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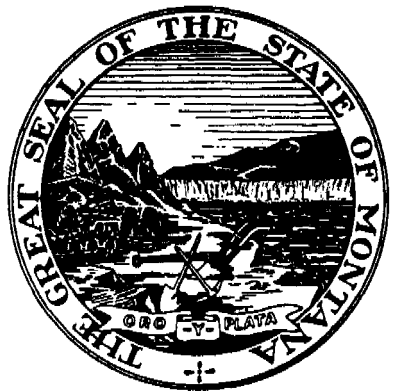
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OF MONTANA

**MONTANA
ADMINISTRATIVE
REGISTER**

1979 ISSUE NO. 1
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84-402(5)	Opinion No. 169	1643
84-429.7	42-2.22(1)-S2200 through S2240	984
84-429.7 - 429.13	42-2.22(1)-S2220	960
84-708.1	42-2.22(2)-S22172	1388
84-708.1	42-2.22(2)-S2260 through S22174	958
84-1319(b)	New Rule	1229
84-5222	42-2.22(2)-S22010	947
84-6301 - 6308	18-2.10(2)-S1010	1009
84-7405	38-2.14(10)-S14780	1736
84-7405	Declaratory Ruling	1494
84-7407 - 7410	Opinion No. 165	1636
84-7410	New Rule	1630
84-7410	36-2.8(18)-S8110	1469
84-7411 - 7413	Opinion No. 165	1636
86-701	Opinion No. 178	1764
92-439 - 441	Opinion No. 156	1373
92-701.1	Opinion No. 156	1373
92-701.6	Opinion No. 156	1373
92-702.1	Opinion No. 156	1373
92-703.1	Opinion No. 156	1373

(10)

<u>R.C.M.</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
93-1501(1)	48-2.18(42)-P18770	1114
94-2-101(65)	20.8.105 through 20.8.110	1330
95-3101 et seq.	Opinion No. 166	1537
95-3131 et seq.	Opinion No. 166	1537
95-3214	Title 20, Subtitle 3	1354
95-3223	Title 20, Subtitle 3	1354
95-3229	Title 20, Subtitle 3	1354
Ch. 28, Sec. 3, Laws of 1974	18-3.14(1)-01400	1009
Ch. 375, Sec. 1, Laws of 1977	18-2.10(2)-S1010	1009
Ch. 566, Laws of 1977	42-2.22(1)-S2220	984

1-1/11/79

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF MEDICAL EXAMINERS

IN THE MATTER of the Proposed) NOTICE OF PROPOSED AMENDMENT
Amendment of ARM 40-3.54(18)-) OF ARM 40-3.54(18)-S54100 (4)(d)
S54100, sub-section (4)(d)) EMERGENCY MEDICAL TECHNICIAN -
concerning Emergency Medical) BASIC
Technician Examination Fees)

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On February 10, 1979, the Board of Medical Examiners proposes to amend ARM 40-3.54(18)-S54100, sub-section (4)(d) concerning fees for examination and application processing for Emergency Medical Technician.
2. The proposed amendment will read as follows: (new matter underlined, deleted matter interlined)
"(4)(d) Pay a \$35 fee sufficient to cover the costs of examination and application processing and this fee shall not ~~to~~ exceed \$50."
3. The rule is proposed to be amended to provide notice of the cost of examination and application processing to the public and further clarify the Attorney General's opinion #174.
4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Medical Examiners, Lalonde Building, Helena, Montana 59601 no later than February 8, 1979.
5. If a person who is directly affected by the proposed amendment 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 Medical Examiners, Lalonde Building, Helena, Montana 59601, no later than February 8, 1979.
6. If the Board receives requests for a public hearing on the proposed amendment from more than 10 percent or 25 or more of the persons who are directly affected by the proposed amendment, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.
7. The authority of the Board to make the proposed amendment is based on section 69-7008 R.C.M. 1947.

BOARD OF MEDICAL EXAMINERS
LLOYD L. GARRELS, D.O.

