MONTANA ADMINISTRATIVE REGISTER

1979 ISSUE NO. 6
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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 6

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NOTICE SECTION

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BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of a rule concerning grievances for State employees.	NOTICE OF PROPOSED ADOPTION OF GRIEVANCE RULE. NO PUBLIC HEARING CONTEMPLATED.

TO: All Interested Persons:

1. On or after April 28, 1979, the Department of Administration proposes to adopt a Rule concerning grievances for State employees.

2. The proposed Rule does not replace or modify any section currently found in the Montana Administrative Code.

3. The proposed Rule reads as follows:

RULE I. INTRODUCTION. This grievance Rule is designed to achieve the following objectives: (a) To guarantee all eligible State employees a consistent, expeditious and equitable means of adjusting grievances.

(b) To protect the employee's right to file grievances without fear of reprisal or prejudice to the employee's job.

(c) To set up a forum for review and final settlement.

RULE II. DEFINITIONS. (a) Class Action Grievance means a grievance by a group of employees affected by similar conditions of employment in the same class, unit and working environment.

(b) Employee means all employees of the state of Montana except those covered by a collective bargaining contract, or by a statutory grievance procedure or working on a contracted services basis.

(c) Grievance means a complaint or dispute initiated by an employee regarding the application, meaning or interpretation of personnel policies or procedures or other terms and conditions of employment that affect the work activity of such employee. This includes complaints of discrimination based on race, color, religion, age, sex, national origin, political belief, marital status or existence of a handicap.

(d) Hearing Committee means the three or more members who officiate a fair and impartial hearing on grievances. The committee consists of equal members designated by the employee and by management and a final member agreeable to both the initial members, who will chair the committee. In a discrimination grievance, one member of the hearing committee should be the EEO Officer or someone with knowledge of EEO.

(e) Inquiry means the process of gathering and weighing evidence bearing on grievances. This process may include: (i) securing documents; (ii) holding individual interviews or group meetings; (iii) conducting a hearing; or (iv) any combination of the above.

(f) Management means those individuals, beginning with the first applicable supervisor, with direct line authority who can effectively resolve grievance matters.

(g) Personnel and/or EEO Officer means an agency employee assigned to participate in the development of and coordinate the implementation of the statewide and the department's uniform personnel policies and procedures and/or assigned to participate in the development of and coordinate the implementation of the department's EEO and affirmative action program.

RULE III. POLICY. (a) Each department should have one non-union grievance procedure, preferably this policy; once that procedure has been initiated, the grievant may not pursue the same grievance through another procedure.

(b) Complete information concerning an agency's grievance procedure shall be available to all employees. All employees shall be informed by the agency of the existence of current procedures. Copies should be posted in locations conspicuous to all employees

(c) Management should consult with the EEO Section and/or agency EEO Officer for technical advice on all grievances alleging discrimination.

(d) The agency Personnel and/or EEO Officer or other official appointed by the Department Director shall be charged with administering this policy and encouraging employees and supervisors to consult with that official freely and informally.

(e) As outlined in Policy 3-0130, Discipline Handling, punitive actions are usually grievable through this grievance procedure, while corrective actions are not.

(f) Class action grievances may be presented by a group spokesperson and/or an outside representative chosen by the group and will follow the outlined steps.

(g) Grievances under the jurisdiction of classification and pay, Human Rights, Merit System or the Board of Personnel Appeals should be handled in an informal manner prior to formalizing their established procedures.

(h) Employees filing a complaint of discrimination are encouraged to follow this policy as an initial step; however, they may concurrently file with the State Human Rights Division or the U.S. Equal Employment Opportunity Commission at any time during the internal complaint process, though no later than 180 days after the occurrence of the alleged grievance.

(i) An employee's grievance must be cancelled when: (i) the employee requests it be cancelled in writing or signs a written waiver indicating that satisfaction has been obtained,

(ii) employment is terminated, unless the grievance is pursued after termination,

(iii) the employee dies, unless the grievance involves a question of pay or fringe benefits; or,

(iv) the employee fails to file or advance the grievance according to established procedure.

(j) If either party fails to act upon the grievance within the specific time limits for each step, that party waives the right to respond at that step. If the employee fails to respond, the grievance will be cancelled; if the supervisor fails to respond, the employee may proceed to the next step of the procedure.

(i) Time limits on each step shall be consistently applied for all employees within an agency.

(ii) Time limits may be waived at any step by mutual written consent of both parties.

(k) Upon written agreement by both parties any step of the proceedings may be waived.

(l) (i) No employee shall be subjected to termination, demotion or any form of punishment or harassment as a result of this activity.

(ii) Retaliation for an EEO complaint is unlawful and can be redressed by the State Human Rights Commission or Equal Employment Opportunity Commission.

RULE IV. GRIEVANCE AND COMPLAINT PROCEDURE. (a) Informal Procedure: (i) An informal (oral) grievance procedure shall be considered prior to any formal (written) complaint or grievance; however, for accurately monitoring time the employee may submit the grievance in writing.

(ii) Every effort should be made to find an acceptable solution at the lowest management level possible within fifteen working days of knowledge of the incident in question.

(iii) Either party may consult the agency personnel/EEO representative for informal discussion, investigation and possible resolution of the grievance at this time.

(b) Formal Procedure: (i) An employee has the right to assistance by a representative of the employee's choosing at any step of the formal grievance and complaint procedure. Costs of representation shall be paid by the employee.

(ii) If an employee pursues a formal grievance, a reasonable amount of working time may be used after appropriate notification has been provided to management and the employee has concurrence from management to consider temporary replacement or other necessary planning.

(iii) Step I. Management: Within five working days of management's informal response or failure to respond, the employee may submit the Employee Grievance Form (attached) to management with a copy to the Personnel/EEO Officer. Management has five working days to respond to the written formal grievance.

(iv) If management's response is not satisfactory to the employee or if management fails to respond within five working days, the grievance will be forwarded to the next step. In a discrimination grievance, the EEO Officer should be consulted for settlement prior to Step II.

(v) Step II. Hearing Committee: If the employee proceeds to this step, the personnel representative initiates arrangement of a hearing, including the selection of a committee within ten working days.

(vi) The hearing committee will conduct an inquiry on the grievance within ten working days after the selection of the final member.

(vii) Basic principles of due process will govern a hearing. Both parties shall have: (A) Notice of specific charges. (B) The right to produce evidence, both in writing and through witnesses. (C) The right to question others who produce evidence. (D) The right to a decision made strictly on recorded evidence.

(viii) Either party may request a typed transcript of the hearing recording. The party requesting a transcript will bear the cost. If both parties request a transcript, they will share the cost.

(ix) All actions and reports shall accompany the final recommendation of the hearing committee.

(x) Step III. Department Director: Within five working days after the actual hearing, the committee will submit its recommendation, in writing, to the Director.

(xi) After receiving the hearing committee's recommendation, the Director has ten working days to render a decision and reason(s) for the decision in writing to the parties involved.

(xii) The decision of the Director shall be the final agency decision in all grievances.

