MONTANA ADMINISTRATIVE REGISTER

1978 ISSUE NO. 16

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 16

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NOTICE SECTION

BEFORE THE DEPARTMENT OF ADMINISTRATION
BUILDING CODES DIVISION
OF THE STATE OF MONTANA

In the matter of the adoption of a rule concerning standards governing the certification of municipal and county building code programs.	NOTICE OF PUBLIC HEARING FOR ADOPTION OF A RULE Standards governing the certification of municipal and county building code programs.

To: All Interested Persons:

1. On Thursday, December 21, 1978, at 9:30 a.m., a public hearing will be held in the Auditorium of Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana, to consider the adoption of a rule concerning standards governing the certification of municipal and county building code programs.

2. The proposed rule does not replace or modify any section currently found in the Administrative Rules of Montana.

3. The proposed rule reads as follows:

STANDARDS GOVERNING THE CERTIFICATION OF MUNICIPAL AND COUNTY BUILDING CODE PROGRAMS (1) The following rules are the result of the requirements set forth in Section 3, 69, 2112, Chapter 504, Montana Session Laws 1977. This particular legislation requires local government to file the codes adopted and a plan for enforcement with the Division before entering into an enforcement program. The legislation further requires that the Division set forth rules and standards governing the certification of local building code enforcement programs.

(2) Since the legislation is an expansion of the existing law covering building codes, the Division will be applying the following requirements to all local government code programs even though they might now be in existence. This is the only way the intent of the legislation can be satisfied, that being statewide uniform code enforcement.

(3) Extent of Local Programs. (a) Municipalities. Municipalities, as covered in Sec. 69-2107, R.C.M. 1947, may adopt codes to cover all building within their jurisdictional area, which when approved by the Building Codes Division could include the area within 4½ miles for the municipal limits.

(b) Counties. Counties, as covered in Sec. 69-2107, R.C.M. 1947, may adopt codes to cover only "public places," meaning any place which a county, municipality or state maintains for the use of the public, or a place where the public has a right to go and be. "Public places" as thus construed to mean any building used for residential occupancy, duplex and above, or any commercial occupancy.

(4) Certification Requirements for Local Government Code Enforcement Programs. (a) Codes. The codes adopted by local government must be the same as those adopted by the Division. This is as required by Section 3, 69-2112, Chapter 504, Montana Session Laws 1977. Local government need only adopt those codes which they intend to enforce, that

is plumbing, electrical, building, mechanical, etc. The codes adopted by local government must also be of the same edition as those adopted by the Division. Each time the Division updates the codes, local government must also update their codes. The Division will notify local government of these code updates at which time the local government will have 90 days from receipt of the notice to update their codes.

(b) Coordination of Plan Reviews. Local governments must submit a written procedure explaining how plan reviews will be handled at the local level. That procedure shall include a time schedule for reviews, requirement that all affected departments will have an opportunity to review and approve plans before issuance of a permit, and shall include the designation of the official responsible for plan review coordination.

(c) Inspections. Local government must submit a procedure for building inspections. Included in this procedure must be a list of staffing, how coordination of inspections between department will be handled, how final inspections and occupancy certificates will be handled.

(d) Inspector Qualifications. The hiring of qualified inspectors is very difficult to say the least. However, due to the hazards to life safety involved with the work to be inspected, it is extremely important that some discretion be used in the selection of inspectors to perform the various functions. Therefore, local governments must submit to the State written job descriptions for each position involved in the code enforcement program. These job descriptions will be used by local government in qualifying and hiring employees.

(e) Minimum Staffing Requirements. Local government shall retain adequate staffing, as determined by them, to carry out the code enforcement program. The staffing plan for the local government program must be filed with the State.

(f) Extension of Municipalities Jurisdictional Area. Section 69-2105, R.C.M. 1947, provides that municipalities may extend their inspection jurisdiction up to 4½ miles from their corporate limits upon written request and upon approval by the Division.

The written request must include a list of adopted codes, list of staff and their qualifications, a statement as to how the additional work load will be handled, the written consent of the county government as to the municipality's right to inspect in the county area, and a budget breakdown.

If the county is already inspecting in the area which the municipality wishes to inspect, the request for the jurisdictional extension will be denied unless they intend not to continue their inspections within the area to be covered by the city.

(g) Funding of Code Enforcement Program. The establishment of permit fees shall be left to local government.

A list of permit fees must be submitted to the State. In addition, all fees for funding the code enforcement shall be accounted for separately and there shall be an audit route for expenditures charged against the account.

(h) Factory-Built Buildings. Once factory-built buildings are approved by the Division as meeting the codes, the units shall be subject only to to local government inspection and fees for zoning, utility connections and foundations.

As part of the submittal to the Division, provisions must be included stating how factory-built buildings will be handled and the charges for permits covering these types of units.

(i) School Plans. Section 11, 75-8206, Chapter 504, Montana Sessions Laws 1977, requires that all school buildings in the State must be approved by the Division. This does create a problem since local government may have a program that also covers the school buildings.

Since the Division is responsible for coordinating plan reviews at the State level, the plan review responsibility cannot be delegated to local government and thus the Division will be charging for a plan review covering school building plans. The inspection of this construction will be left to local government unless otherwise arranged.

