  
11 additional penalty fee prescribed by Respondents. In addition,  
12 Respondents needed to specify in this notice the amount of the  
13 prescribed additional fee. While this notice is not required by  
14 the language of Mont. Code Ann. §37-68-310, it is necessary to  
15 effect the statutory provision.

16 In this notice, Respondents should also have stated that if  
17 the statutorily required license fee, along with Respondents'  
18 prescribed additional fee, was not recieved on or before August  
19 15th, Respondents' would withdraw his license.

20 To completely apprise Gordon of the penalty, this notice  
21 should have stated that if Gordon did not pay the required fees  
22 by August 15, 1993, Respondents would withdraw his licenses, and  
23 in addition to payment of the fees, require that Gordon  
24 successfully re-take the Master Electrician License Examination.

25 Finally, as a regulatory penalty was involved, this notice  
should further have informed Gordon that any such regulatory

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1 withdrawal of his license was subject to M.A.P.A.'s contested  
2 case provisions. Specifically, Respondents' notice should have  
3 stated that in the event the Board contemplated the withdrawal  
4 of his licenses for failure to make the required fee payments by  
5 August 15, 1993, prior to taking the action, Respondents would  
6 provide Gordon the opportunity to request a hearing. In  
7 addition, the notice should have stated that if Gordon requested  
8 the hearing, Gordon would receive reasonable notice of the  
9 hearing date, time and place.

10 Finally, if Gordon still failed to make payment by the  
11 August 15, 1993 deadline, Respondents should have provided a  
12 final notice. This notice should have complied with M.A.P.A.'s  
13 notice provisions. **Mont. Admin. R. §1.3.212(1) (1993).** It should  
14 also have notified Gordon of his right to representation by  
15 counsel. **Mont. Admin. R. §1.3.212(1)(b) (1993).** It should also  
16 have included a statement at what point the parties legal  
17 rights, duties or privileges would be revoked or imposed. **Mont.**  
18 **Admin. R. §1.3.212(1)(c) (1993).** As the notice should have  
19 included the date when the parties rights, duties or privileges  
20 would be revoked or imposed, the notice must also have included  
21 a date by which Gordon must have applied for the hearing or he  
22 would default and the agencies contemplated action become the  
23 Board's action by default. **Mont. Admin. R. §1.3.214 (1993).**  
24 Finally, if a default order was entered, the default order must  
25 include findings of fact and conclusions of law. **Mont. Admin. R.**  
**§1.3.214 (1993).**

1           The only alternative provided is to invoke the contested  
2 case emergency rule. Here, the authority provides that:

3           (1) Section 2-4-631(3) provides:

4           . . . If the agency finds that public health, safety  
5 or welfare imperatively requires emergency action and  
6 incorporates a finding to that effect in its order,  
7 summary suspension of a license may be ordered pending  
8 proceedings for revocation or other action. These  
9 proceedings shall be promptly instituted and  
10 determined.

11           Mont. Admin. R. §1.3.213(1) (1993).

12           If Respondents had presented Gordon these opportunities,  
13 the following would have occurred.

14           First, presumably, as Gordon has done since the inception  
15 of Respondent Electrical Board in 1967, Gordon would have made  
16 timely and sufficient payment of his license fees.

17           Second, if for some unforeseen reason Gordon failed to make  
18 payment by July 15th, upon the second notice, Gordon would have  
19 made timely and sufficient payment of the license fees plus the  
20 prescribed additional fees.

21           Third, if Gordon failed to make the required payment after  
22 the second notice, upon receipt of the third, Gordon would have  
23 instituted proceedings under M.A.P.A's. contested case  
24 proceedings.

25           Fourth, in any event, unless the Board invoked the  
emergency provision, sending the required emergency notice,  
*Gordon would have maintained his licenses during contested case  
proceedings which would have protected his license from August  
15th through the last date to seek judicial review of the agency  
order or a later date fixed by the Court.*

1 While Respondent may argue some of the above described  
2 notices are not specifically prescribed by statute, they are  
3 required 1) by past practice; and 2) either explicitly provided  
4 for or required by inference to effect the statute. The third  
5 notice is explicitly mandatory. Respondents' duty to maintain  
6 Gordon's licenses, as part of the notice and hearing provision  
7 is also expressly mandatory.

8 The Writ of Mandamus lies to compel performance of clear  
9 legal duties. Paradise Rainbow et. al. v. Fish and Game Comm'n,  
10 148 Mont. 412, 417, 421 P.2d 717, \_\_\_\_\_ (Mont. 1966). Respondents's  
11 are under such clear legal duty. Respondents unlawfully refused  
12 to perform their clear legal duty to afford Gordon his rights  
13 under M.A.P.A.'s contested case provisions. Respondents caused  
14 Gordon substantial immediate injury, approximately \$50,000.00 in  
15 lost earnings, and potentially irreparable future damage in lost  
16 contractor's who utilize his services, valued at approximately  
17 \$500,000.00, for which Gordon has no plain, adequate and speedy  
18 remedy at law. The reasons are:

19 1) Respondent exceeded their authority, unlawfully  
20 depriving Gordon of M.A.P.A.'s contested case due process  
21 rights; and

22 2) Respondents exceeded their authority, unlawfully  
23 depriving Gordon of his licenses during Gordon's exercise of his  
24 rights under M.A.P.A.'s contested case provisions; and

25 3) Respondents exceeded their authority, by unlawfully  
depriving Gordon of M.A.P.A.'s contested case provisions,



1 thereby unlawfully depriving Gordon of his right to judicial  
2 appeal of final agency orders.

3 By depriving Gordon his right to judicial appeal of final  
4 agency order, depriving Gordon his right to maintain his  
5 licenses during contested case proceedings, including judicial  
6 review of final agency orders, Respondents denied Gordon the  
7 means to any plain, speedy or adequate remedy in the courts of  
8 law.

9 Mandamus lies to compel proper exercise of a Board's duties  
10 where the Board acted arbitrarily and capriciously, abusing its  
11 discretion. Paradise Rainbow et. al. v. Fish & Game Comm'n, 138  
12 Mont. 412, 417, 421 P.2d 717, \_\_\_ (Mont. 1966). Constitutionally,  
13 every person has a right to operate a business, subject to  
14 applicable state laws, and may not be deprived of such property  
15 right without due process of law which is constitutionally  
16 guaranteed by Montana's Constitution. State ex. rel. Bennett v.  
17 Stow, 144 Mont. 599, 621, 399 P.2d 221, \_\_\_ (Mont. 1965).

18 As Respondents arbitrarily, capriciously abused their  
19 discretion, depriving Gordon of his property rights without  
20 Constitutionally and statutorily mandated due process of law,  
21 and thereby deprived Gordon of any plain, speedy and adequate  
22 remedy, Mandamus lies to compel Respondents to properly exercise  
23 their duties. Consequently, the Court should grant Gordon's  
24 Petition for Writ of Mandamus.