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

Certified to the Secretary of State, January 2, 1979.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF REAL ESTATE

IN THE MATTER of the Proposed) NOTICE OF PROPOSED AMENDMENT
Amendment of ARM 40-3.98(6) -) TO ARM 40-3.98(6)-S98040
S98040 concerning renewal -) RENEWAL - INACTIVE LIST - REGISTER
inactive list - register)

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On February 10, 1979, the Board of Real Estate proposes to amend ARM 40-3.98(6)-S98040 by adding a new sub-section (3) concerning out-of-state persons applying for salesman licenses.

2. The proposed amendment will add a new sub-section (3) to the above stated rule and will read as follows:

"(3) An out-of-state resident may be permitted to sit for the Real Estate Salesman's exam and upon receiving a passing score and upon making the proper application for licensure will be issued a Real Estate Salesman's license. He must be sponsored for licensure by a resident Real Estate Broker. The real estate license of a non-resident will be activated when that person is actually in the state. When the person leaves the state, the sponsoring broker must return the license to the Board of Real Estate, where it will remain until such time as the person again returns to Montana and both he and the sponsoring broker request the license to be activated."

3. The reason the Board is proposing the amendment is that if a Real Estate Salesperson were allowed to operate independently from his broker in another state, the sponsoring broker may not be aware of that licensee's real estate related activities, yet the broker is responsible for those actions. The public would have no assurance that the real estate transaction they may become involved in through the non-resident licensee would be proper as the supervising broker would not be in a position to properly supervise the transaction. In fact the supervising broker may not be aware of the transaction at all. The supervising broker must have all salesmen he has responsibility for operating from the general vicinity of his agency to give proper supervision to these salesmen in the public interest.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Real Estate, Lalonde Building, Helena, Montana 59601, no later than February 8, 1979.

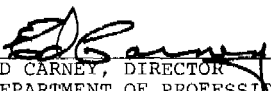
5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Board of Real Estate, Lalonde Building, Helena, Montana 59601, no later than February 8, 1979.

6. If the Board receives requests for a public hearing on the proposed amendment from more than 10 percent or 25 or more

of the persons who are directly affected by the proposed amendment, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

7. The authority of the Board to make the proposed amendment is based on section 66-1927 R.C.M. 1947.

BOARD OF REAL ESTATE
ROBERT T. CUMMINS, CHAIRMAN

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

Certified to the Secretary of State, January 2, 1979.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption) NOTICE OF THE ADOPTION OF
of Rules concerning National) RULE ARM 2-3.18(10)-S1871
Guard Membership in the Public) PERTAINING TO NATIONAL
Employees Retirement System.) GUARD MEMBERSHIP IN THE
) PUBLIC EMPLOYEES RETIREMENT
) SYSTEM.

TO: All interested persons

1. On November 30, 1978, the Public Employees Retirement Board published notice of the proposed adoption of a rule concerning National Guard Membership in the Public Employees Retirement System at pages 1545-1547 of the Montana Administrative Register, issue number 16.

2. The Board has adopted the rule with the following changes:

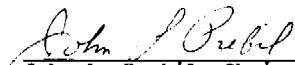
2-3.18(10)-S1871 National Guard Membership

(1)-(4)(c) same as proposed rule.

(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 either receive~~ 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 is not creditable service in any other public retirement 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.

3. No comments or testimony were received. The Board has adopted the rule in order to implement participation by members of the National Guard in the Public Employees Retirement System.



John L. Prebil, Chairman
Public Employees Retirement Board

Certified to the Secretary of State, December 29, 1978.

BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
STATE OF MONTANA

In the Matter of the Amend-)	NOTICE OF AMENDMENT OF RULE
ment of the Rule concerning)	36-2.2(1)-P200 CONCERNING
Attorney General's Model Pro-)	ATTORNEY GENERAL'S MODEL
cedural Rules.)	PROCEDURAL RULES

TO: All Interested Persons

1. On November 17, 1978 the Department of Natural Resources and Conservation published notice of the amendments to the rule relating to the Attorney General's Model Procedural Rules. The rule is being amended to bring the Department's procedural rule in conformity with the Attorney General's procedural rules implementing Article II, Section 8 of the 1972 Constitution. Notice of the proposed amendment was published on page 1517 of the Montana Administrative Register, 1978 Issue No. 15.

2. No public hearing was contemplated and the Department did not receive a request for public hearing. No comments were received. The Department has adopted the proposed amendment.