In order to prevent the double charging of fees to school districts, local government will not charge a plan review fee for the review of school plans.

In addition, before approval of the school plans is issued by the State, local government must notify the Division of their approval of the site, sewer, water and other local requirements.

(j) Revocation of Local Government Programs. Local government inspection programs having any of the following deficiencies in their programs will have their certification revoked if the deficiencies are not corrected: lack of qualified and adequate staff, lack of inspections, lack of plan reviews, use of permit fees for other than code related activities, or use of codes other than those adopted by the State.

The Division shall notify, in writing, local government as to what deficiencies exist and establish, in cooperation with local government, a time frame for the correction of the same. If the corrections are not completed within the set time frame, a hearing will be held as per the Administrative Rules of Montana to decide if the certification should be revoked. If certification is revoked, the Division will then handle code enforcement in the area.

4. The Department is proposing this rule as a result of Section 69-2112, R.C.M. 1947 which requires the establishment of rules and standards governing the certification of municipal and county building code programs.

5. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing.

6. J. Michael Young, Administrator, Insurance and Legal

Division, State of Montana, Capitol Station, Helena, Montana 59601, has been designated to preside over and conduct the hearing.

7. The authority of the agency to adopt the proposed rule is based on Section 69-2111 and 69-2112, R.C.M. 1947. Section 69-2112, R.C.M. 1947, provides the authority of implementation to enforce the proposed rule.

David M Lewis

David M. Lewis
Director
Department of Administration

Certified to the Secretary of State November 9, 1978.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of Rules concerning National Guard Membership in the Public Employees Retirement System.	))))	NOTICE OF PROPOSED ADOPTION OF NATIONAL GUARD MEMBERSHIP IN THE PUBLIC EMPLOYEES RETIREMENT SYSTEM. NO PUBLIC HEARING CONTEMPLATED.

TO: All interested persons

1. On or after December 30, 1978, the Department of Administration proposes to adopt rules concerning the National Guard Membership in the Public Employees Retirement System.

2. The proposed rules do not replace or modify any section currently found in the Administrative Rules of Montana.

3. The proposed rules read as follows:

RULE I. NATIONAL GUARD MEMBERSHIP. (1) Application. All members of the Montana Army and Air National Guard may elect membership in the Public Employees Retirement System on forms provided by the Public Employees Retirement Division.

(2) Creditable Service. Creditable service for employment by the National Guard shall be calculated as follows:

(a) One day of service credit (8 hours) shall be granted for each day of pay received computed on the federal military pay schedule.

(b) Members of the Montana National Guard electing membership in the PERS, who are otherwise members of PERS because of other covered public employment, shall not receive service credit in the PERS for more than twelve months in any calendar year.

(c) Members of the National Guard who are not full-time public employees except for their service in the National Guard shall be considered "seasonal" employees pursuant to section 68-1601, Revised Codes of Montana, 1947.

(3) Prior Creditable Service. (a) All members of the National Guard electing membership in the PERS may qualify any or all prior National Guard service as creditable service subject to the requirements of sections 68-1607 and 68-1608, R.C.M. 1947. Applications for prior service credit shall be made on a form prescribed by the Public Employees Retirement Board, and the Adjutant General shall provide the Public Employees Retirement Division a report of all prior service for each applicant certifying the amount of such prior service and the remuneration received for said service from all sources.

(b) Both the employer and employees contributions plus accrued interest must be paid to the division before prior service will be credited to the account of any national guardsman electing membership in the PERS. In the event the Montana National Guard elects to pay the pro-rata employers contribution for all prior National Guard service, the Adjutant General

shall establish by appropriate rule a policy governing the amount of retroactive employer contributions; provided that said policy shall apply equally to all present and past members of the National Guard.

(c) Any member of the National Guard who believes the Adjutant General's policy regarding the amount of retroactive employer's contributions is discriminatory as to himself and others similarly situated may file a petition with the Public Employees Retirement Board detailing the nature of his complaint. At the request of the Petitioner, the Board shall conduct a "contested case" hearing in accordance with the Montana Administrative Procedure Act prior to rendering a final decision on the merits of the complaint.

(d) No active-duty military service qualified and purchased under section 68-1605 and 68-1605.1, R.C.M. 1947, shall be eligible for credit as prior service under this section.

(4) Reporting - Current Service. (a) Current service for all participating national guardsmen shall be reported by the Adjutant General to the Public Employees Retirement Division annually based upon the twelve month calendar year. The Annual Report of Service shall be filed with the Public Employees Retirement Division no later than January 31 of the following year.

(b) Both employer and employee contributions shall be deposited by the Adjutant General with the Public Employees Retirement Division in a single payment within thirty days from the end of each calendar quarter, e.g., March 31, June 30, September 30, and December 31 of each year.

(c) Current service for which no employer and employee contributions have been received prior to the annual report of service from the Adjutant General shall not be credited to the retirement accounts of the individual national guardsmen. Any member of the National Guard who fails to pay the employee contributions, and who has less than five years of creditable service, will be considered as having terminated service, and all accumulated employee contributions plus accrued interest shall be refunded subject to the provisions of section 68-1905, R.C.M. 1947.