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1 III. THE COURT SHOULD ISSUE THE PETITIONED FOR WRIT OF MANDAMUS  
2 COMMANDING RESPONDENTS TO RESTORE PETITIONER'S MASTER  
3 ELECTRICIAN AND ELECTRICAL CONTRACTOR LICENSE UPON PAYMENT OF  
4 APPROPRIATE LICENSE FEES AS RESPONDENTS ACTION IS  
5 UNCONSTITUTIONAL AS A HARSH, ARBITRARY, CAPRICIOUS AND  
6 UNREASONABLE DENIAL OF PETITIONER'S LICENSE WITHOUT DUE PROCESS  
7 OF LAW AND ARBITRARY, CAPRICIOUS, UNREASONABLE AND UNNECESSARY  
8 IMPOSITION OF A REGULATORY PENALTY FOR FAILURE TO PAY A MERE  
9 SIXTY DOLLAR LICENSING FEE IN A TIMELY MANNER WHERE PETITIONER  
10 WAS NOT PROVIDED TIMELY AND ADEQUATE NOTICE OF HIS OBLIGATION.

11 *A. As Petitioner meets the initial legal standards for*  
12 *issuance of mandamus to compel issuance of a license, the Court*  
13 *should grant Gordon's Petition.*

14 Initially, the Writ of Mandamus lies when two conditions  
15 are met. First, generally, before mandamus will issue to a  
16 public officer, board or municipality, the Petitioner must have  
17 first demanded the act sought compelled. Liebman v. Brunell, 212  
18 Mont. 459, 460, 689 P.2d 248, \_\_\_\_ (Mont. 1984).

19 Here, after Respondents' February 1994 telephone  
20 notification that Petitioner no longer had a license, Gordon  
21 took action for restoration of his licenses. On March 17, 1994,  
22 Gordon called the Respondents' representatives seeking  
23 reinstatement. On March 24, 1994, Gordon drove to Helena and met  
24 with Respondents' representatives seeking proper reinstatement  
25 of his licenses.

In a letter dated May 9, 1994, Respondents denied Gordon's

1 requests. Respondents notified Gordon his only available action  
2 was to successfully re-take the Master Electrician License  
3 Examination as a condition to restoration of his licenses. To  
4 this end, Respondent tentatively scheduled Gordon for the next  
5 Master Electrician License Examination.

6 In addition, responding to Gordon's legitimate concerns  
7 regarding the required re-taking of a Master Electrician License  
8 Examination for failure to pay the license fee in a timely  
9 manner, Respondents invited Gordon to meet with them at the  
10 Board's next scheduled meeting on July 14 or 15, 1994. Gordon  
11 accepted the invitation and attended with his attorney.

12 Prior to meeting with the Board at the July meeting, Gordon  
13 tendered \$70.00 for a Temporary Master Electrician License  
14 pending efforts to resolve the case. Under M.A.P.A.'s contested  
15 case provisions, the Board should have maintained Gordon's  
16 license through such proceedings. As such, Gordon properly  
17 tendered the license fees.

18 Gordon met with the Board on July 14, 1994. There, the  
19 Board returned his check.

20 At the meeting, Gordon described the injury he suffered  
21 approximately \$50,000.00 in lost contracts to date and  
22 potentially a lifetime of relationships with construction  
23 contractor's who utilized his services valued at approximately  
24 \$500,000.00. Gordon's attorney presented the legal ramifications  
25 of the Board's actions. Gordon's attorney notified Respondents  
they were statutorily obligated to provide Gordon the benefit of

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1 M.A.P.A.'s contested case provisions.

2 In addition, Gordon and his attorney requested the Board  
3 reconsider and provide Gordon his licenses as the licensing  
4 renewal statute, as implemented, created an unconstitutional  
5 arbitrary, unreasonable, unnecessary deprivation of Gordon's  
6 constitutionally protected rights. At first, the Board  
7 maintained its rejection of Gordon's position.

8 During discussions, Gordon's position was supported by the  
9 fact that Respondents had not mailed Gordon notice of his  
10 license fee obligation as had been Respondents practice for the  
11 past 27 years. Respondents had no evidence that they had  
12 provided this notice.

13 Respondents counsel admitted the M.A.P.A.'s contested case  
14 provisions likely applied to the matter. However, she stated it  
15 did not matter as the end result must be the same. After further  
16 plea by Gordon, the Board eventually agreed to reconsider its  
17 position.

18 Despite this agreement, in a letter dated July 26, 1994,  
19 from Respondents' counsel, Respondents reiterated their denial  
20 of Gordon's plea. According to Respondents, as Mont. Code Ann.  
21 §37-68-310 specifically provided

22 "[from Respondents letter] . . . all licenses for  
23 renewal must be made prior to August 15 of the year in  
24 which the prior license expired otherwise the license  
25 is forfeited and the applicant is required to pass the  
examination and pay the fees required of applicants  
for original license."

Respondents stated that applying this statute, Respondents  
could not restore Gordon his license until after he successfully

1 re-took the examination.

2 This denial included denial to Gordon of his rights under  
3 M.A.P.A.'s contested case provisions. The denial was made  
4 despite Respondents admission of Gordon's entitlement to those  
5 proceedings.

6 Applying Liebman, Gordon made a proper demand for  
7 Respondents performance of their obligation. This fact supports  
8 the Court granting Gordon's Petition.

9 Under Montana precedent, the Petitioner must surmount a  
10 second technical legal hurdle. For mandamus to lie to compel  
11 issuance of license, the Petitioner must show a clear legal  
12 right to the license. State ex. rel. Sharp v. Cross, 123 Mont.  
13 261,263, 211 P.2d 760, \_\_\_\_ (Mont. 1949). To do so, Petitioner  
14 must show compliance with all statutory terms and conditions for  
15 issuance of a license. Id.

16 Montana's case precedent limits this condition. While  
17 mandamus is available only to compel performance of a clear  
18 legal right not involving discretion, if an abuse exists which  
19 amounts to no exercise of discretion at all, mandamus lies to  
20 compel the proper exercise of the powers granted. Barnes v. Town  
21 of Belgrade, 164 Mont. 467,470, 524 P.2d 1112, \_\_\_\_ (Mont. 1964)  
22 citing Paradise Rainbow v. Fish & Game Comm'n, 148 Mont. 412,  
23 417, 421 P.2d 717,720 (Mont. 1966). An administrative board's  
24 arbitrary or capricious action constitutes such an abuse of  
25 discretion. Id. citing State ex. re. Sanders V. Hill, 141 Mont.  
558, 381 P.2d 475 (Mont. 19\_\_\_\_).

1 Further, where the public interest is involved, the Court  
2 must grant relief if it is evident Petitioner is entitled to  
3 such relief upon any theory. State ex rel. Morgan v. Retirement  
4 System, 136 Mont. 470, 483, 348 P.2d 991, \_\_\_\_ (Mont. 1960). In  
5 Morgan, where an administrative board did not provide a hearing  
6 as contemplated by statute, the Petitioner in mandamus was  
7 entitled to: 1) have the board's decision set-aside; and 2) have  
8 the case remanded to the agency for appropriate remedy and  
9 hearing as statutorily provided. Id. at 484, 485, 348 P.2d at  
10 \_\_\_\_.

11 Montana's precedent on the issuance of mandamus has two  
12 affects in this case, one of which impacts whether Gordon  
13 complied with all statutory terms and conditions for issuance of  
14 a license.

15 First, as discussed above, the Board's action denying  
16 Gordon his statutory right to M.A.P.A.'s contested case  
17 provisions and due process of law constituted an arbitrary,  
18 capricious, and unreasonable act by Respondents. As such,  
19 alternatively, should the Court deny Gordon's Petition in part -  
20 refusing Gordon's Petition for the Writ to Compel Respondents to  
21 restore his licenses based upon Respondents action as arbitrary,  
22 capricious, harsh, unreasonable and unnecessary and thereby an  
23 unconstitutional deprivation of his property rights - the Court  
24 should still exercise its authority and remand the case back to  
25 Respondents for contested case proceedings. In so doing, the  
Court should order Respondents to provide Gordon his licenses

1 during those proceedings in accordance with M.A.P.A.'s contest  
2 case provisions and award Gordon damages in this proceeding.