3. The authority for the adoption of the proposed amendment to ARM Rule 36-2.2(1)-P200 is based on Section 82-4203, R.C.M. 1947.

DATED this 28th day of December, 1978.

Richard T. Sawyer, Deputy Director
for Ted J. Doney, Director
Department of Natural Resources
and Conservation


Certified to the Secretary of State December 28, 1978.

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 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
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To: All Interested Persons:

1. On November 11, 1978, the Board of Cosmetologists published a notice of proposed amendments to 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 at page 1548 through 1551 of the 1978 Montana Administrative Register, issue number 16.
2. The Board has amended the rules exactly as proposed.
3. No comments or testimony were received. The Board's reasons for the amendments are as stated in the notice.


ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State January 2, 1979.

VOLUME 37

OPINION NO. 177

BOARDS OF HEALTH - Power of district boards of health to adopt licensing regulations for sewage disposal contractors;
LICENSES - Validity of license regulations adopted by district boards of health.
Section 69-4509, R.C.M. 1947.

HELD: District boards of health have the statutory power to license contractors who perform work on sewage disposal systems which are not connected to municipal sewage systems.

20 December 1978

Timothy J. O'Hare
Deputy County Attorney
Fergus County
Lewistown, Montana 59457

Dear Mr. O'Hare:

You have requested my opinion on a question which I will state as follows:

Is a district board of health created pursuant to Title 69, chapter 45, R.C.M. 1947, empowered to promulgate a regulatory license requirement for sewage disposal contractors?

Your letter and accompanying documents inform me that six central Montana counties have formed the Central Montana Health District, to be served by a district board of health. The Board has promulgated a regulation requiring contractors who construct or alter a sewage disposal system "other than a public or community system" to first obtain a license by paying a fee and meeting certain enumerated criteria. Your request deals with the validity of this regulation.

The regulation in question is a result of an attempt by the district board to exercise a police power for the protection of public health. As such, its validity depends on the two-fold finding that the district board possessed the statutory power to enact the regulation, and that the regulation is reasonably tailored to the problem it was intended to solve, is not arbitrary or capricious, and therefore does not violate constitutional requirements of due process. See City of Missoula v. Swanberg, 116 Mont. 232, 234, 149 P.2d

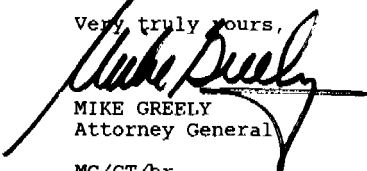
248 (1944). Evaluation of the factual questions which must be answered nor a decision on the constitutionality of the regulation are within the proper scope of this opinion. However, the question of statutory authority is one I feel free to consider.

District boards of health are delegates of the state for the purpose of exercising a portion of the state's police power for the protection of public health. As such, the board possesses those powers granted by statute as well as those which must necessarily be implied if the board is to fully achieve its purpose. See Guillot v. State Highway Commission, 102 Mont. 149, 153-54, 56 P.2d 1072 (1936). Section 69-4509(2)(j) empowers the board to promulgate "necessary regulations ... for the control and disposal of sewage from ... buildings not currently connected to any municipal system." The regulation in question reaches contractors only when they work on systems within the regulatory power of the board, that is, on those systems not connected to a public sewage disposal system. Further, it could not be questioned that the power to regulate sewage disposal necessarily includes the power to ensure the creation and operation of safe and sanitary sewage disposal systems. The board has broad discretion to meet this regulatory goal by the means which it finds best suited. See Guillot, 102 Mont. at 158. In my opinion, a requirement that sewage contractors meet certain minimum competency requirements is a proper exercise of that discretion.

THEREFORE, IT IS MY OPINION:

District boards of health have the statutory power to license contractors who perform work on sewage disposal systems which are not connected to municipal sewage systems.

Very truly yours,



MIKE GREELY
Attorney General

MG/CT/br

VOLUME 37

OPINION NO. 179

CORONER - Duties; Conflict of Interest;
COUNTY OFFICER AND EMPLOYEES - Coroner; Code of Ethics;
EMPLOYEES, PUBLIC - Code of Ethics;
SECTIONS - 59-1702; 82-443(1); 95-801, R.C.M. 1947.