(5) Termination and Retirement. (a) Members of the PERS who are members by virtue of their employment in the National Guard and other public employment, may not terminate service in either capacity and maintain eligibility for a retirement benefit or receive a refund of employee contributions plus accrued interest until such time as service in both capacities has been terminated.

(b) Upon attaining the regular or early retirement eligibility requirements contained in section 68-2001, R.C.M. 1947, any member of the National Guard may file an application for a retirement benefit with the Board on forms prescribed by the Public Employees Retirement Division. Both the individual national guardsman applying for retirement and the Adjutant

General shall file a joint affidavit with the application for retirement certifying that the creditable service in the PERS system supported wholly or in part by funds of the United States, or any state government or political subdivision thereof, including any military retirement system maintained for the benefit of national guardsmen by the United States Government.

4. The rule is proposed to implement participation by members of the National Guard in the Public Employees Retirement System.

5. Interested persons may submit their data, views or arguments concerning the proposed adoption to Mr. J. Michael Young, Administrator, Insurance and Legal Division, Department of Administration, Mitchell Building, Helena, Montana 59601.

6. If a person directly affected wishes to express his data, views, or arguments orally or in writing at a public hearing, he must make written request for a public hearing and submit his request along with any written comments to Mr. J. Michael Young before **December 28, 1978.**

7. If the department receives requests for a public hearing on the proposed Rules from more than ten percent (10%) or twenty-five (25) or more persons directly affected, a public hearing will be held at a later date. Notification will be made by publication in the Administrative Register.

8. The authority of the department to make the proposed adoption of rules is based on Section 68-1803, R.C.M. 1947. Implementation is based on Sections 68-2510, 68-1601, 68-1602, 68-1604, 68-1607, 68-1608, R.C.M. 1947.

John L. Prebil, Chairman
Public Employees Retirement Board

Certified to the Secretary of State, November 21, 1978

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF COSMETOLOGISTS

IN THE MATTER of the Proposed Amendments of ARM 40-3.30(7)-S3065(5) Curriculum: Brush up Courses; ARM 40-3.30(7)-S3095 (4), (5) and (5)(a) Transfer Students - Out-of-state; ARM 40-3.30(8)-S30055 (1)(d) Examination - Out-of-State Students; ARM 40-3.30(8)-S30065 (2) Application - Out-of-state Operators; and 40-3.30(8)-S30125 Renewal of Licenses.	NOTICE OF PROPOSED AMENDMENTS OF RULES ARM 40-3.30(7)-S3065 (5) CURRICULUM: BRUSH UP COURSES; ARM 40-3.30(7)-S3095 (4), (5) and (5)(a) TRANSFER STUDENTS - OUT-OF-STATE; ARM 40-3.30(8)-S30055 (1)(d) EXAMINATION - OUT-OF-STATE STUDENTS; ARM 40-3.30(8)-S30065(2) APPLICATION - OUT-OF-STATE OPERATORS; AND ARM 40-3.30(8)-S30125 RENEWAL OF LICENSES

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 30, 1978, The Board of Cosmetologists proposes to amend rules ARM 40-3.30(7)-S3065, sub-section (5) concerning brush up courses; ARM 40-3.30(7)-S3095 sub-section (4), (5) and (5)(a) concerning transfer students from out-of-state; ARM 40-3.30(8)-S30055, sub-section (1)(d) concerning examinations for out-of-state students; ARM 40-3.30(8)-S30065, sub-section (2) concerning applications for out-of-state operators; and ARM 40-3.30(8)-S30125 concerning license renewals.

2. The proposed amendment to ARM 40-3.30(7)-S3065, sub-section (5) Curriculum: Brush up courses will allow a licensed cosmetologist to practice on the public while completing advance brush up courses and will read as follows: (deleted matter interlined, new matter underlined)

"(5) BRUSH UP COURSES: A licensed cosmetologist who wishes to take advance hair styling, tinting, bleaching, permanent waving or hair cutting shall be registered with the office of the Department not to exceed three (3) consecutive months and ~~but shall not be permitted~~ to practice on the public. ~~and no~~ No hours credit shall be given. Schools must hold an Advanced Training License."

3. The reason for the proposed amendment is that licensees enrolled for brush up courses in schools are considered as "students" while enrolled. However, they have been restricted to working on "mannequins only". The Board feels that due to frequent changes in chemical preparations, it is important to allow these licensees to practice on the public, rather than mannequins, in order to learn the proper use of these chemical preparations, while under the supervision of licensed instructors. Thus eliminating danger to the health, safety and welfare of the consuming public by having licensees learn under "direct supervision".

4. The proposed amendment to ARM 40-3.30(7)-S3095 Transfer Students - Out-of-State, sub-section (4) (5) and (5)(a) will

allow transfer students from out-of-state to apply for Temporary License, will delete (5)(a) entirely and will read as follows: (new matter underlined, deleted matter interlined)

"(4) Graduates or licensed operators from other states that are enrolled in cosmetology schools in order to receive the necessary amount of hours of training to take the State Board Examination ~~will be classed as post-graduates and~~ are ~~not~~ eligible to apply for a Temporary License."