3 Second, the Board's lack of exercise of discretion in this  
4 matter constitutes an abuse of discretion. In applying the  
5 standard of whether Gordon met the licensing requirements for  
6 Master Electrician, the Court should only look to whether Gordon  
7 is qualified as having the required experience required and  
8 successfully taken the Master Electrician Licensing Examination.  
9 To do otherwise would compel Gordon to have completed precisely  
10 the act which is at issue as an unconstitutional requirement in  
11 this case - the required successful retaking of the Master  
12 Electrician Licensing Examination as a regulatory penalty.

13 Gordon successfully passed Montana's Master Electrician  
14 Licensing Examination in 1967. As such Gordon met the  
15 Respondents license examination requirement.

16 In addition, for the past 42 years Gordon practiced his  
17 profession as a Master Electrician. During Gordon's 42 years as  
18 a Master Electrician, there is no record of any negative  
19 citation concerning his services. As Respondents tentatively  
20 scheduled Gordon to re-take the licensing examination, Gordon  
21 unquestionably meets Respondents experience requirements.

22 For the past 27 years, since inception of the Board, Gordon  
23 paid his license fees in a timely manner after Respondent  
24 provided notice he owed the license fee. In this case, Gordon  
25 again attempted to and eventually did tender his license fees in  
a timely manner after notification of his obligation. As such

1 Gordon meets Respondents fee payment requirments.

2 Gordon meets Respondents experience, license examination  
3 and fee requirements for issuance of his Master Electrician and  
4 Electrical Contractor licenses. Applying Sharp, Gordon meets the  
5 initial legal standard required for the Court to grant Gordon's  
6 Petition for Writ of Mandamus to compel issuance of his  
7 licenses.

8 *B. The Court should grant Gordon's Petition for Writ of*  
9 *Mandamus to compel issuance of his licenses as Gordon has a*  
10 *clear legal right to the licenses where Respondents' actions are*  
11 *unconstitutional as a harsh, arbitrary, capricious, and*  
12 *unreasonably denial of Gordon's licenses without due process of*  
13 *law and a arbitrary, capricious, unreasonable and unnecessary*  
14 *imposition of a regulatory penalty for failure to pay a mere*  
15 *sixty dollar licensing fee in a timely manner where Petitioner*  
16 *was not provided timely and adequate notice of his obligation,*  
17 *his rights, and the penalties.*

18 1. As Respondents' actions were unconstitutional as a  
19 harsh, arbitrary, capricious and unreasonable denial of  
20 Petitioner's licenses without due process of law, the Court  
21 should grant Gordon's Petition for Writ of Mandamus.

22 While attempting not to belabor Petitioner's due process  
23 argument, Petitioner must specifically address Respondents'  
24 action on constitutional grounds. Not only did Respondents'  
25 action constitute an abuse of discretion as an arbitrary,  
capricious and unreasonable denial of statutorily prescribed due



1 process, Respondents' actions were unconstitutional as an  
2 arbitrary, capricious and unreasonable denial of  
3 constitutionally required due process prior to the taking of  
4 property under the State's police powers.

5 It is the well established rule that every person has a  
6 right to operate a business, subject to applicable state laws,  
7 and the state may not deprive individual's this property right  
8 without due process of law. State ex. rel. Bennett v. Stow, 14  
9 Mont. 599,620, 399 P.2d 221,\_\_\_\_ (Mont. 1965); Porter v.  
10 Investor's Syndicate, 286 U.S. 461,469 (1932).

11 As such, Respondents' actions were unconstitutional as ar  
12 arbitrary, capricious and unreasonable denial of Petitioner's  
13 due process rights. Consequently, the court should grant  
14 Gordon's Petition for Writ of Mandamus.

15 Respondents argues this failure has no affect, as, applying  
16 Mont. Code Ann. §37-68-310, the Board had only one alternative.  
17 Since Gordon had not paid the appropriate license and other fees  
18 by August 15, 1993, Respondents claimed Mont. Code Ann. §37-6  
19 310 explicitly left them no alternative but to: 1) withdraw  
20 Gordon's licenses, declaring them forfeited; 2) require Gordon  
21 pay required fees; and 3) require Gordon statisfactorily meet  
22 the prescribed regulatory penalty by succesfully retaking the  
23 Master Electrician's License Examination.

24 This is Respondents' fundamental argument. As presented by  
25 Respondent, it purportedly rebuts Petitioners' legal position.  
As such, Respondents argument requires a detailed response.

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1           While Respondents' argument lacks merit, Petitioner  
2 acknowledges that research found one case where Montana's Court  
3 ruled that mandamus cannot lie to compel the performance of an  
4 act which would be useless, ineffectual, unavailing as a remedy  
5 or beyond the power of Respondents to perform. State v. Poland  
6 et. al., 61 Mont. 600,607, 203 P.2d 352,\_\_\_ (Mont. 1924).

7           The following demonstrates Poland does not apply to this  
8 case.

9           First, by Respondents' admission, Gordon's case likely  
10 comes under the provisions of M.A.P.A.'s contested case  
11 provisions and thereby constitutional due process requirements.  
12 The facts and law of the case bear out Gordon's position that  
13 the taking of his license is a matter falling under M.A.P.A.'s  
14 contested case provisions and constitutional due process  
15 requirements. As such, Respondents' position amounts to this.

16           We recognize this case involves mandatory due process under  
17 M.A.P.A., but we are refuse to provide you that mandatorily  
18 required due process because it would be a meaningless exercise.  
19 The statute says that upon this occurrence you forfeit your  
20 license. As that occurrence took place, we have no alternative  
21 but to take your license and require you to successfully retake  
22 the Master Electrician License Examination. Consequently,  
23 providing you your mandated due process rights under M.A.P.A.  
24 would be a meaningless waste of effort which can have no effect  
25 As such, to grant you your rights is useless, ineffectual,  
unavailing as a remedy, beyond Respondents' power. Applying

1        Poland, Montana Supreme Court precedent supports us.

2                Respondents' position is abhorrent to Montana's  
3        Constitution, the United States Constitution, and in violation  
4        of Montana's statutorily provided due process provisions.  
5        Respondents simply argues that a state agency, in the exercise  
6        of police powers, is entitled to take property without due  
7        process of law, if in the state policing authorities opinion.  
8        Respondents argument is supported neither by the United States  
9        Supreme Court and Montana Supreme Court or the facts of the  
10       case.

11               Contrary to Respondents' position, Respondents compliance  
12       with its obligations to afford Gordon his constitutionally and  
13       statutorily provided due process rights would have effected a  
14       useful, effective remedy which would have protected Gordon from  
15       Respondents' arbitrary, capricious, unreasonable, harsh, and  
16       unnecessary abuses of discretion. It was within Respondents'  
17       power to do this. If Respondent had, Gordon would have  
18       maintained his licenses through contested case proceedings  
19       through the last date for seeking judicial review of the  
20       agencies final order or a later date as set by the court. As  
21       Gordon would not have lost his licenses, Gordon would not have  
22       suffered the approximately \$50,000.00 in damages to date,  
23       approximately \$500,000.00 in future damages, lost good will,  
24       loss of customers and loss of reputation.