(xiii) If the employee is not satisfied with the outcome of the Director's decision, the grievance may be brought before the applicable statutorily authorized review body: the Board of Personnel Appeals, the Merit System Council, the Human Rights Commission, or any appropriate federal enforcement agency, while those grievances not allowed redress with the aforementioned may be pursued at the district court level.

RULE V. CONCLUSION. (a) In all grievances alleging discrimination, the employee will be advised of the employee's right to file a complaint with the Montana Human Rights Division.

(b) A record of the grievance steps and final outcome shall be filed with the Personnel/EEO Officer or central records function at the end of the grievance.

(c) All State agencies shall adopt internal rules and procedures to implement this Rule unless it conflicts with negotiated labor contracts or specific statutory authority, which shall take precedence to the extent applicable.

4. The reason for this Rule is as follows: There is a critical need to provide equitable grievance procedures for State employees. Adoption of these Rules will assure a consistent, expeditious and equitable means of adjusting grievances.

5. Interested persons may submit their data, view or arguments concerning the proposed adoption to the Administrator, Personnel Division, Department of Administration, Room 130, 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 that office before April 26, 1979.

7. If the department receives requests for a public hearing on the proposed Rule 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 of parties will be made by publication in the Administrative Register.

8. The authority of the Department to make the proposed adoption of the Rule is based on Section 2-18-102, MCA (59-913, R.C.M., 1947). Implementation is based on Section 2-18-102, MCA (59-913, R.C.M., 1947).

David M. Lewis

David Lewis, Director
Department of Administration

Certified to the Secretary of State, MARCH 20, 1979

EXAMPLE

STATE OF MONTANA	EMPLOYEE GRIEVANCE FORM

Instructions

EMPLOYEE: Type or print all requested information and submit to management with a copy to the Personnel/EEO officer within five (5) days of conclusion of informal (oral) grievance procedure.

MANAGEMENT: Type or print all requested information and submit to employee within five (5) days of receipt. If the grievance is not resolved at the initial step (first applicable supervisor), the employee must so note below and this form will be forwarded to the Hearing Committee within five (5) days of receipt of response or lack of response from management.

If the grievance is not resolved at the second step (Hearing Committee), the employee must so note below and this form will be forwarded to the Department Director within five (5) days of receipt of response from the Hearing Committee.

NOTE

IF EITHER PARTY FAILS TO ACT UPON THE GRIEVANCE WITHIN THE SPECIFIC TIME LIMITS FOR EACH STEP, THAT PARTY WAIVES THE RIGHT TO RESPOND AT THAT STEP.

Employee Information

Employee's Name _____ Social Security Number _____
(Last) (First) (Middle)

Department _____ Division _____

Bureau _____ Section _____

Position Title _____ Home Phone _____ Work Phone _____

Immediate Supervisor's Name _____ Date of (oral) grievance procedure _____

Describe the grievance: _____

Describe the desired solution: _____

I certify that all facts stated here are correct to the best of my knowledge and belief	EMPLOYEE'S SIGNATURE AND DATE

Supervisor's Statement

Supervisor's Response: _____

Date of receipt of grievance	SUPERVISOR'S SIGNATURE AND DATE OF RESPONSE

continued on next page

EXAMPLE

Employee's Statement

The Supervisor's Response is: ( ) Accepted and I hereby request cancellation of this grievance
( ) Rejected for the following reasons:

EMPLOYEE'S SIGNATURE AND DATE

Hearing Committee's Statement

Hearing Committee's Response:

Date of receipt of grievance	CHAIRPERSON'S SIGNATURE AND DATE OF RESPONSE

Employee's Statement

The Hearing Committee's Decision is: ( ) Accepted and I hereby request cancellation of this grievance
( ) Rejected for the following reasons:

EMPLOYEE'S SIGNATURE AND DATE

Department Director's Statement

Department Director's Decision:

Date of receipt of grievance	DEPARTMENT DIRECTOR'S SIGNATURE AND DATE OF RESPONSE

Employee's Statement

The Department Director's Decision is: ( ) Accepted and I hereby request cancellation of this grievance
( ) Rejected for the following reasons:

EMPLOYEE'S SIGNATURE AND DATE

If the employee is rejecting the Department Director's decision, refer to Grievance Policy for next step

PD-7, NEW 4-78

Distribution: Original: Routing Copy, First Carbon: Personnel/EEO Officer, Second Carbon: Employee's Copy.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment) of Rule 4.14.530(1) Proclaiming & Establishing U.S. Std. Grades In the matter of the adoption) of Rules I, II, III, IV, V,) VI, VII, VIII, and IX.)	NOTICE OF PROPOSED AMENDMENT OF RULE 4.14.530(1)A.R.M.; AND NOTICE OF PROPOSED ADOPTION OF RULES I, II, III, IV, V, VI, VII, VIII, AND IX. NO PUBLIC HEARING CONTEMPLATED.

TO: All Interested Persons

1. On the 1st day of May, 1979, the department proposes to amend Rule 4.14.530(1)A.R.M. by deleting from the listing set forth therein, the word "cherries". A copy of the entire rule as proposed to be amended may be obtained by contacting Mr. Roy Bjornson. Catchphrase to Rule is, Proclaiming and Establishing U.S. Standard Grades.

2. The rule is proposed to be amended by deleting the word "cherries" in order that the proposed rules to be adopted, following below, can more fully and completely address in detail the grading and handling of cherries.

3. The Rules proposed to be adopted provide as follows:

RULE I MONTANA NO. 1 GRADE AND TOLERANCES DEFINED. (1) Montana No. 1 shall consist of sweet cherries which meet the following requirements: Similar Varietal characteristics; mature; fairly well colored; well formed and clean; free from decay insect larvae or holes caused by them, soft over-ripe or shriveled, underdeveloped doubles and sunscald; and free from damage by any other cause.

(2) Size. Unless otherwise specified, the minimum diameter of each cherry shall be not less than three-fourths inch. The maximum diameter of the cherries in any lot may be specified in accordance with the facts.

(3) Tolerances. In order to allow for variations incident to proper grading and handling, the following tolerances, by count, are provided as specified:

(a) For defects at shipping point. Montana No. 1. Eight percent for cherries which fail to meet the requirements for this grade: PROVIDED, That included in this amount not more than four percent shall be allowed for defects causing serious damage, including in this latter amount not more than one-half of one percent for cherries which are affected by decay.

NOTE: Shipping point, as used in these standards, means the point of origin of the shipment in the producing area or at port of loading for ship stores or overseas shipment, or, in the case of shipments from outside the continental United States, the port of entry into the United States.

(b) For defects en route or at destination. Montana No. 1. Twenty-four percent for cherries in any

lot which fail to meet the requirements for this grade: PROVIDED, That included in this amount not more than the following percentages shall be allowed for defects listed:

(i) Eight percent for cherries which fail to meet the requirements for this grade because of permanent defects; or

(ii) Six percent for cherries which are seriously damaged, including therein not more than four percent for cherries which are seriously damaged by permanent defects and not more than two percent for cherries which are affected by decay.

(c) For off-size. Five percent for cherries which fail to meet the specified minimum diameter and ten percent for cherries that fail to meet any specified maximum diameter.