"(5) Transfer students from other states completing ~~one thousand (1000)~~ the necessary hours of training in Montana are eligible to apply for a Temporary License. "

~~"(5)(a) Transfer students from other states with less than one thousand (1000) hours of training in Montana are considered to be transfer students and are not eligible to apply for a Temporary License.~~"

5. The reason for the proposed amendment to sub-section (4) and (5) is that the Board feels that transfer students from out-of-state, completing the necessary hours of training in a Montana school are "graduates of registered schools of this state". Therefore they should be granted a temporary license, thus eliminating any discrimination between in-state students com- completing the 2000 hour course and out-of-state students, completing the required number of hours to meet Montana requirements.

The reason for the deletion of (5)(a) is that the Board feels this is adequately covered by the amendments of sub-sections (4) and (5).

6. ARM 40-3.30(8)-S30055 (1)(d) is proposed to be amended allowing temporary licenses to be issued to out-of-state students pending examination and will read as follows: (new matter underlined, deleted matter interlined)

"(1)...(d) ~~No~~ Temporary Licenses ~~will~~ may be issued to out-of-state students~~,~~ pending examination."

7. The reason for the proposed amendment is to eliminate discrimination between in-state and out-of-state students as stated in the previous reason.

8. ARM 40-3.30(8)-S30065 (2) is proposed to be amended to allow a temporary license to be issued to an out-of-state operator pending the next examination and will read as follows: (new matter underlined, deleted matter interlined)

"(2) ~~No~~ A Temporary License ~~will~~ may be issued to out-of-state operators pending the next scheduled examination."

9. The reason for the proposed amendment is the same as those listed above in the previous two amendments.

10. ARM 40-3.30(8)-S30125 is proposed to be amended by changing the catch phrase, places (1)(a) under the present sub-section (2), takes the present sub-section (2) and makes it sub-section (3). The proposed amendment adds fees currently

set by the Board of Cosmetologists and reads as follows: (new matter underlined, deleted matter interlined)

" 40-3.30(8)-S30125 ~~RENEWAL OF LICENSES~~ FEES, GENERAL INITIAL AND ANNUAL RENEWAL FEES (1) ~~General License Renewal~~ Fees - General:

(a) Student Registration fee shall be $3.50.

(i) Temporary License fee shall be $4.

(ii) Applicant for examination to practice shall pay $20 plus $6 Operator License Fee.

(iii) Applicant for examination to teach shall pay $30 plus $10 Instructor License Fee.

(iv) Applicant for itinerant license shall pay $50 plus $10 Manager-Operator License Fee.

(v) Applicant for reciprocal license shall pay $50 plus $6 Operator License Fee.

(vi) Duplicate License fee shall be $4.

(2) Annual Renewal Fees:

(a) All cosmetology licensesare to be renewed on or before December 31st of each year.

(i) Operator License fee shall be $6.

(ii) Manager-Operator license fee shall be $10.

(iii) Cosmetological salon license shall be $10.

(iv) Instructor license fee shall be $10.

(v) Cosmetology school license fee shall be $50.

(vi) Advanced Training license fee shall be $50.

(vii) Teacher-Training license fee shall be $50.

(b) A fee of ten dollars ($10) shall be levied for late renewal of licenses."

11. The reason for the proposed amendment is to implement Section 66-815, sub-sections (1) through (14) and Section 66-816, sub-sections (1) through (3), which places a maximum fee and allows the board to impose a fee within that maximum. The Board has reviewed the costs of operation and has determined that the fees as proposed are necessary and adequate to cover the costs.

12. Interested parties may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Cosmetologists, Lalonde Building, Helena, Montana 59601, no later than December 28, 1978.

13. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Board of Cosmetologists, Lalonde Building, Helena, Montana 59601, no later than December 28, 1978.

14. If the Board receives requests for a public hearing on the proposed amendments from 25 or more of the persons who are directly affected by the proposed amendments, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

15. The authority of the Board to make the proposed amendments is based on sections 66-806, 815, and 816 R.C.M. 1947.

BOARD OF COSMETOLOGISTS
JUNE BAKER, PRESIDENT

BY: 
ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State, November 21, 1978.

BEFORE THE BOARD OF PARDONS AND PAROLE
OF THE STATE OF MONTANA

In the Matter of the Proposed Revision of the Rules of the Board of Pardons and Parole	))))	NOTICE OF ADOPTION OF RULES TO ALL INTERESTED PERSONS

1. On September 14, 1978, the Montana Board of Pardons and Parole gave notice of proposed revision for the rules of its agency in Notice Number 20-3-1.

2. Since rule-making by the Board is exempt from the notice and comment or opportunity for hearing requirements of the Montana Administrative Procedures Act, the notice was published in the Administrative Register as a courtesy to those persons who may wish to offer comments and suggestions before the Board made its final decision.

3. The text of the proposed revisions were mailed to each district judge, county attorney, the Montana Defender Project at the University of Montana Law School, and the Montana State Prison. Also copies were mailed to the Attorney General's Office and the Staff Attorney for the Legislative Council.

4. Only three written comments recommending suggestions were made to the Board. The Board adopted these recommendations and also added an additional rule which spelled out the criteria for parole eligibility that may be used by the Board.