25               Finally, if Gordon were to be damaged by the State's  
      actions, the damage would only have occurred after Gordon was

1 afforded full opportunity to present his case at hearing, after  
2 discover, application of the rules of evidence, and making  
3 written legal arguments on all issues through final agency  
4 decision, opportunity of judicial appeal, and final decision by  
5 the courts.

6 Applying the facts to the legal principle of Poland,  
7 Respondents' argument lacks merit. Poland has no application in  
8 this case.

9 Respondents' discretion argument also lacks merit based  
10 upon Respondents past discretionary actions. Here, Respondents  
11 frequently liberally modified express statutorily provisions to  
12 accomplish their legislative purpose. Where Respondents' past  
13 practice was to act with discretion, Respondent cannot now claim  
14 express statutory provisions prevented their acting with  
15 discretion. This is especially true, where as here,  
16 Respondents', in their rule making authority, are to adopt and  
17 effect rules reasonably necessary to effectuate the purpose of  
18 statutes. Board of Barbers, etc. v. Big Sky College, etc, 626  
19 Mont. 1269 (Mont. 1981).

20 Respondent's, specifically Respondent Electrical Board,  
21 was, by legislative act, formed, among other reasons, to assure  
22 that person(s) making electrical installations are qualified.  
23 Mont. Code Ann. §§37-68-101(3) and (4) (1993). To this end, the  
24 legislature granted the Board the following authority:

- 25 (4) The Board may:  
(a) adopt rules for administration of this  
chapter, for the licensing of electrical  
contractors, and for the examination and

1           licensing of master and journeymen  
2           electricians;

                 \* \* \* \* \*

3           (c) cause the prosecution and enjoinder of  
4           persons violating this chapter.

5           Mont. Code Ann. §37-68-201(4) (1993).

6           Acting under the statutory grant of authority, Respondent  
7           exercised their discretion in rule making authority establishing  
8           administrative rules which modified explicit statutory  
9           provisions regarding licensing of Master Electricians.

10          First, Respondents modified the standards of practical  
11          experience required to qualify for licensing as a Master  
12          Electrician. Montana's legislature expressly stated the  
13          qualifications to qualify for licensing as a Master Electrician  
14          are:

15               (1) An applicant for a master electrician's license  
16               shall furnish written evidence that he is a graduate  
17               electrical engineer of an accredited college or  
18               university and has 1 year of practical experience or  
19               that he is a graduate of an electrical trade school  
20               and has at least 4 years of practical experience in  
21               electrical work or that he has had at least 5 years  
22               practical experience in planning, layout, or  
23               supervising the installation and repair of wiring,  
24               apparatus, or equipment for electrical light, heat,  
25               and power.

          Mont. Code Ann. §37-68-304(1) (1993) [Emphasis added].

          Respondents effectively set aside the legislatively  
prescribed experience qualification requirements for Master  
Electrician's. Respondents did so by reserving for themselves  
the determination of what constitutes satisfactory experience to  
qualify for licensing as a Master Electrician. Mont. Admin. R.  
§§8.18.402(1) and (2) (1994).

1 According to Respondents, "(1) The practical experience  
2 requirement set forth in sections 37-68-304, 305, MCA *shall be*  
3 *of such nature as is satisfactory to the board.*" Mont. Admin. R.  
4 §8.18.402(1) (1994) [Emphasis added]. Respondent Board  
5 specifically reserved the determination of proper experience  
6 qualifications to its sole discretion, on a case by case basis  
7 stating "(2) All applications shall be approved or disapproved  
8 on a case by case basis *as the board may deem proper.*" Mont.  
9 Admin. R. §8.18.402(2) (1994) [Emphasis added].

10 From this language, Respondents took two actions.  
11 Respondents effectively set aside the express statutory standard  
12 experience qualification requirements, replacing the  
13 legislature's express experience standard with the undefined  
14 standard of Respondents discretion. Second, Respondents declared  
15 themselves the sole authority of what experience met the  
16 requirements for licensing as a Master Electrician. Clearly,  
17 Respondents substantially and materially altered the  
18 legislatively expressed Master Electrician experience  
19 requirements.

20 In another example, in a letter dated June 23, 1994, the  
21 Board notified Gordon he was not eligible for issuance of a  
22 Temporary Master Electrician License pending proceeding to  
23 resolve this case. The Board cited as authority Respondents  
24 administrative rule, Mont. Admin. R. 8.18.404 under which  
25 Respondent Board determined it would not issue temporary master  
electrician licenses. Yet, Mont. Code Ann. §37-68-306

1 specifically authorizes issuance of temporary master electrician  
2 licenses pending examination.

3 As such, again, despite the evident legislative intent and  
4 grant of authority, Respondents exercised their discretion and  
5 determined no temporary master electrician licenses would issue.  
6 This action is especially egregious where as here, Respondent  
7 has no doubt Gordon is qualified to work in his profession as  
8 Master Electrician. Respondents' decision adheres to form over  
9 substance in a manner which unnecessarily and unreasonably  
10 injures Gordon. Finally, Respondents' action was beyond the  
11 scope of their authority as Gordon was entitled to maintain his  
12 licenses under M.A.P.A.'s contested case proceedings.

13 Another example of Respondents' past willingness to  
14 exercise its authority modifying express statutory provisions  
15 as follows. Under Mont. Code Ann. §37-68-301 (1993), all that  
16 required for a person to work as a Master Electrician is that  
17 the person have a Master Electrician license. The Board, in its  
18 discretion, modified this statutory provision. The Board  
19 requires in addition, that the licensed individual have the  
20 Master Electrician's license on his or her person at all times  
21 when employed in the profession. Mont. Admin. R. 8.18.403  
22 (1993).

23 Finally, Gordon requests the Court take judicial notice of  
24 Mont. Admin. R. 8.18.403(3). Here, Respondent Board established  
25 restrictive conditions upon which Master Electricians could work  
in their profession. Respondents restrained Master Electricians

1 in the practice of their profession by administrative rule that  
2 Master Electricians may only contract with one contractor at a  
3 time and must be engaged with that contractor on a full time  
4 capacity. As such, the Respondents exercised their rule making  
5 authority not only modifying and contravening express  
6 legislative intent and express statutory authority, but also  
7 affecting constitutional issues such as the right to contract  
8 and restraints upon commerce.

9 From the above, it is clear the Respondents historically  
10 acted with great discretion in the exercise of their regulatory  
11 rule making authority. While Petitioner does not wish to  
12 litigate the constitutionality of Respondents discretionary  
13 actions noted above, Respondent argues that given Respondents'  
14 past liberal exercise of discretionary authority, the Court  
15 should not permit Respondent to hide behind an argument it  
16 lacked discretionary authority.

17 As noted in Board of Barbers, etc. v. Big Sky College, etc.,  
18 Montana Supreme Court precedent requires regulatory bodies such  
19 as Respondents to exercise their rulemaking authority as  
20 reasonably necessary to effectuate the statute. Applied to this  
21 case, Respondents should have provided the constitutionally  
22 required due process as set forth in statute and administrative  
23 rule which was necessary to effect Mont. Code Ann. §37-68-310  
24 constitutionally. As Petitioner will demonstrate later, this  
25 failure rendered the statute at issue unconstitutional.