RULE II APPLICATION OF TOLERANCES. Individual samples shall have not more than double the tolerances specified, except that at least two defective and two off-size specimens may be permitted in any sample: PROVIDED, That the averages for the entire lot are within the tolerances specified for the grade.

RULE III DEFINITIONS. (1) Similar varietal characteristics. "Similar varietal characteristics" means that the cherries in any container are similar in color and shape.

(2) Mature. "Mature" means that the cherries have reached the stage of growth which will insure the proper completion of the ripening process.

(3) Fairly well colored. "Fairly well colored" means that at least ninety-five percent of the surface of the cherry shows characteristic color for mature cherries of the variety.

(4) Well formed. "Well formed" means that the cherry has the normal shape characteristic of the variety, except that mature well developed doubles shall be considered well formed when each of the halves is approximately evenly formed.

(5) Clean. "Clean" means that the cherries are practically free from dirt, dust, spray residue, or other foreign material.

RULE IV DAMAGE. "Damage" means any specific defect described in this section; or any equally objectionable variation of any one of these defects, any other defect, or any combination of defects, which materially detracts from the appearance, or the edible or marketing quality of the fruit. The following specific defects shall be considered as damage:

(1) Cracks within the stem cavity when deep or not well healed, or when the appearance is affected to a greater extent than that of a cherry which has a superficial well healed crack one-sixteenth inch in width extending one-half the greatest circumference of the stem cavity;

(2) Cracks outside of the stem cavity when deep or not well healed, or when the crack has weakened the cherry to the extent that it is likely to split or break in the process of proper grading, packing and handling, or when materially affecting the appearance;

(3) Hail injury when deep or not well healed, or when the aggregate area exceeds the area of a circle three-sixteenths inch in diameter;

(4) Insects when scale or more than one scale mark is present, or when the appearance is materially affected by any insect;

(5) Limbrubs when affecting the appearance of the cherry to a greater extent than the amount of scarring permitted;

(6) Pulled stems when the skin or flesh is torn, or when the cherry is leaking;

(7) Russeting when affecting the appearance of the cherry to a greater extent than the amount of scarring permitted;

(8) Scars when excessively deep or rough or dark colored and the aggregate area exceeds the area of a circle three-sixteenths inch in diameter, or when smooth or fairly smooth, light colored and superficial and the aggregate area exceeds the area of a circle one-fourth inch in diameter;

(9) Skin breaks when not well healed or when the appearance of the cherry is materially affected; and,

(10) Sutures when excessively deep or when affecting the shape of the cherry to the extent that it is not well formed.

RULE V DIAMETER. "Diameter" means the greatest dimension measured at right angles to a line from the stem to the blossom end of the cherry.

RULE VI SERIOUS DAMAGE. "Serious damage" means any specific defect described in this section; or an equally objectionable variation of any one of these defects, any other defect, or any combination of defects which seriously detracts from the appearance or the edible or marketing quality of the fruit. The following specific defects shall be considered as serious damage:

(1) Decay;

(2) Insect larvae or holes caused by them;

(3) Skin breaks which are not well healed;

(4) Cracks which are not well healed; and,

(5) Pulled stems with skin or flesh of cherry torn or which causes the cherry to leak.

RULE VII PERMANENT DEFECTS. "Permanent defects" means defects which are not subject to change during shipping or storage; including, but not limited to, factors of shape, scarring, skin breaks, injury caused by hail or insects, and mechanical injury which is so located as to indicate that it occurred prior to shipment.

RULE VIII CONDITION DEFECTS. "Condition defects" means defects which may develop or change during shipment or storage; including but not limited to decayed or soft cherries and such factors as pitting, shriveling, sunken areas, brown discoloration and bruising which is so located as to indicate that it occurred after packing.

RULE IX MARKING CONTAINERS. Containers shall be conspicuously and legibly stamped with the name and the address of the grower, packer or shipper, the net weight, and may be marked with the true variety name of "Sweet Cherries."

4. The rule changes proposed are to provide for a uniform grading classification with the states of Oregon and Washington, thereby benefiting the cherry producing industry of Montana and the Montana public.

5. Interested parties may submit their data, views or arguments concerning the proposed amendment and proposed rules in writing to Roy Bjornson, Room 110, Scott Hart Bldg., Sixth & Roberts Sts., Helena, Mt. 59601, no later than April 30, 1979.

6. The authority of the department to make the proposed rule changes is section 80-3-110 MCA. (Title 3, Section 1408, R.C.M. 1947.)

W. Gordon McOmber, Director

Certified to the Secretary of State March 19, 1979.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

In the Matter of the Amendment of Rule 8-3.14(14)-S1440(6), (b), (d), (g) New (j) and (k) as it relates to Amendment of the Distributor Formula: Pricing New Products: Special School Price on Low-Fat Milk: Reducing Distributor and Retailer Margins: Increase the Interval in the Distributor's Formula and Method of Computing Retail Price. (Statewide Hearing April 20 & 21, 1979)	NOTICE OF PUBLIC HEARING FOR THE AMENDMENT OF A RULE

TO: All Interested Persons:

1. On April 20 and 21, if necessary, 1979, at 9:30 a.m., MST, or as soon thereafter as interested parties can be heard, a public hearing will be held in the Capital Club Room of the Colonial Motor Hotel and Convention Center, 2301 Colonial Drive, Helena, Montana 59601. The hearing is for the purpose of amending Rule 8-3.14(14)-S1440, as follows:

(a) Amending the above-referenced rule to reflect a change in the interval in the Distributor's from 5.3 to 6.3 and deleting economic factors (1), (2) and (3) and substituting therefor—Weekly Wages--Total Private--(Revised).

(b) Amending subsection (6)(b) to reflect a change from December 1973 to March 1978 as a base period and changing the incremental deviation from 122.10 to 200.40 and thus reflecting a four cent rather than a two cent reduction in a distributor's margin based on a one-half gallon of whole milk.

(c) Subsection (6)(d) will be amended to reflect a change in dates for conversion of factors to weighted values from each month to the first of the month following the close of each calendar quarter.

(d) Subsection (6)(g) is amended to reflect that the wholesale price of a half gallon of whole milk will be marked up nine cents to arrive at the retail prices and all other products priced accordingly.

(e) New subparagraphs (j) and (k) are proposed to be added to 8-3.14(14)-S1440(6):

(j) It is proposed that low-fat chocolate milk be priced by adding the difference between whole white milk and whole chocolate milk to the price of white low-fat milk.

(k) It is further proposed that a special price on low-fat and low-fat chocolate milk in half

(1/2) pints to schools be established using the same differential as is used for whole homogenized milk for schools and monthly price announcements amended accordingly.

2. Because of length, the entire Notice of Public Hearing in this matter is not reproduced herein, but copies of the complete Notice and the underlying documents utilized by the Board in the development of this Notice and Hearing are available for inspection, during regular business hours, at the offices of the Department of Business Regulation, 805 North Main Street, Helena, Montana 59601. Copies will be provided upon request and payment of copying charges. Requests for copies should be made to the Department by visiting or writing the address given in this paragraph or by telephone, (406) 449-3163.