5. At its October, 1978 meeting in Deer Lodge, Montana, the Board of Pardons unanimously adopted the proposed rules.

6. These rules will become effective immediately upon publication in the Montana Administrative Register. Complete copies of the text will be available by contacting Nick A. Rotering, Legal Counsel, Department of Institutions, 1539 11th Avenue, Helena, Montana 59601.

Henry E. Burgess, Chairman
Montana Board of Pardons & Parole

Certified to the Secretary of State, November 21, 1978.

BEFORE THE DEPARTMENT OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

IN THE MATTER of adoption of New Rules regarding telephone extended area service guidelines.	)))	NOTICE OF ADOPTION OF NEW RULES PERTAINING TO TELEPHONE EXTENDED AREA SERVICE GUIDELINES

TO: All Interested Persons

1. On August 10, 1978, the Department of Public Service Regulation published notice of proposed new rules concerning guidelines for requests of telephone extended area service at page 1136-1139 of the 1978 Montana Administrative Register, issue number 9.

2. The Commission has adopted the rules as proposed, with the following changes:

Rule I. (38-2.14(10)-S14750) DEFINITION (1) Extended Area Service (EAS) is nonoptional, unlimited, flat rate calling service between two or more exchanges, provided at exchange rates or at an increment to exchange rates, rather than at toll prices.

Comment: Rule I(1) and Rule III(2)(a) were changed to allow the possibility of Extended Area Service between more than two exchanges. Currently there are a number of multi-exchange areas with EAS; the Commission wishes its guidelines to apply should consideration be given to the creation of more such areas.

Rule II. (38-2.14(10)-S14760) CONDITIONS FOR APPROVAL (1) The Commission will order a new Extended Area Service arrangement to be provided when the following general conditions have been met.

(2) A strong community of interest exists between contiguous exchanges or between noncontiguous exchanges.

Comment: The modification of Rule II(2) permits Extended Area Service between noncontiguous exchanges as suggested by Continental Telephone of the West. EAS should not be limited to adjoining exchanges. Instead, existence of a "community of interest" as defined in the rules, not geography, should guide the formation of extended areas.

(3) The incremental rates charged for the EAS arrangement will generate revenues within the affected exchanges sufficient to meet the increased intrastate revenue requirement resulting from provision of EAS.

(4) The proposed EAS arrangement, offered at a price sufficient to meet the increased revenue requirement, is approved by a majority of subscribers in the affected exchanges via written ballot.

Rule III. (38-2.14(10)-S14770) PROCEDURE (1) When the Public Service Commission receives a request for EAS from customers of a regulated telephone company, a telephone cooperative, a political subdivision, an organized community group; receives a proposal by a telephone company; or, initiates an investigation, the following standards will be used to determine whether it should implement EAS:

(2) The Commission will determine whether a community of interest exists between the exchanges sufficient to warrant further study in the following manner:

(a) The Commission will order the company or companies involved to initiate a calling usage study. A sufficient indication of community of interest between the exchanges will be deemed to exist if there is an average of eight (8) calls per main and equivalent main station per month and at least 50 percent of the customers make at least one (1) toll call per month to the exchange to which the service is requested. These community of interest qualifications shall exist for ~~both~~ all exchanges in the proposed EAS area. ~~on the proposed route, unless the large exchange has over twice the number of main and equivalent main stations on the smaller exchange, in which case the community of interest qualification shall apply only to the smaller exchange.~~

Comment: Rule I(1) and Rule III (2)(a) were changed to allow the possibility of Extended Area Service between more than two exchanges. Currently there are a number of multi-exchange areas with EAS; the Commission wishes its guidelines to apply should consideration be given to the creation of more such areas.

(b) The Commission may order the company (companies) or petitioners involved to provide information on factors influencing community of interest, such as (but not limited to) location relative to exchange boundaries of:

(i) schools
(ii) medical and emergency services
(iii) local government entities
(iv) police and fire protection
(v) shopping and service centers
(vi) churches
(vii) agricultural and civic organizations
(viii) employment centers

(3) When the Commission determines that a sufficient community of interest exists to warrant consideration of EAS it will order its staff and the company or companies involved to determine the increase in intrastate costs resulting from this proposed EAS arrangement. This study will consider the following relevant costs over a ~~five~~ one year future planning period:

(a) Losses in revenues from toll and other discontinued services such as foreign exchange service.

(b) Increases in capital costs resulting from required additions to network capacity.

(c) Changes in operating expenses

(d) Changes in Interstate Division of Revenue Settlements

(e) Changes in Bell-Independent settlements.

Comment: In Rule III (3), the planning period over which costs are estimated was shortened to one year. Because it believes that implementation of EAS would alter calling patterns and, consequently, costs, the Commission recognizes the propriety of basing revenue requirements on projected

costs. However, rates should not be set to cover costs not expected to occur for five years. A one year future planning period was determined appropriate.

(4) Studies to determine the increased intrastate cost will be completed utilizing the following methodology:

(a) Lost revenue will be based upon estimates of toll messages for each year of the study multiplied by the expected average revenue per message and upon estimates of the quantities of other affected services, such as FX, for each year of the study multiplied by the appropriate annual rate.