As Respondents did not, Respondents' actions are



1 unconstitutional as a harsh, arbitrary, capricious, and  
2 unreasonably denial of Gordon's licenses without due process of  
3 law. Applying Barnes v. Town of Belgrade, Respondents failure  
4 exercise discretion in this case is an abuse of discretion  
5 sufficient to support issuance of the Writ of Mandamus to compel  
6 Respondents restoration of Gordon's licenses. Consequently, the  
7 Court should grant Gordon's Petition for Writ of Mandamus.

8 2. As Respondents' actions were unconstitutional as  
9 arbitrary, capricious, unreasonable and unnecessary imposition  
10 of a regulatory penalty for failure to pay a mere sixty dollar  
11 licensing fee in a timely manner where Petitioner was not  
12 provided timely and adequate notice of his obligation, his  
13 rights, and the penalties, the Court should grant Gordon's  
14 Petition for Writ of Mandamus.

15 Petitioner acknowledges that the police power, which is  
16 inherent in the state, permits the reasonable regulation of a  
17 business or profession when such regulation appears necessary  
18 for the general welfare of the people. State v. Abstracters  
19 Board of Examiners, 99 Mont. 564, 578, 45 P.2d 668, \_\_\_\_ (Mont.  
20 1935). Petitioner further acknowledges that his profession is  
21 such a one impacting the general health and welfare of the  
22 people.

23 As a profession properly regulated within the states police  
24 powers, it is also true that the state may require such  
25 qualifications which, in its judgement assures against  
ignorance, incapacity, deception or fraud. State ex. rel.

1 Marshall v. District Court, 50 Mont. 289,296, 146 P. 743,\_\_\_\_  
2 (Mont. 1915). In this regard, the State may impose examinations  
3 to assure qualification. Id.

4 However, it is similarly well-settled that the state may  
5 not unduly interfere with private businesses, or impose  
6 unreasonable or unnecessary restrictions upon them. Freeman v.  
7 Board of Adjustment, et. al., 97 Mont. 342,355, 34 P.2d 534,\_\_\_\_  
8 (Mont. 1934); Brackman v. Kruse, 122 Mont. 91,109, 199 P.2d  
9 971,\_\_\_\_ (Mont. 1948).

10 Further, the Constitution requires that such regulations  
11 have a real and substantial relationship to the object sought to  
12 be obtained. Freeman v. Board of Adjustment, et. al. at 579, 34  
13 P.2d at \_\_\_\_\_. In addition, any exercise of such power may only  
14 extend as reasonably necessary to preserve the public welfare.  
15 State ex. rel. Bennett v. Stow at 620, 399 P.2d at \_\_\_\_\_. The  
16 general rule is that all police regulations must be reasonable  
17 under all circumstances. Id. at 621, 399 P.2d at \_\_\_\_\_.

18 Where issues such as Gordon's are raised, the Courts look  
19 behind the regulation to determine if the police regulation is  
20 actually for the public health or good or merely oppressive.  
21 Brackman v. Kruse at 106, 199 P.2d at \_\_\_\_\_. It is this review  
22 Gordon's Petition seeks.

23 Prior to the effective date of the 1993 amendment, Mont.  
24 Code Ann. §37-68-310 read the same as the current version with  
25 one exception. Prior to the 1993 amendment, the provision  
renewal period was every year for Master Electrician licenses.

1 After the 1993 amendment, the renewal period for Master  
2 Electrician licenses was every three years. The yearly fee of  
3 Twenty Dollars (\$20.00) remained the same, only now three years  
4 licensing fees are collected the first year.

5 Significantly, neither the licensing fee nor the prescribe  
6 additional fee for failure to make payment are prescribed by  
7 statute. Instead, these fees are set forth in Mont. Admin. R.  
8 §8.18.407. Consequently, without notice of the licensing fee and  
9 the date it is due, Master Electrician's such as Gordon cannot  
10 make payment by the July 15th deadline. This is especially true  
11 in this transition year. Similarly, without notice of the  
12 prescribed additional fee, Master Electrician's such as Gordon  
13 cannot make the appropriate payment of fees by the August 15th  
14 date. As such, without the notice of obligations from  
15 Respondents which Mont. Code Ann. §37-68-310 necessarily infer  
16 from its terms, Master Electricians cannot comply with the  
17 statute to preserve their licenses.

18 Consequently, Mont. Code Ann. §37-68-310, as implemented by  
19 Respondents, without a real and substantial relationship to the  
20 penalty and Respondents objectives, imposes unreasonable and  
21 unnecessary restrictions upon Master Electricians which unduly  
22 interferes with, by indefinitely withdrawal of license, their  
23 practice of their profession and private business. Applying  
24 Freeman v. Board of Adjustment, et. al., Brackman v. Kruse, and  
25 State ex. rel Bennett v. Stow, the Court should grant Gordon's  
Petition for Writ of Mandamus.

EXHIBIT 1  
DATE 1-19-95  
HB 243

1 Further, notwithstanding Respondents' failure, Mont. Code  
2 Ann. §37-68-310 is unconstitutional as written. To require any  
3 Master Electrician, let alone a Master Electrician such as  
4 Gordon with Forty-two years of unblemished, exemplary service,  
5 to successfully retake the Master Electrician Licensing  
6 Examination, as a regulatory condition precedent to restoration  
7 of his license, for the mere failure to pay, what is now a Sixty  
8 Dollar licensing fee is unconstitutional as imposing harsh,  
9 arbitrary, capricious, unreasonable, unnecessary restrictions  
10 upon the renewal of licenses of Master Electricians. The  
11 regulatory penalty has no rational, real and substantial  
12 relationship to the State's objectives of acting to promote the  
13 safety and health of the public by assuring that the persons  
14 making electrical installations are qualified. The statute goes  
15 beyond the reasonable exercise of police power to preserve the  
16 public welfare. Without demonstrated need of such harsh  
17 condition, it is unreasonable under all circumstances.

18 Administrative and statutory support Gordon's position.  
19 Mont. Admin. R. §2-4-631(3) and Mont. Code Ann. §2-4-631(3),  
20 which provides for the *emergency* immediate revocation,  
21 suspension, withdrawal or amendment of a licensee's license,  
22 requires notice by mail to the licensee of the facts and  
23 circumstances which warrants such immediate action pending  
24 further proceedings. Where the State is required to provide  
25 notice of facts and circumstances warranting such emergency  
action pending further action to protect the public's health and

1 safety, to impose this regulatory penalty upon Master  
2 Electrician's with no cause for disciplinary action, without  
3 even the benefit of the emergency revocation provisions, is  
4 manifestly harsh and oppressive.

5 This again raises the issue of notice and opportunity under  
6 the license renewal statute. As before, the issue is  
7 Respondents' failure to exercise discretion in providing  
8 statutorily required notice and opportunities and notice  
9 necessarily inferred in the statute such as notice of the  
10 license fee, date due, upon failure, notice of the prescribed  
11 additional fee and date due.

12 The statute states an inference. The legislature infers  
13 that at a certain time, upon failure to make sufficient and  
14 timely application, the licensee chose to forfeit his or her  
15 license. If the circumstances of notice and opportunity were  
16 reasonable so that the inference could reasonably be drawn, the  
17 license renewal statute would not be unconstitutional on its  
18 face.

19 As such, if Respondents had provided the sequence of  
20 notices and opportunities Petitioner described above,  
21 Respondents' actions would have went far to bring the license  
22 renewal statute within constitutional standards. To finally  
23 accomplish this, Respondents should have sent an additional  
24 notice where the affected individual would be notified that if  
25 the necessary action to maintain his or her license was not  
taken within a prescribed time, the licensee would be deemed to

1 have forfeited his or her license.