- HELD: 1. When a county coroner investigates a death, he has authority to remove the body;
2. The county coroner must make the decision as to whether or not a physician will sign the death certificate;
3. A county coroner who is also a mortician or employed by a funeral home is not automatically in violation of the provisions of the Montana Code of Ethics. However, the mortuary that he is affiliated with may not receive compensation for any services related to the coroner's official duties.

27 December, 1978

Keith Haker
Custer County Attorney
Custer County Courthouse
1010 Main
Miles City, Montana 59301

Dear Mr. Haker:

You have requested my opinion on the following questions:

1. When a person dies of natural causes and is not under the care of a physician or surgeon licensed in the State of Montana and the county coroner is called to make an investigation, can he remove the body of the deceased?
2. Does the county coroner make the decision whether a physician will sign a death certificate, and what steps must he take to make that determination?
3. If there is more than one mortician in the county, and one of the morticians is the county coroner, is he automatically in violation of section 59-1702(2)(b) if he performs the duties of county coroner?

Montana Administrative Register

1-1/11/79

In regard to your first question, section 95-801 provides in pertinent part:

Whenever a coroner is informed that a death was caused by other than natural causes, or that a death has occurred under circumstances such as to afford a reasonable ground that the death is the result of criminal conduct, or when no physician or surgeon licensed in the State of Montana will sign a death certificate, the coroner shall make an investigation thereof.

In addition, section 82-443(1) provides:

When a medical examiner or coroner takes custody of a body of a deceased person for purposes of examination and no other person claims the body, the coroner of the county in which the death occurred where the body was found, shall cause it to be decently interred.

It is clear from the reading of the two provisions that the coroner has the duty to investigate a death when a person dies of natural causes and is not under the care of a physician. The coroner also has the authority to do all that he considers necessary to perform an adequate investigation, including removing or having the body of the deceased removed. The powers which a county officer can exercise are not confined to those expressly granted by statute. An officer has by implication such powers as are necessary for due and efficient exercise of those expressly granted. Guillot v. State Highway Commission, 102 Mont. 149, 56 P.2d 1072 (1936).

It is also clear that the coroner must eventually make the decision as to whether a physician will sign the death certificate. The statute does not specifically provide what steps a coroner must take in making that determination, but it may be inferred that the coroner should contact any appropriate medical personnel including the physician that most recently treated the person together with appropriate county health officials.

Your last question concerns the application of the Montana Code of Ethics, contained in section 59-1701 et seq., R.C.M. 1947, to the office of the county coroner.

It is my opinion that a county coroner who is also a mortician does not automatically violate the provisions of section 59-1707(2)(b) when he performs his official duties. That section provides:

(2) An officer or an employee of local government may not:... (b) perform an official act directly and substantially effecting to its economic benefit a business or other undertaking which he either has a substantial financial interest or is engaged as counsel, consultant, representative or agent.

"Financial interest" is defined in section 59-1702(4)(c) to include an employment interest. The Code of Ethics prevents a county officer from performing an act that will provide substantial economic benefit to a business in which he is an employee. Therefore, as long as the mortuary in which the coroner is associated, either as an owner or employee, does not obtain a direct economic benefit from the actions of the coroner, the provisions of section 59-1707(2)(b) would not be violated.

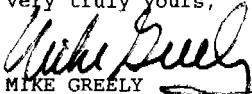
By way of example, a coroner who is also a mortician must conduct an investigation when a person dies of natural causes and a physician has not signed the death certificate. That investigation could include the removal of the body to the mortuary with which the coroner is affiliated. However, that mortuary may not receive compensation in connection with that case. This rule does not apply if the mortuary is the only mortuary in the county. See 37 OP. ATT'Y. GEN. NO. 104.

THEREFORE, IT IS MY OPINION:

1. When a county coroner investigates a death, he has authority to remove the body;
2. The county coroner must decide whether a physician will sign the death certificate;
3. A county coroner who is also a mortician or employed by a funeral home is not automatically in violation of the provisions of the Montana Code of Ethics. However, the mortuary that he is affiliated with may not receive

compensation for services related to the coroner's
official duties.

Very truly yours,


MIKE GREELY
Attorney General

MG/McG/ar