(b) The added investment will be based on the additional switching and trunking facilities required to carry the incremental usage each year. Estimates of incremental usage involve call stimulation factors and holding time effects due to EAS. Appropriate annual charges will be applied to the added investment to obtain additional annual revenue requirements.

(c) Changes in Division of Revenue settlements will be based on the increase in intrastate usage and investment quantities experienced under Extended Area Service. The usage and investment increases will be determined from the call stimulation and changed holding time patterns forecast as a result of EAS.

(5) The Commission will then use the equivalent annual average additional revenue requirement to determine the rate increment to be charged to subscribers in the affected exchanges in such a way that no increase in rates or charges will be incurred by nonbenefited exchanges. This will be accomplished in the following manner:

(a) The total additional revenue requirement will be ~~equally divided between the two exchanges.~~

~~(b) The additional revenue requirement in each exchangewill then be~~ divided by the total number of main and equivalent main stations in all affected exchanges to determine the EAS Rate Increment applicable to all main stations. ~~in that exchange.~~

~~(c)~~ (b) New extended area service will be priced using these rate increments designed to recover the additional revenue requirement. Each exchange will retain its own appropriate rate group classification.

Comment: According to the proposed rules, the heaviest financial burden of EAS would fall upon subscribers in the smaller exchanges: the total revenue requirement would have been divided equally between the exchanges, resulting in a greater EAS increment in exchanges with fewer telephones. Absent demonstration that these subscribers benefit more, the Commission modified Rule III (5)(a) and (b) to equalize the EAS increment for each main or equivalent main stations.

Continental Telephone of the West commented that the equal division of total revenue requirements between the two exchanges could result in a windfall for one exchange and a failure to cover costs for the other exchange. The Commission believes that the comment does not accurately reflect the rule

either as originally proposed or as it has been amended. Under the rule, only the total revenue requirement will be determined. The rule is not premised on the theory that each exchange will fully recover its revenue requirements, but rather that the exchanges who receive the service will fully absorb the total costs for providing those services.

Bruce Orcutt, Miles City, submitted comments which could be characterized as a complaint that the rules as proposed did not adequately acknowledge the benefits the telephone company and the larger exchanges would receive with EAS service. The Commission believes that these concerns have been addressed in the changes in Rule III (5)(a) and (b).

(6) The Commission will then order a survey by mail to be made under its supervision. The ballot to be mailed to each customer would include all pertinent information (including rates and effective date) that would enable the customer to make a rational choice of acceptance or rejection of the proposal. If at least a simple majority of all affected customers in each exchange vote in favor of establishing EAS at the determined rate, then the Commission will order it implemented.

(7) When the Commission determines that the EAS increment to ~~either~~ any exchange is of such magnitude that it believes a substantial majority of the customers would not desire EAS, then it may dispense with the survey.

(8) The Extended Area Service increments are subject to future increase as the Commission may order.

3. These guidelines are adopted so that the public can know when extended area service (EAS) applications will be granted. They describe those situations where the grant of such applications will not result in discrimination against other customers. The guidelines also inform the public of the procedures which the Commission intends to follow in considering these applications.

Several letters were received from rural residents who endorsed the rules on the assumption that they would facilitate extended area service. The Commission believes that the changes made in the rule generally increase the incentives to rural customers to seek EAS.

Several individuals and corporations sent letters of support for the rules as proposed in 1977.

Continental Telephone made several requests relating to discontinuance of extended area service. These were not adopted as they were considered beyond the noticed scope of these rules.

4. Authority of the Department to make the proposed rules is based on Sections 70-104 and 70-113, R.C.M. 1947.

GORDON E. BOLLINGER, Chairman

CERTIFIED TO THE SECRETARY OF STATE November 21, 1978.

VOLUME 37 OPINION NO. 167

ARMED FORCES - Veteran's fee waivers for extra studies offered in university system;
FEES - University system, waivers for veterans for extra studies;
STATE BOARD OF REGENTS - Fee payment by veterans for extra studies, power to require;
UNIVERSITY OF MONTANA - Fee waivers for veterans for extra studies;
SECTIONS - 75-8611, R.C.M. 1947;
MONTANA CONSTITUTION, 1972 - Article II, section 35; Article X, section 9(2)(a).

HELD: The Board of Regents may not require veterans qualifying under the provisions of Section 75-8611, R.C.M. 1947, to pay fees for extension or continuing education courses offered by units of the Montana University System.

9 November 1978

The Montana University System
Lawrence K. Pettit
Commissioner of Higher Education
33 South Last Chance Gulch
Helena, Montana 59601

Dear Commissioner Pettit:

You have requested my opinion on the following question:

> May the Board of Regents require veterans to pay fees for extension or continuing education courses offered by units of the Montana University system?

Free tuition and fees for veterans are mandated by Section 75-8611, R.C.M. 1947, which provides, in pertinent part:

> All honorably discharged persons who served with the United States forces in any of its wars and who were bona fide residents of this state at the time of their entry into the United States forces shall have free fees and tuition in any of the units of the university of Montana, including the law and medical departments, and for extra studies in any of the units of the university of Montana. (Emphasis added.)