3. This Rule is proposed for the purpose of removing insofar as possible volatility of the pricing formula at the distributor level and providing for price as well as service competition at the retail level.

4. Interested persons may present their data, views or arguments pursuant to Section 2-4-302, MCA, either orally or in writing at the hearing or by mailing the same to the Board of Milk Control, 805 North Main Street, Helena, Montana 59601.

5. James T. Harrison, Esq., Suite 21, Professional Center, Helena, Montana 59601, has been designated by the Board and the Department to preside over and conduct the hearing.

6. The authority of the Board of Milk Control to conduct this hearing is based on Section 81-23-302, MCA. **(Sec. 27-407, R.C.M. 1947)**

BY ORDER OF THE MILK CONTROL BOARD

Curtis C. Cook

Curtis C. Cook, Esq.
Chairman of the Board

By: K.M. Kelly

K.M. Kelly, Administrator
and Executive Secretary

CERTIFIED TO THE SECRETARY OF STATE'S OFFICE ON MARCH 19th, 1979.

BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of the repeal of rule ARM 16-2.14(2)-S14210 and the adoption of rule ARM 16-2.14(2)-____, a rule for regulating food service establishments.	)))))	RE-NOTICE OF PUBLIC HEARING FOR REPEAL OF RULE ARM 16-2.14(2)-S14210 AND FOR THE ADOPTION OF A RULE REGULATING FOOD SERVICE ESTABLISHMENTS

TO: All Interested Persons

1. On January 25, 1979, the Department of Health and Environmental Sciences published at page 18 of the 1979 Montana Administrative Register, issue number 2, notice of a proposed repeal of rule ARM 16-2.14(2)-S14210 and the adoption of rule ARM 16-2.14(2)-S____, a rule for regulating food service establishments. A public hearing was to have been held on February 26, 1979, to receive comments from the public on this proposed Department action but it was postponed. A new date has been set for the previously scheduled public hearing, April 24, 1979, at 1:30 p.m., or as soon thereafter as practicable, in rooms 142-143, Conference room of the Cogswell Building, corner of Roberts Street and Lockey Avenue, Capitol Complex, Helena, Montana, 59601.

2. The proposed new rule replaces the present rule regulating food service establishments. The present rule, ARM 16-2.14(2)-S14210, will be repealed if the new rule is adopted.

3. The proposed rule provides in summary for the regulation of food service establishments including but not limited to:

(a) the care of food supplies;
(b) food protection;
(c) food storage;
(d) food preparation;
(e) food display and service;
(f) food transportation;
(g) personnel;
(h) equipment and utensils materials;
(i) equipment and utensils design and fabrication;
(j) equipment installation and location;
(k) equipment and utensil cleaning and sanitization;
(l) equipment and utensil storage;
(m) water supply;
(n) sewage;
(o) plumbing;
(p) toilet facilities;
(q) lavatory facilities;
(r) garbage and refuse;
(s) insect and rodent control;
(t) floor construction and maintenance;
(u) wall and ceiling construction and maintenance;
(v) cleaning of physical facilities;

(w) lighting;
(x) ventilation;
(y) dressing rooms and locker areas;
(z) poisonous and toxic materials;
(aa) premises;
(ab) mobile food services;
(ac) commissaries;
(ad) mobile food service establishment servicing areas;
(ae) temporary food service establishments;
(af) licensing;
(ag) inspections;
(ah) examination and condemation of food;
(ai) review of proposed construction plants;
(aj) procedures for action when employees are suspected of transmitting communicable diseases.

A copy of the entire proposed rule may be obtained by contacting the Food and Consumer Safety Bureau, Montana State Department of Health and Environmental Sciences, Board of Health Building, Capitol Complex, Helena, Montana 59601, phone: (406) 449-2408.

4. The Department's Food and Consumer Safety Bureau is proposing to repeal the present rule and adopt a new rule in order to deal with regulatory problems encountered in the administration of the present rule and to implement changes recommended by the 1976 Federal Model Food Service Sanitation Ordinance.

5. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Persons desiring to submit written comments prior to the hearing should send them to the hearing officer.

6. Robert Solomon, Montana Department of Health and Environmental Sciences, Cogswell Building, Capitol Complex, Helena, Montana, 59601, has been designated by the Director to preside over and conduct the hearing.

7. The Department's authority to act on these rules is based on sections 27-620 and 27-621, R.C.M. 1947 (50-50-103, 50-50-104, 50-50-301 through 50-50-304, MCA).

A Knight

A. C. KNIGHT, M.D., F.C.C.P.
Director

Certified to the Secretary of State March 20, 1979.

BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of the adoption of a rule setting requirements for the control of outbreaks of measles	NOTICE OF PUBLIC HEARING FOR ADOPTION OF A RULE TO CONTROL MEASLES OUTBREAKS

1. On April 30, 1979, at 9:00 a.m., a public hearing will be held in Rooms 142-143, Cogswell Building, Lockey and Roberts, Capitol Complex, Helena, Montana, to consider the adoption of a rule which sets out reporting and quarantine requirements for control of measles outbreaks which apply both to individuals and to schools.

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

3. The proposed rule provides as follows:

16-2.13(10)- MEASLES QUARANTINE (1) The provisions of this rule apply to outbreaks of measles, exclusive of quarantine measures contained in any other rules for control of communicable diseases.

(2) Definitions. Unless otherwise specified, for the purposes of this rule, the following definitions apply:

(a) "Measles" means an acute, highly communicable febrile disease caused by Rubeola virus.

(b) "Measles case" means a person suffering from measles, from five days before the onset of rash to five days after the onset of rash.

(c) "Immunity" means immunity to measles, as demonstrated by:

(i) a school health record of receipt of an approved measles vaccine in 1967 or later, at or after the age of 12 months, and showing the month and year of administration;

(ii) a signed statement from a licensed physician that the person has had measles disease, indicating the date of diagnosis; or

(iii) other evidence of measles immunization with an approved vaccine administered after 1967 and at or older than 12 months of age, such evidence to be verified by a licensed physician or county health department.

(d) "Approved vaccine" means a measles vaccine approved by the Food and Drug Administration, U. S. Public Health Service, or the Department.

(e) "Susceptible contact" means any person not able to demonstrate immunity who is less than 21 years of age, and who has been exposed face-to-face to a measles case, or attends the same school as a case or rides the same school bus, or attends a school which shares one or more school buses with the school in which a case has occurred.

(3) Reporting. Suspected cases of measles are to be reported by telephone immediately to the local health department and to the State Health Department by any person having

knowledge of the case, or having reason to believe that a person has this disease.

(4) Quarantine.

(a) Quarantine measures may be ordered by the local health department or by the state health department, based on the diagnosis of measles in one or more persons as confirmed by a licensed physician. The ordering authority shall post public notice of the effective date of the quarantine and provide immunizations, to the extent of its resources, to all who might desire or need such immunization, on or before the effective date.

(b) Cases of measles are to be confined to home until five days after the onset of rash. The movements of other household members in or out of the household are not restricted or prohibited unless they are susceptible contacts. The local health department shall advise the residents of the home where the measles case is quarantined to warn visitors who are not immune against measles against entering the household.