2 With these notices, which are not unreasonable given the  
3 significance of the license at issue, any future contested case  
4 hearing should then focus on the true issue. At the hearing, the  
5 licensee would be called upon to demonstrate to the Board  
6 actions and activities which would overcome inference that the  
7 licensee had intended to forfeit his or her license. This  
8 discretion lies within Respondents past exercise of discretion.  
9 If Respondent had done so, arguably the license renewal statute,  
10 *if implemented with appropriate discretion*, would not have been  
11 unconstitutional. However, Respondents did not. That leaves only  
12 the following conclusion.

13 Where, as here, under the license renewal statute,  
14 Respondent summarily indefinitely takes a licensees license,  
15 without notice of the licensees obligations and opportunity to  
16 maintain his or her license, imposing a regulatory penalty  
17 requiring the licensee to successfully retake the Master  
18 Electrician License Examination, without providing reason(s)  
19 justifying the regulatory penalty, the statute, and Respondents'  
20 action under statute, is unconstitutional as a harsh,  
21 unreasonable, unnecessary restriction upon the licensing of  
22 Master Electrician's and Master Electrician's practice of their  
23 private business which has no rational, reasonable and  
24 substantial relationship to the protection of the public safety  
25 and health. The statute, and Respondents' action under statute  
extends beyond the reasonable exercise of the State's police

1 power to regulate the licensing of profession in the public's  
2 interest.

3 Applying, Freeman v. Board of Adjustment, et. al., Brackman  
4 v. Kruse, and State ex. rel Bennett v. Stow, the statute, and  
5 Respondents action under statute, is unconstitutional.

6 Consequently, Gordon respectfully requests the Court grant his  
7 Petition for Writ of Mandamus. Further support is found in State  
8 ex. rel. Morgan v. Retirement System, 136 Mont. 470,483, 348

9 P.2d 991, (Mont., 1960), which provides that where the public  
10 interest is affected, the Court must grant relief if it is  
11 evident the Petitioner is entitled to relief on any theory.

12 Consequently, the Court should grant Gordon's Petition for Writ  
13 of Mandamus.

14 IV. UPON GRANTING PETITIONER'S PETITION FOR WRIT OF MANDAMUS,  
15 THE COURT SHOULD GRANT PETITIONER'S REQUESTS FOR COSTS AND  
16 ATTORNEY'S FEES IN THIS MATTER.

17 If the Court grants Gordon's Petition for Writ of Mandate,  
18 under Mont. Code Ann. §27-26-402, Gordon is also entitled to  
19 recover damages and costs of the action. Kadillak v. Mont.  
20 Dept. of State Lands, 198 Mont. 70,74, 643 P.2d 1178, (Mont.  
21 1982). Reasonable attorney's fees are included within the  
22 meaning of Mont. Code Ann. §27-26-402. Id.

23 Applying Kadillak, if the Court grants Gordon's Petition  
24 in addition to the relief sought, Gordon is entitled to recover  
25 damages including reasonable attorney's fees and costs incurred.  
While Gordon, although suffering great damage by Respondents'

1 actions, does not request damages for actual losses, Gordon does  
2 seek damages for legal fees and costs incurred in this action.  
3 Consequently, Gordon respectfully requests the Court grant him  
4 such relief.

5 **CONCLUSION**

6 Montana's Third Judicial District Court, Deer Lodge County,  
7 has jurisdiction and venue over the above-captioned matter.

8 Respondent's unlawfully exceeded their authority depriving  
9 Gordon of his Master Electrician License and Electrical  
10 Contractor License by not providing Gordon required due process  
11 of law in violation of Montana Administrative Procedure Act and  
12 the Attorney General's Model Rules adopted by Respondents.

13 In this same action, Respondents violated Petitioner's due  
14 process rights by unlawfully exceeding their authority depriving  
15 Petitioner of his licenses pending and during contest case  
16 proceedings in violation of the Montana Administrative Procedure  
17 Act and the Attorney General's Model Rules adopted by  
18 Respondents.

19 As such, the District Court should order the Respondents to  
20 meet their non-discretionary duty and provide Petitioner his  
21 Master Electrician and Electrical Contractor licenses, upon  
22 payment of the license fees at issue pending and during  
23 proceedings before this Court.

24 Respondent's action, and the statutory provision under  
25 which Respondents' action was taken, is unconstitutional as a  
harsh, arbitrary, capricious, unreasonable and unnecessary

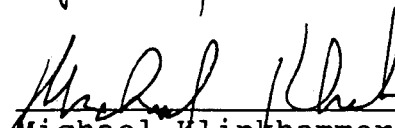


1 denial of Petitioner's licenses without due process of law.

2 Respondents's action, and the statutory provision under  
3 which Respondents' acted, is unconstitutional as an arbitrary,  
4 capricious, unreasonably and unnecessary imposition of a  
5 regulatory penalty for the mere failure to pay a Sixty Dollar  
6 licensing fee in a timely manner. Respondents' action, and the  
7 statutory provision under which Respondent acted bears no real  
8 and substantial relationship to the object of the licensing  
9 provisions - protecting the safety and health of the public by  
10 assuring that persons making electrical installations are  
11 qualified. Respondents action, and the statutory provision under  
12 which Respondent acted effects a regulatory penalty which  
13 unconstitutionally exceeds reasonable regulation for the general  
14 welfare. Further, as the regulatory penalty is effected with no  
15 cause for disciplinary action, it fails the constitutional  
16 requirement of reasonableness under all circumstances.

17 Applying Freeman v. Board of Adjustment, et. al., Brackman  
18 v. Kruse, and State ex. rel Bennett v. Stow Respondents'  
19 action, and the statutory provision under which Respondent acted  
20 is unconstitutional. Consequently, the Court should grant  
21 Petitioner's Petition for Writ of Mandamus including costs and  
22 reasonable attorneys fees as damages.

23 DATED this 29th day of September, 1994

24   
25 Michael Klinkhammer  
Attorney for Petitioner

TESTIMONY  
HOUSE BILL NO. 243

MY NAME IS CHARLES SWEET AND I AM THE CHAIRMAN OF THE STATE ELECTRICAL BOARD. THE BOARD WAS FIRST INFORMED ABOUT A BILL DRAFT REQUEST FROM REP. MENAHAN BY OUR LEGAL COUNSEL, CAROL GRELL. BART CAMPBELL, LEGISLATIVE COUNSEL, CONTACTED MS. GRELL ABOUT THE REQUEST. MS. GRELL DRAFTED LANGUAGE THAT WAS APPROVED AND SUPPORTED BY THE BOARD. THE BILL INTRODUCED DIFFERS FROM THE DRAFT APPROVED AND SUPPORTED BY THE BOARD IN THE FOLLOWING WAYS:

1. THE DRAFT APPROVED AND SUPPORTED BY THE BOARD CONTAINED THE SENTENCE "IT IS UNLAWFUL FOR A PERSON WHO REFUSES OR FAILS TO PAY THE RENEWAL FEE TO PRACTICE ELECTRICAL WORK IN THIS STATE." THIS SENTENCE IS A VERY IMPORTANT ADDITION TO THE LANGUAGE THAT CLARIFIES THAT A PERSON CANNOT WORK WITH A LAPSED LICENSE. THIS GIVES INCENTIVE TO THE PERSON TO RENEW HIS LAPSED LICENSE IMMEDIATELY UPON FINDING IT LAPSED INSTEAD OF HOLDING THE LAPSED LICENSE FOR THE ENTIRE YEAR, THEN PAYING THE FEES TO REINSTATE IT. THIS IS NECESSARY SO THAT THE BOARD ADMINISTRATOR CAN CORRECTLY ESTIMATE BUDGET REVENUE AND SO THE BOARD CAN COUNT ON FEES TO BE COLLECTED IN THE FISCAL YEAR NEEDED.
2. THE BOARD WAS AWARE OF THE REQUEST BY REP. MENAHAN TO CREATE A GRANDFATHER CLAUSE AND DOES NOT SUPPORT THIS IDEA BECAUSE OF THE FISCAL IMPACT AND ADMINISTRATIVE NIGHTMARE IT WOULD CAUSE THE BOARD. THE LANGUAGE IN THE CURRENT DRAFT DOES NOT INDICATE WHAT THE BOARD'S RESPONSIBILITY WOULD BE TO THE ALMOST 500 PEOPLE THAT WOULD BE AFFECTED BY THIS NEW SECTION OF LAW. THE OTHER CONSIDERATION THAT THE BOARD HAS MADE IN OPPOSING THIS PART OF THE BILL IS THAT MANY LICENSEES HAVE FOLLOWED THE PRESENT STATUTE AND HAVE ALREADY RE-APPLIED AND RE-EXAMINED, PAYING THE ADDITIONAL FEES THIS REQUIRES, TO RE-OBTAIN THEIR LICENSE. THE BOARD FEELS THAT SINCE THESE PEOPLE HAVE FOLLOWED THE REMEDY PROVIDED BY STATUTE, THE REST OF THE LICENSEES NOT RENEWING DURING THE SAME RENEWAL PERIOD SHOULD HAVE TO FOLLOW THAT SAME REMEDY. LASTLY, THE GRANDFATHER CLAUSE DOES NOT CLARIFY EXACTLY WHAT FEES A LICENSEE WOULD HAVE TO PAY IF THEY WERE WITHIN THE THREE YEAR PERIOD.

IN CONCLUSION, THE STATE ELECTRICAL BOARD SUPPORTS THE IDEA OF A ONE YEAR LAPSED LICENSE STATUS FOR LICENSEES. THE BOARD DOES, HOWEVER, WISH TO SEE THE BILL AMENDED TO INCLUDE LANGUAGE STATING THAT IT IS UNLAWFUL FOR A LICENSEE TO WORK WITH A LAPSED LICENSE AND AMENDED TO ELIMINATE THE GRANDFATHER CLAUSE.

THE LICENSING TECHNICIAN AND THE LEGAL COUNSEL FOR THE STATE ELECTRICAL BOARD ARE PRESENT TO ANSWER ANY QUESTIONS THAT YOU MAY HAVE AND I ALSO WOULD BE HAPPY TO ANSWER ANY QUESTIONS.

EXHIBIT 3  
DATE 1-19-95  
HB 243

January 19, 1995

House Business & Labor Committee  
House Bill 243

AMENDMENTS OFFERED BY STATE ELECTRICAL BOARD

1. Page 1, line 21.

Following: ~~"for original licenses."~~

Insert: "It is unlawful for a person who refuses or fails to pay  
the renewal fee to practice electrical work in this state."

2. Page 1, line 26 through line 27.

Strike: section 2 in its entirety

EXHIBIT 4  
DATE 1-19-95  
HB 243

TESTIMONY  
HOUSE BILL NO. 243

MY NAME IS KAREN SCHREDER AND I AM THE LICENSING TECHNICIAN FOR THE STATE ELECTRICAL BOARD. I AM HERE NEITHER AS AN OPPONENT OF THE BILL OR A PROPONENT, BUT FOR INFORMATION PURPOSES ONLY.

THE STATE ELECTRICAL BOARD CURRENTLY MAINTAINS 2,365 ELECTRICAL LICENSES. DURING THE RENEWAL PERIOD ENDING JULY 15, 1994, 231 LICENSED ELECTRICIANS DID NOT RENEW THEIR LICENSE. DURING THE RENEWAL PERIOD ENDING JULY 15, 1993, 198 LICENSED ELECTRICIANS DID NOT RENEW THEIR LICENSE. DURING THE RENEWAL PERIOD ENDING JULY 15, 1992, 63 LICENSED ELECTRICIANS DID NOT RENEW THEIR LICENSE. THIS COMES TO A TOTAL OF 492 LICENSED ELECTRICIANS NOT RENEWING THEIR LICENSES IN THE PAST THREE RENEWAL PERIODS THAT WOULD BE AFFECTED BY THE GRANDFATHER CLAUSE IN THIS BILL. THIS NUMBER DOES NOT INCLUDE THE APPROXIMATELY 40 LICENSEES THAT DID NOT RENEW BUT DID COMPLETE THE STATUTORY REQUIREMENTS OF RE-APPLYING AND RE-TESTING TO RE-OBTAIN THEIR LICENSE IN THE PAST THREE YEARS.

THE BOARD AND THE BUREAU WOULD LIKE THIS COMMITTEE TO CLARIFY THE INTENT OF THE NEW SECTION 2, GRANDFATHER CLAUSE. IF IT IS DETERMINED THAT THE INTENT IS FOR THE BOARD TO CONTACT THESE PEOPLE WHO DID NOT RENEW THEIR LICENSES FOR THE PAST THREE YEARS AND LET THEM KNOW THERE IS NOW ANOTHER REMEDY TO OBTAIN THEIR FORFEITED LICENSE, THERE WILL BE A DEFINITE FISCAL IMPACT THAT THE BOARD CANNOT ABSORB UNDER THEIR CURRENT BUDGET.

I WOULD BE HAPPY TO ANSWER ANY FURTHER QUESTIONS.