The language concerning "extra studies" clearly encompasses extension and continuing education courses offered by units of the System.

Although the Board of Regents is a constitutional body vested with the government and control of the Montana University System, MONTANA CONSTITUTION, Article X, §9(2)(a), it is nevertheless subject to the legislature's appropriation power and the "public policy of this state." Board of Regents of Higher Education v. Judge, 168 Mont. 433, 449, 543 P.2d 1323, 1332 (1975). Montana's public policy as to veterans is clearly expressed in Article II, section 35 of the Montana Constitution, which states: "The people declare that Montana servicemen, servicewomen and veterans may be given special considerations determined by the legislature." The question presented here involves the construction and reconciliation of two co-equal constitutional provisions. In view of the strong statement of public policy in Article II, section 35 and the special power thereby vested in the legislature to effectuate that policy, it is clear that Section 75-8611, R.C.M. 1947, is a permissible intrusion into the general powers of the Board of Regents to manage and control the university system.

In 1977, the Montana legislature rejected the Regents' proposal that extension courses be state-supported in the same manner as regular academic courses. Instead, the appropriations committee directed that "continuing education" be set up in an account with fees matching expenditures. Therefore, the question arises whether the legislature's failure to make appropriations for extension courses implicitly repealed Section 75-8611's requirement of fee waivers for veterans.

The failure of a legislature to make appropriations necessary to the continued existence of an institution or program of its own creation may in fact result in the cessation of operation of that institution or program. The absence of appropriations may also impliedly repeal those laws which established the institution or program and those laws integrally dependent upon the program or institution for their continuing validity and practicability. See Ex parte Williamson, 116 Wash. 560, 200 P. 329, 330 (1921); 19 OP. ATT'Y GEN. NO. 513 at 883, 885 (1942). It should be noted, however, that implied repeal of valid legislation is not favored by the law and therefore must be manifest from legislative enactment or intent. In regard to the question

presented here, it is clear, from the specific recommendation by the appropriations committee as to continuance of extra studies, that the legislature did not intend to terminate continuing education programs or to repeal by implication any laws relating to such programs. Furthermore, legislative failure to appropriate will generally be viewed as terminating programs and institutions or as repealing existing laws only when those programs, institutions, or laws could not exist absent funding by the legislature -- that is, only when they have not been and could not be self-supporting or independent of state appropriations.

Continuing education and extension courses in units of the university system are not necessarily dependent upon legislative funding for their existence. Despite the absence of appropriations, the Board of Regents has chosen to continue to offer such extra courses on a self-supporting basis, with fees from students covering the expenses of the program. The Regents contend that, regardless of their decision to maintain continuing education courses in the system, the legislature's explicit fee waiver for honorably discharged veterans was repealed by the lack of state funding. I do not agree.

Section 75-8611, R.C.M. 1947, specifically requires that tuition and fees be waived for veterans in all "extra studies in any of the units of the university of Montana," without reference to the method or source of funding for those studies. Although under the Montana Constitution the legislature probably cannot require the continued offering of extra studies by the Board of Regents, once the Board chooses to offer such programs, Section 75-8611 becomes applicable and mandates a fee waiver for veterans. The people of Montana have expressly voiced their desire that special consideration be given to veterans; the legislature has implemented that desire by endowing veterans with special educational benefits. The Board of Regents, while vested with control over university policies, cannot ignore such a clear and strong statement of public policy in Montana. Therefore, as long as extra studies are offered by units of the university system, no matter how financed, honorably discharged veterans are entitled, by virtue of Section 75-8611, to participate in those courses without payment of fees or tuition.

It should be noted that the fee waiver provision of Section 75-8611, R.C.M. 1947, is a limited one. For instance, it

does not apply to those veterans who qualify for veterans' educational benefits from the federal government under the Servicemen's Readjustment Act of 1944 and supplementary federal legislation. Therefore, unless a veteran's eligibility under the G.I. Bill has expired or otherwise terminated, he may not take advantage of Montana's fee waiver provision. Moreover, qualifying veterans under Section 75-8611 must have been honorably discharged; they must actually have served in the United States forces during a war; and they must have been residents of Montana when they entered the service. §75-8611, R.C.M. 1947.

THEREFORE, IT IS MY OPINION:

> The Board of Regents may not require veterans qualifying under the provisions of Section 75-8611, R.C.M. 1947, to pay fees for extension or continuing education courses offered by units of the Montana University System.

Very truly yours,

MIKE GREELY
Attorney General

MG/MBT/br

VOLUME NO. 37 OPINION NO. 168

CONSTITUTIONAL LAW - Executive Branch, independent offices within;
GOVERNOR - Powers, Collective bargaining for executive agencies;
PUBLIC EMPLOYERS - Collective bargaining for executive agencies;
MONTANA CONSTITUTION, 1972 - Article VI, Sections 1(1), 2, 4, 7, 8;
REVISED CODES OF MONTANA, 1947 - Sections 59-1602(1), 59-1609, 82A-105.

HELD: The governor or his designee has the statutory authority to represent all agencies of the Executive Branch for purposes of collective bargaining with public employee unions.