(c) Susceptible contacts are to be confined to home until 14 calendar days after their last exposure to the disease, whether face-to-face with a case or by attendance at school or school-sponsored activities. The movements of other household members or visitors in or out of the household are not restricted or prohibited.

(d) A susceptible contact may be released from confinement to receive immunization against measles, and may return to school and school-sponsored activities after having received measles immunization from a physician or health department and having submitted written documentation of such immunization to the school.

(e) The department shall, to the extent of its resources, provide measles immunizations free of charge to all susceptible contacts.

(f) Schools may have in attendance children who were immunized recently because they were susceptible contacts of a case. Such schools shall not participate in interscholastic events until 14 calendar days have elapsed since the last such child was immunized.

(5) Removal of quarantine measures. The restrictions on measles cases and on susceptible contacts will automatically terminate after the time periods indicated. If a case of measles occurs beyond the 14th day from the onset of rash of the last case, the quarantine measures may be reimposed.

4. The department is proposing this rule because of the need to establish clear control measures to prevent the spread of measles, particularly among school-age children. The need is evidenced by the fact that several outbreaks of measles have occurred within Montana in recent years and have a tendency to spread through the public school system and

interscholastic activities. Control of such outbreaks is especially important because the disease is occasionally fatal. Therefore, the rule is aimed at identification of school children who are susceptible to measles and at preventing the spread of measles through contacts at school or school-related activities.

(5) Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing or prior to it by contacting Dr. Martin Skinner, Preventive Health Bureau, Department of Health and Environmental Sciences, Helena, Montana, 59601 (Phone: 449-2645).

6. Robert Solomon, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana, has been designated to preside over and conduct the hearing.

7. The authority of the agency to make the proposed rule is based on Section 50-1-204, MCA (Section 69-4112, R.C.M. 1947).

A. C. KNIGHT, M.D., Director

Certified to the Secretary of State March 20, 1979

BEFORE THE DEPARTMENT OF STATE LANDS AND
THE BOARD OF LAND COMMISSIONERS
OF THE STATE OF MONTANA

In the matter of the)	NOTICE OF PROPOSED
adoption of rules on)	ADOPTION OF RULES
leasing of State)	NO PUBLIC HEARING
land for coal mining)	CONTEMPLATED

TO: All Interested Persons:

1. On May 21, 1979 the Board of Land Commissioners propose to adopt rules concerning coal leasing on state land.

2. The department published proposed coal leasing rules in the Montana Administrative Register on April 25, 1977 as MAC No. 26-2-19 and a public hearing was held in Helena on May 23, 1977. The department received many comments, many of which were accepted and the rules were amended accordingly. All persons who commented at the hearing have been mailed a statement of responses to comments made at the hearing. Any interested party may request a copy from the department.

3. The proposed rules provide as follows:

Rule I GENERAL PROVISIONS The board is established by the constitution of the state of Montana (Article X, section 4) to consist of the governor, superintendent of public instruction, auditor, secretary of state and attorney general. Pursuant to the provisions of section 2-15-3201 MCA (82A-1101, R.C.M., 1947) the board is designated the department head of the department as established by the legislature of the state of Montana. The department has responsibility for the administration of laws relating to state lands.

Rule II DEFINITIONS (1) When used herein, unless a different meaning clearly appears from the context:

(a) "State" means the state of Montana;

(b) "Board" means the board of land commissioners of the state of Montana;

(c) "Commissioner" means commissioner of state lands, chief administrative officer of the department;

(d) "State Lands" means all lands the leasing of which for coal purposes is under the jurisdiction of the board;

(e) "Person" means any individual, firm, association or corporation or other legal entity;

(f) "Lessee" means the person in whose name a coal lease appears of record in the offices of the department, whether such person be the original lessee or a subsequent

assignee. The term "lessee" also includes, where the context of the rule may indicate, any person who is the apparent successful bidder for a coal lease but with whom a formal coal lease agreement has not been completed and finalized;

(g) "Coal" means and includes black or brownish-black solid fossil fuel which has been subjected to the natural process of coalification and which falls within the classification of coal by rank; I Anthracite, II Bituminous, III Sub-bituminous, IV Lignite;

(h) "Qualified Applicant" means any person who may become a qualified lessee as set forth herein;

(i) "Department" means department of state lands as provided in section 2-15-3201 MCA (82-A-1101, R.C.M. 1947);

(j) "Commercial quantities" means that quantity of coal which, when produced, will enter the commercial market in the usual course of business of the entity producing the coal.

(k) "Foreign Interests" means states or governmental subdivisions of states foreign to the United States, other than Canada or Mexico; business entities organized under the laws of any state foreign to the United States, other than Canada or Mexico; and persons who are citizens of any state foreign to the United States, other than Canada or Mexico.

(l) "Value" means the contract sales price as defined in section 15-35-102 MCA (84-1313, R.C.M. 1947).

Rule III ADMINISTRATIVE DETAILS AND INFORMATION The offices and records of the department are maintained at 1625 Eleventh Avenue, Helena, Montana, under the direction and administration of the commissioner. All mail, including requests for information, application for leases and other matters should be addressed to the "Department of State Lands, Capitol Station, Helena, Montana, 59601". Payment of all moneys required or permitted under these rules and regulations or pursuant to the provisions of any coal lease shall be made to the department. All checks, drafts and money orders shall be made payable to the "Department of State Lands, Montana." Sight drafts will not be accepted.

Rule IV LANDS AVAILABLE FOR LEASING (1) State lands available for leasing by the board under these rules include state lands to which the title has vested in the state and in which the coal or coal rights are not reserved by the United States. Such state lands include those which have been sold but in which coal rights have been reserved, in whole or in part, whether such lands are under certificate of purchase or whether patents have been issued. The board in its discretion may withdraw any lands from leasing. In cases where the lands are under lease for grazing, agri-

culture or similar purposes, care will be taken in issuing the coal lease to protect the rights of the purchaser or surface lessee.

(2) If after a determination of the amount, location, and quality of the coal on the lands for lease, it appears that the extraction of the coal from such lands by strip mining methods would adversely affect the methods of recovery of deep minable coal from such operations on such lands in the future, the board may not issue a lease.

Rule V WHO MAY LEASE FOR COAL -- QUALIFIED LESSEES (1) Any person, qualified under the constitution and laws of the state of Montana, except corporations, the majority of the stock of which is controlled by foreign interests, may lease state lands for coal purposes; provided, that:

(2) Any person qualified to hold a coal lease on state lands may acquire, receive and hold more than one lease.

(a) All corporations not incorporated in Montana must obtain a certificate of authority to transact business in this state from the Secretary of State;

(b) no officer or employee of any agency of the executive department of state government who is required to inspect or examine field information in regard to prospecting for coal or the mining thereof, may take or hold such lease;

(c) the applicant, if a natural person, has reached the age of 18 years.

Rule VI PROCEDURES FOR ISSUE OF LEASE (1) The land shall be leased in as compact bodies as the form and areas of the tract held by the state and offered for lease will permit. No lease may embrace non-contiguous subdivisions of lands unless such subdivisions are within an area comprising not more than 1 square mile.