EXHIBIT 5  
DATE 1-19-95  
HB 200

WC HOUSEKEEPING BILL  
SECTION SYNOPSIS

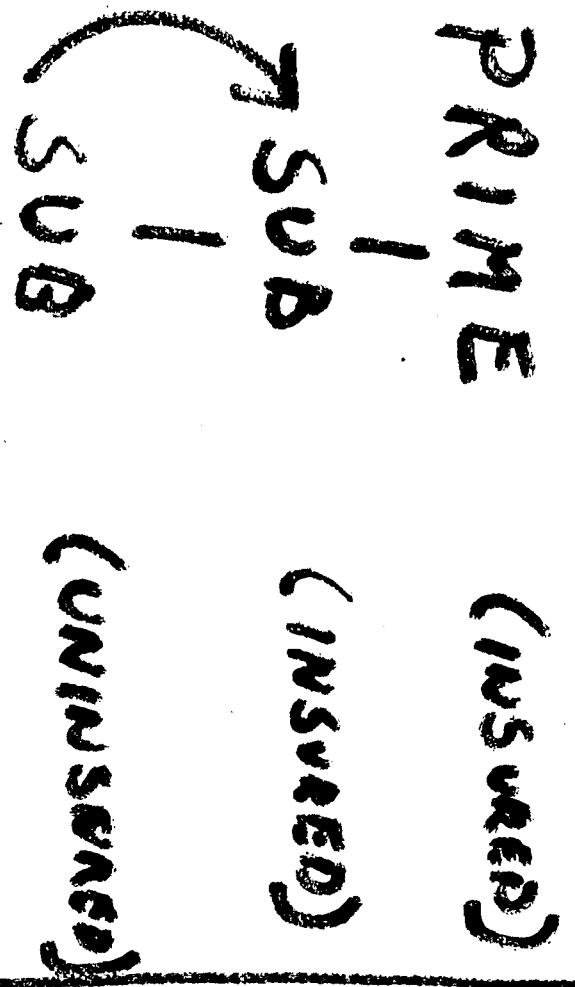
- Section 1: Definitions
- Section 2: Revises the definition of "employer" to include limited liability companies, a new business entity authorized by the 1993 Legislature.
- Section 3: Adds persons who are managers in manager-managed limited liability companies and corporate officers of quasi-public and private corporations as employers who may elect to include themselves as employees within the provisions of the Workers' Compensation Act.
- Section 4: Excludes medical providers who have an ownership interests in managed care organizations from the prohibition of referring injured workers for treatment or diagnosis at a facility wholly or partly owned by the medical provider.
- Section 5: Permits workers' compensation contested case hearings to be conducted by telephone or videoconference.
- Section 6: Exempts working members of member-managed limited liability companies, managers in manager-managed limited liability companies, and officers in quasi-public and private corporations from the provisions of the Workers' Compensation Act.
- Section 7: Imposes liability for injuries of workers employed by an uninsured subcontractor on the first insured contractor or subcontractor. There is an increasingly common situation of the creation of a chain or a "totem pole" where a principal contractor will contract with a subcontractor who also subcontracts with another subcontractor, etc. resulting in multiple subcontractors.
- Section 8: Definitions
- Section 9: Clarifies that a group certified under this section may add new members without the approval of the department.
- Section 10: Codifies the long standing practice of utilizing the board of investments to invest the money of the Uninsured Employer Fund. The proposed language will also clarify that the investment income from the fund must be deposited in the fund and cannot be utilized for other purposes.

- Section 11: Removes the \$50,000 limitation on employer liability under this section.
- Section 12: Authorizes the department to issue cease and desist orders to prime contractors who utilize uninsured subcontractors.
- Section 13: Authorizes district court judges to request the workers' compensation court judge to determine the amount of recoverable damages due an employee.
- Section 14: Removes the reference to "wage supplement" since those benefits were eliminated during the last legislature.
- Section 15: Adjusts cited reference numbers/letters to align them with changes made in Section 39-71-116.
- Section 16: Adjusts cited reference numbers/letters to align them with changes made in Section 39-71-116.
- Section 17: Removes the reference to "wage supplement" since those benefits were eliminated during the last legislature.
- Section 18: Codifies the long standing practice of utilizing the board of investments to invest the money of the Subsequent Injury Fund. The proposed language will also clarify that the investment income from the fund must be deposited in the fund and cannot be utilized for other purposes.
- Section 19: Excludes treating physicians who have ownership interests in managed care organizations from the prohibition of referring injured workers for treatment or diagnosis at a facility wholly or partly owned by the treating physician.
- Section 20: Includes limited liability companies with other types of business entities referenced in this section.
- Section 21: Shortens, from 45 days to 20 days, the time allowed for a party to respond to the recommendation made by a Workers' Compensation Mediator.
- Section 22: Authorizes district court judges to request the workers' compensation court judge to determine the amount of recoverable damages due an employee.
- Section 23: Language made gender neutral; clarifies selection of the Occupational Disease Panel Chair.

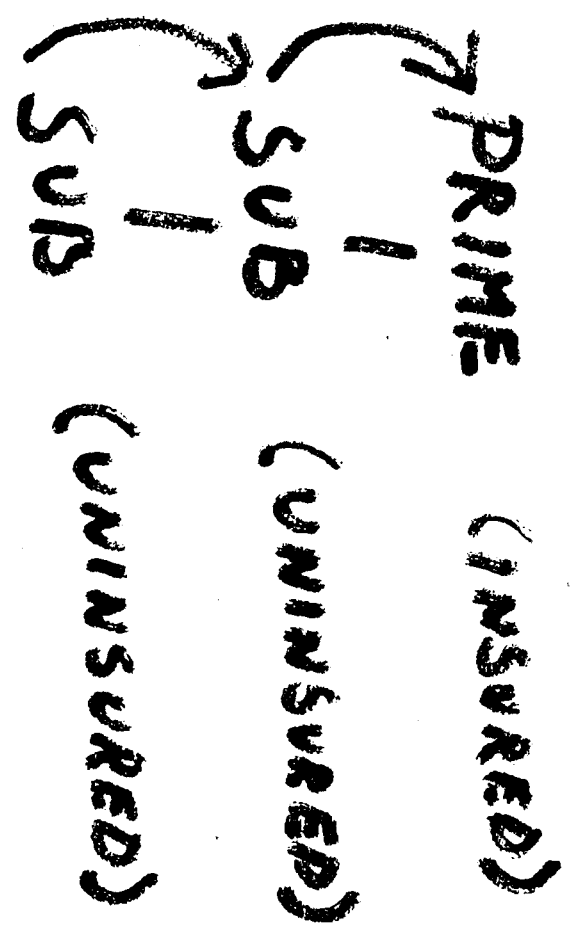
EXHIBIT 5  
DATE 1-19-95  
HB 200

- Section 24: Language made gender neutral; clarifies examination and reporting process of physicians on Occupational Disease Panel to reflect fluid makeup of the Panel.
- Section 25: Permits workers' compensation contested case hearings to be conducted by telephone or videoconference.
- Section 26: Saving clause
- Section 27: Severability
- Section 28: Applicability
- Section 29: Effective dates

A



B





HOUSE OF REPRESENTATIVES  
VISITORS REGISTER

BUSINESS & LABOR SUB-COMMITTEE DATE 1-19-95  
BILL NO. 243 SPONSOR(S) REP MENAHE

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[illegible]

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HR:1993

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CS-14

HOUSE OF REPRESENTATIVES  
VISITORS REGISTER

Business & Labor

SUB-COMMITTEE

DATE 1/19/95

BILL NO. H.R. 200

SPONSOR(S) \_\_\_\_\_

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| NAME AND ADDRESS | REPRESENTING          | Support | Oppose |
|------------------|-----------------------|---------|--------|
| George Wood      | MT Self Interest Club | ✓       |        |
| Carl Schweitzer  | MT Govt Ass'n         | ✓       |        |
| Maguline Denmark | Am. Ins. Assoc.       | ✓       |        |
| CHUCK HUNTER     | D.O.L.I               | ✓       |        |
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PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

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HOUSE OF REPRESENTATIVES  
VISITORS REGISTER

Business & Labor SUB-COMMITTEE DATE 1-19-95  
BILL NO. HB 211 SPONSOR(S) ~~LEE~~ ~~SMITH~~ LIZ SMITH

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

| NAME AND ADDRESS   | REPRESENTING       | Support            | Oppose |
|--------------------|--------------------|--------------------|--------|
| Pete Joseph        | MFT                | X                  |        |
| George Wood        | MT Self Trans Care |                    | ✓      |
| Melissa Case       | HERE               | X                  |        |
| Chris Beckett      | NABLA              |                    |        |
| Michael Klunkhauer | Public Center      |                    |        |
| Don Allen          | CEWEST             | ✓<br>Circuit Court |        |
| SCOTT ST. ARNAULD. | AFSCME             | X                  |        |
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