15 November, 1978

Mr. Dave Lewis, Director
Department of Administration
S.W. Mitchell Building
Helena, Montana 59601

Dear Mr. Lewis:

You have requested my opinion on the following question:

> Does the Governor or his designee have the statutory authority to represent all agencies of the Executive Branch for purposes of collective bargaining with public employee unions?

The Collective Bargaining for Public Employees Act, Title 59, chapter 16 of the Revised Codes of Montana, 1947, was enacted in 1973 to grant public employees the statutory right to bargain collectively with their employers. As pertinent to the issue presented here, a "public employer" subject to the Act's provisions is defined as "the state of Montana or any political subdivision thereof, ... and any representative or agent designated by the public employer to act in its interest in dealing with public employees." §59-1602(1), R.C.M. 1947. The Act further provides:

> The chief executive officer of the state, the governing body of a political subdivision, the commissioner of higher education (whether elected or appointed) or the designated authorized representative shall represent the public employer in collective bargaining with an exclusive representative.

§59-1609, R.C.M. 1947 (emphasis added)

When these two sections are read together, it is clear that the state of Montana is the "public employer" of employees within the executive branch of government. Furthermore, the legislature plainly intended that the governor, as chief executive officer, or his designee, should represent all agencies of the executive branch in the collective bargaining process. See Mont. Const. art. VI, §4; §82A-105, R.C.M. 1947. The question remains, however, whether this statutory denomination of the governor as negotiating representative is constitutionally permissible as it applies to constitutional agencies within the executive branch.

Article VI, section 1(1), of the Montana Constitution provides for an executive branch composed of a governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction and auditor. Each of these officers, except the team of governor and lieutenant governor, is elected individually at a general election, MONT. CONST. art. VI, §2; by constitutional provision and the electoral process, therefore, each is essentially independent of the other officers in the executive branch.

Section 7 of article VI further establishes the structuralization of the executive branch by providing that all administrative and executive agencies are to be organized into not more than twenty departments. These departments are specifically made subject to direct supervision by the governor, their head executives being appointed by him, rather than elected. MONT. CONST. art VI, §8. Article VI, Section 7, however, specifically excludes the offices of governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor from its organizational scheme; this exclusion likewise exempts these constitutional agencies of the executive branch from section 8's provision for control by the governor. Within the framework of Montana's Constitution, therefore, each explicitly established executive office constitutes an

independent agency, able to make its own policy determinations and answerable ultimately only to the people of Montana.

The legislature itself has recognized the independent status of constitutional executive agencies in the Executive Reorganization Act, Title 82A of the Revised Codes of Montana 1947. Section 82A-105, R.C.M. 1947, specifically limits the governor's policy-making and supervisory powers to the executive departments established by the Act. Consistent with the framework of the Constitution, the constitutional offices of the executive branch are excluded from the provision concerning gubernatorial control.

Article II of the Montana Constitution and its implementing legislation require a separation of powers and functions within the executive branch of Montana's government. Those powers constitutionally vested in the separately elected executive officers and the authority to formulate policy necessary to effectuate those powers cannot be usurped by other officers of the executive branch. However, the Governor is constitutionally endowed with the executive power of the state and such duties as are provided by law. Mont. Const. Art. VI, §4. He is thereby implicitly empowered to perform any administrative duties necessary to the efficient and coordinated functioning of the executive branch. His executive duties may also be explicitly delineated by the Legislature so long as there is no consequent interference with the powers constitutionally granted to the other executive officers.

The legislature has protected the constitutional powers of the elected state officials under the collective bargaining act since that act does not apply to personnel who have authority to act for the agency on matters relating to the implementation of agency policy. Section 59-1602(2),(4), R.C.M. 1947. Clearly the policy making and executive staffs of the elected officials are not covered by the act.

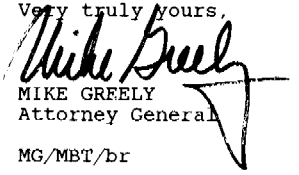
In an analogous way the legislature has protected the constitutional prerogatives of the elected officials with regard to the State Classification and Pay Plan by designation of certain personal and policy making staff of elected officials for exemption from the classification and pay plan. Under Section 59-904(10), R.C.M. 1947 specific provisions of Chapter 9 of Title 59 do not apply to the personal staff of elected officials. Likewise Chapter 9 does not cover the elected official, his chief deputy or executive secretary.

In view of the foregoing I see no invasion of the constitutional prerogatives of the elected state officials by the provision of Section 59-1609 that the Governor is the collective bargaining representative for the state of Montana. This requirement imposes upon the governor, as chief executive officer of the state, the administrative duty of negotiating with public employee unions for the agencies within his branch. Section 59-1609, then, comports with the constitutional scheme of Montana's executive branch; it charges the governor with a specific responsibility in his administration and coordination of that branch, but does not interfere with the constitutional powers and policy-making prerogatives of the separate and independent executive officers.

THEREFORE IT IS MY OPINION:

> The governor or his designee has the statutory authority to represent all agencies of the executive branch for purposes of collective bargaining with public employee unions.

Very truly yours,



MIKE GREELY
Attorney General

MG/MBT/br