(2) No state coal lease may be issued until the coal resources and the surface of the tract to be leased have been evaluated as provided for by section 77-3-312 MCA (81-501(1), R.C.M. 1947). No coal lease may be issued for less than the fair market value of the coal included under the lease.

(3) Tracts may be offered for lease pursuant to an application submitted by a qualified lessee, or by the department of its own volition.

(4) An application to have a tract offered for lease may be made at any time during the year on a form provided by the department.

(a) Such application shall contain the information called for therein, including an adequate and sufficient description of the lands sought to be leased.

(b) Such application shall be accompanied by a $10.00 application fee. Applications not accompanied by the application fee will not be considered.

(5) Where more than one application is filed on any one tract, the department shall notify each person submitting an application subsequent to the the first qualified application that there is a prior application for that tract. All subsequent application fees shall be returned. This is the only instance in which the application fee may be refunded.

(6) When sufficient applications have been received to warrant a sale, or at the commissioner's discretion, a lease sale will be announced.

(a) Notice of a lease sale shall be given by publication in a trade journal of general circulation in the coal mining industry or in the major newspapers of general circulation within Montana each week for 4 weeks preceding the date of sale. The notice shall contain a list of the tracts being offered for lease, state the date of the lease sale, describe the bidding procedure and contain other information as is appropriate.

(b) The department shall maintain a master mailing list of prospective coal lessees who request, in writing, that their names be placed on such list; and concurrently with the publication of the notice of sale in the newspapers or trade journal, the board shall mail to each addressee on the master mailing list a copy of the notice of sale. However, such mailing shall not be deemed a legal prerequisite to a valid sale. Furthermore, the board shall have no liability to any person who may be inadvertently omitted in the mailing of such additional notices.

(c) Sales of state coal leases will be by competitive bidding. The board may call for bids on the percentage of royalty to be paid by the lessee, on a first year cash bonus to be paid by the lessee, or both; but unless the sales notices state that bids on the percentage of royalty will be called for on particular leases, all leases will be sold by bidding on the first year bonus alone.

(7) The board may require bidding to be by submission of written sealed bids, by oral bidding or by a combination of both. When sealed bids are required, the notices of sale will so state as to particular leases and will designate a date by which bids must be submitted. Where the sales notices do not state otherwise, all bidding will be oral.

(8) Subject to the board's right to reject any and all bids:

(a) When bidding is on a cash bonus basis, the lease will be awarded to the qualified applicant who submits a bid of the highest cash amount per acre;

(b) when bidding is on a percentage of royalty basis, the lease will be awarded to the qualified bidder who submits a bid of the largest percentage of royalty to be paid. No bid of less than 10% of the f.o.b. price of the coal prepared for shipment excluding that amount charged by the seller to pay taxes on production will be accepted;

(c) when bidding is on a cash bonus and percentage of royalty basis the board will determine which bid is to the best advantage of the state and award the lease accordingly.

(9) When sealed bids have been required and there is a tie for high bid, the highest bidder will be determined by oral auction among the tied bidders. If no oral bid is offered which is higher than the sealed bids, the highest bidder will be determined by lot. If no bid is made on a tract offered for lease, no lease will be awarded for that tract.

(10) The department may require a bid deposit in any amount it may determine, up to 10% of the appraised value of the coal offered for lease under any tract. When such a deposit is to be required, notice of the requirement shall be given in the notice of the lease sale.

(11) When bidding is by submission of sealed bids and a bid deposit is required, the deposit shall accompany the bid. When bidding is oral and a bid deposit is required, the deposit must be submitted prior to the opening of bidding.

(12) An applicant or successful bidder shall pay a $25.00 administrative fee for issuance of any coal lease.

Rule VII TERM OF LEASE (1) Coal leases issued hereunder shall be granted for a primary term of 10 years and so long thereafter as coal is produced from such lands in commercial quantities on the condition that all obligations of the lease agreement are met by the lessee. The rental and royalty terms of each lease shall be subject to readjustment to reflect fair market value at the end of its primary term of 10 years and at the end of each 5 year period thereafter.

(2) A lease not producing coal in commercial quantities at the end of the primary term shall be terminated, unless the leased lands are described in a mining permit issued under section 82-4-221 MCA (50-1039, 1947), or in a mine site location permit under section 82-4-122 MCA (50-1607, R.C.M. 1947), prior to the end of the primary term; and the lease shall not be terminated so long as said lands are covered and described under valid permit.

Rule VIII FORM AND PROVISIONS OF LEASE A coal lease which will be issued hereunder shall be upon the form

currently in use and approved by the board. Such form may contain all terms, provisions, and conditions as may be reasonable and proper which are not inconsistent with the Enabling Act, the Constitution and the laws of the state, and these regulations.

Rule IX RENTALS (1) An annual money rental shall be paid to the state for each coal lease at the rate of not less than $2.00 for each acre of land leased. Rental for the first year of the lease shall include any sums in excess of $2.00 per acre offered and accepted as a cash bonus for such first year's rental. The first year's rental shall be paid before issuance of the lease. Rental for each subsequent year of the lease shall be due and payable before the beginning of that year.

(2) The annual money rental shall be in addition to any royalty payment.

(3) No partial rental payment will be accepted, and the entire rental shall be considered unpaid until the full rental payment has been received.

Rule X ROYALTIES (1) The lessee shall pay in cash a royalty on all coal produced from the leased premises at a rate of not less than ten percent (10%) of the value of the coal.

(2) The value of the coal shall be determined in accordance with section 15-35-109 MCA (84-1325, R.C.M. 1947). This statute, in conjunction with section 15-35-102(1) MCA (84-1313, R.C.M. 1947), requires that the value of the coal for royalty purposes shall be either the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production, or a price imputed by the department of revenue under section 15-35-107 MCA (84-1318, R.C.M. 1947), which authorizes the department of revenue to impute a value to the coal which approximates market value f.o.b. mine, under certain conditions including utilization of the coal by the operator and sales under a contract which is not an arm's length agreement.

(3) On or before the last day of each month every holder of a producing coal lease shall make a report to the department, on a form the department prescribes, showing the number of tons mined during the preceding calendar month, the price obtained therefor at the mine, the total amount of all sales and any additional information required by the department. The report shall be signed by the lessee or some responsible person having knowledge of the facts reported and be accompanied by payment of the royalty due the state for the preceding month as shown by the report.

(4) The lessee shall report any adjustments to the sales price of the coal which affect the sales price as previously reported in the monthly reports within 30 days of the adjustment. The royalty shall be adjusted accordingly.

Rule XI ASSIGNMENTS AND TRANSFERS (1) A lessee may assign any lease, either in whole or as to subdivisions of land embracing not less than forty (40) acres covered thereby, to any assignee qualified to be a lessee as provided under the law and these regulations. Such assignment is not, however, binding upon the state until filed with the department, accompanied by the required fees, together with proof of qualifications of the assignee as a lessee, and until the assignment is approved by the department. For the purpose of this rule, any government surveyed lot whether it contains 40 acres or more shall be assignable. The approval of any assignment so filed and supported may not be withheld in any case where the rights or interests of the state in the premises assigned will not, in the judgment of the board, be prejudiced thereby, and the decision is subject to appeal as provided by law. Until such an assignment is approved by the department, the lessee of record shall continue fully liable and responsible for all of the requirements and obligations of the lease.

(2) In the case of a partial assignment, i.e. assignment of a full interest in only a portion of the leased premises, the department shall issue a new lease or new leases, with the same expiration date as the original lease for the assigned acreage. A new ledger sheet or sheets shall be prepared and the original lease adjusted accordingly. The original lessee and the assignee(s) assume full liability for their respective leases.

(3) The lessee may assign an undivided, fractional interests in any lease, either as to the whole of the leased premises or as to any portion thereof, by assigning title to the acreage in question to himself and the assignee. The assignment must show the respective shares of interest and may be approved by the commissioner as a transfer of title only without recognition of any assignment of lease obligations and responsibilities.

(4) All other assignments of coal leases or interests therein are subject to approval by the board and are binding upon the state in the discretion of the board.

(5) Assignments involving reservations of overriding royalties or other interests by assignee are approved by the commissioner as a transfer of title only and without recognition of such overriding royalties or interests. Such reservations do not affect the validity of the transfer of title.

(6) An assignment or transfer must be on the form

currently approved by the board. Evidence of transfers by operation of law should be in the form of a certified copy of the appropriate court order or decree or similar document, such as letters of administration to personal representatives, decree of distribution, executor's deed or sheriff's deed.

(7) The board may recognize any transfer by operation of law to an unqualified lessee for a period of time no longer than one year, and only for the purpose of the further transfer of the interest.

(8) The commissioner shall notify the parties to any assignment or other transfer submitted of approval or non-approval thereof.

Rule XII BONDING REQUIREMENTS The department shall demand a surety company bond, in such form and amount as it may determine, conditioned for the payment of all royalties due the state and for the carrying on of the mining operations according to the terms of the lease.

Rule XIII IMPROVEMENTS OF FORMER LESSEE (1) When a coal mining lease is applied for on land where mining operations have been carried on by a former lessee and there are surface or underground improvements on the land used at the former operations, disposition of the improvements satisfactory to the board shall be made before a new lease is issued. If the owner of such improvement desires to sell the same to the new lessee, then the new lessee shall pay him the reasonable value thereof to the extent they are suitable for the new mining operations. If they fail to agree on the value of such improvements, then such value may be ascertained and fixed by 3 arbitrators, one of whom shall be appointed by the owner of the improvements, one by the new lessee and the third by the 2 arbitrators so appointed.

(2) The reasonable compensation that the arbitrators may fix for their services shall be paid in equal shares by the owner of the improvements and the new leassee. The value of the improvements so ascertained and fixed is binding on both parties. However, if either party is dissatisfied with the valuation so fixed, he may within 10 days appeal from their decision to the department. The department shall examine the improvements and its decision shall be final. The department shall charge and collect the actual cost of the reexamimation to the owner and the new lessee in such proportion as in its judgment justice demands.

(3) Before the new lease is issued, the applicant shall show to the satisfaction of the board that he has paid the owner for the improvements as agreed upon between them or as fixed by the aforesaid arbitrators or the department,

that he has tendered payment as so fixed, or that the owner desires to remove his improvements.

Rule XIV SURRENDER OF LEASE (1) The lease may be terminated at any time by mutual consent of the lessee and the department. Such termination shall not excuse the lessee of his duty to perform obligations which have accrued or become fixed before the date of such termination. Termination shall be effective at a date agreed upon by the lessee and the department.

Rule XV FORFEITURE, CANCELLATION AND TERMINATION OF LEASES (1) If the lessee fails to comply with any provisions of state law relating to coal leases, the provisions of these rules, or the provisions of its coal lease, the department shall give lessee written notice specifying such failure. Lessee shall have a period of 60 days following such notice to cure the failure so specified. Failure to so cure may result in cancellation of the lease by the board. Any lessee whose lease has been so cancelled has the right to a hearing pursuant to the Montana Administrative Procedure Act and the regulations of the department.

(2) Upon a finding at a hearing held in accordance with the Montana Administrative Procedure Act, that a lessee has contracted with any foreign interest for the sale of coal, the lease shall automatically terminate.

Rule XVI OPERATING AGREEMENTS Any lessee may enter into agreements with another person for mining and other operations involving coal production on state lands under his lease or leases. However, no such operating agreements are in any way binding upon the state until filed with and approved by the department.

Rule XVII OPERATIONS ON STATE LEASES (1) A coal lease on state lands is subject to the conditions that the coal must be mined, handled, and marketed in a manner that will prevent as far as possible all waste of coal and that the mining operations shall be carried on in a systematic and orderly manner that will not make subsequent mining operations more difficult or expensive. A violation of any of these conditions is grounds for the cancellation of the lease.

(2) Every coal lease is conditioned upon compliance with the Montana Strip Mining and Reclamation Act and The Strip Mining Siting Act, Title 82, Chapter 4, Parts 2 and 1, respectively, MCA (Chapters 10 and 16, respectively, of Title 50, R.C.M. 1947), and any other applicable laws and regulations of the state of Montana.

(3) The lessee shall allow the department to make as

many inspections of the leased premises as it deems necessary and shall carry out at the lessee's expense all reasonable orders and requirements of the department relative to the prevention of waste and preservation of property. On the failure of the lessee to comply with this paragraph, the department shall have the right, together with other recourse herein provided, to enter on the property, repair damages, and prevent waste at the lessee's expense. These remedies are not exclusive and do not limit the state's other remedies of law.

(4) Upon the termination for any cause of any lease, the lessee must within six months after the date of the termination remove all machinery, fixtures, improvements, buildings and equipment belonging to him from the premises. Any machinery, fixtures, improvements, buildings and equipment belonging to any lessee and not removed within six (6) months after the date of termination of the lease shall, upon the expiration of the six (6) month period, become the property of the state. In special circumstances the department may allow a reasonable extension of time for removal. However, the claiming of such property of the state for salvage or otherwise, and the removal of such property from the lands, or any of such actions shall not relieve the lessee of his obligations to properly reclaim the land and restore the premises to their condition prior to mining operations as far as reasonably possible, as prescribed by Title 82, Chapter 4, Parts 1 and 2 MCA (Title 50, Chapters 10 and 16, R.C.M. 1947).

Rule XVIII COAL MINING PERMITS FOR PRIVATE USE AND FOR SCHOOLS (1) The board may in its discretion grant to any resident of this state a permit for a term of not more than 1 year to mine coal for the use of himself and his family from any coal deposit belonging to the state of Montana and not under lease upon payment to the state of the flat sum of $5.00 as a royalty for any amount of coal mined by him not exceeding 30 tons of 2,000 pounds.

(2) The board may also grant a similar 1 year permit to the board of trustees of any school district in this state, provided that if such school district requires more than 30 tons of coal per annum then any additional amount required shall be paid for in advance at the rate of 12½ cents per ton. Applications for such permits shall be accompanied by an affidavit to the effect that the coal is not wanted for sale or disposal to other parties but that it is wanted for the use of the applicant and his family or for the use of the school district, as the case may be.

(3) The granting of such permits shall not prevent the board from issuing the usual coal mining lease on land from

which the coal under such permit is to be taken. In cases of this kind the permittee shall remove the quantity of coal to which he is entitled as expeditiously as possible and his rights under the permit shall then automatically cease upon the issue of the lease.

(4) Such permits shall be subject to all other laws and rules of the state of Montana.

Rule XIX HEARINGS AND APPEALS (1) It is the desire and intent of the board that any lessee or prospective lessee be given full and adequate opportunity to be heard with respect to any matter affecting his interests in any particular lease. Any hearing will be conducted informally, without adherence to the strict rules of evidence of a court of law.

(2) A verbatim written record of any hearing or rehearing will be made if any party in interest so requests not less than 5 days prior to the day set for hearing and if the requesting party agrees to pay the cost thereof, including the cost of the original copy of the transcript. The transcript shall become a part of the case record and remain on file with the department. The party requesting such verbatim record may be required to deposit, in advance, the anticipated cost of the record. Any transcript must be certified as true, correct, and complete before it becomes part of the record.

Rule XX RECORDS (1) The board shall keep a record of all of its meetings in the form of minutes of such meetings, reflecting all matters considered by the board, decisions made and actions taken with respect to the leasing or possible leasing of state lands for coal. Such minutes shall be open to public inspection during normal office hours of the department. With respect to any hearing held by the board on application of any affected lessee, the minutes shall show only that such hearing was held, the nature of the hearing, and the decision reached by the board.

(2) A separate file and record shall be kept on each hearing held on application of a lessee or prospective lessee. Such separate file shall contain the written application for the hearing, a copy of the notice of the hearing, evidence of the mailing thereof, and the transcript of the hearing, if prepared.

(3) The department shall maintain a record of the publication of notices of all lease sales. Such record shall consist of published copies of such notices or affidavits by each printer or publisher of the newspaper or his foreman or principal clerk, annexed to a copy of the document or notice. The record shall specify the times when

and the paper in which the publication was made.

Rule XXI FEES The department shall assess the following fees:

(1) For application for coal lease.....$10.00
(2) For issuance of each coal lease.....$25.00
(3) For filing each assignment affecting a coal lease, or interest therein, of whatsoever nature.....$10.00
(4) For royalties on coal mined for private use not exceeding 30 tons of 2,000 pounds.....$ 5.00

Rule XXII AMENDMENT OF RULES AND REGULATIONS (1) These rules and regulations may be altered, changed or modified at any time by action of the board in accordance with the Montana Administrative Procedures Act. No alteration, change or modification of the rules will alter, change or modify the provisions of existing leases with regard to term, rental or royalty.

Rule XXIII IMPAIRMENT OF CONTRACT (1) Nothing in these rules may be construed to impair the obligations of any contract entered into before the effective date of Chapter 358, Law 1925.

STATE OF MONTANA
COAL LEASE

Lease No. _____

This indenture of lease, made and entered into between the state of Montana, by and through its lawfully qualified and acting State Board of Land Commissioners, hereinafter referred to as lessor, and the person, company or corporation herein named, hereinafter referred to as lessee, under and pursuant to the terms and provisions of Title 77, Chapter 3, Part 3, MCA (Title 81, Chapter 5, Revised Codes of Montana, 1947), all acts amendatory thereof and supplementary thereto, and all rules and regulations adopted pursuant thereto,

WITNESSETH:

The lessor, in consideration of the rents and royalties to be paid and the conditions to be observed as hereinafter set forth, does hereby grant and lease to the lessee, for the purpose of mining and disposing of coal and constructing all such works, buildings, plants, structures and appliances as may be necessary and convenient to produce, save, care for, dispose of and remove said coal, all the lands herein described, as follows:

Date this lease takes effect:

Name of lessee:

Address of lessee:

Land located in _____county.

Description of land:

Total number of acres, _____, more or less, belonging to _____Grant.

Annual Rental:

_____for the first year at the lease and _____per year for each succeeding year of the primary term of ten years.

Royalties:

At a rate of _____percent of the value of the coal as defined herein.

This lease is granted for a primary term of ten years and so long thereafter as coal in commercial quantities shall be produced from the land, subject to all of the terms and conditions herein set forth; however, if at the end of the primary term the land described in this lease is also described in a strip mine permit issued under section 82-4-221 MCA or in a mine site location permit under section 82-4-122 MCA, this lease shall not be terminated for non-production so long as the land remains under valid permit.

IT IS MUTUALLY UNDERSTOOD, AGREED AND COVENANTED BY AND BETWEEN THE PARTIES TO THIS LEASE AS FOLLOWS:

1. The lessor expressly reserves the right to sell, lease, or otherwise dispose of any interest or estate in the lands hereby leased, except the interest conveyed by this lease. However, lessor agrees that sales, leases, or other dispositions of any interest or estate in the lands hereby leased shall be subject to the terms of this lease and shall not interfere with the lessee's possession or rights hereunder.

2. The lessee shall pay the lessor annually, in advance, for each acre or fraction thereof covered by this lease, beginning with the date this lease takes effect, the rentals as specified and provided for above. The rental

terms of this lease shall be subject to readjustment to reflect fair market value at the end of the primary term of ten years and at the end of each five-year period thereafter if the lease is producing coal in commercial quantities. The annual rental shall be in addition to any royalty payment.

3. The lessee shall pay in cash to the lessor a royalty as specified above on all coal mined during the term of the lease. The value of the coal shall be determined in accordance with section 15-35-109 MCA (84-1325, R.C.M. 1947) Title 15, Chapter 35, Part 1 MCA (Title 84, Chapter 13, R.C.M. 1947) requires that the value of the coal for royalty purposes shall be defined as either the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production, or a price imputed by the department of revenue. The department of revenue may impute a value to the coal which approximates market value f.o.b. mine, under certain circumstances including utilization of the coal by the operator and sales under a contract which is not an arms length agreement.

4. The lessee shall make a report to the department on or before the last day of each month, showing the total number of tons mined during the preceding calendar month, the price obtained therefor at the mine (f.o.b. mine price of a ton of coal prepared for shipment or utilization, excluding that amount charged by the seller to pay taxes on production), the total amount of all sales and any additional information as requested by the department. Such report shall be on a form prescribed by the department and in current use. The royalty payment for the reported month shall accompany the report. It is the responsibility of the lessee to report any adjustments in the sales price of the coal as previously reported in the monthly reports within 30 days of the adjustment and the royalty shall be adjusted accordingly.

5. The department shall demand a surety company bond in such form and amount as it may determine conditioned for the payment of all royalties due the state and for the carrying on of the mining operations according to the terms of the lease.

6. The assignment of any lease, either in whole or as to subdivisions embracing not less than 40 acres, made to a qualified assignee is permitted. Such assignment is not binding on the state until filed with the department accompanied by the required fees, together with proof of qualifications of the assignee as a lessee, and until approved by the department.

7. This lease may be surrendered at anytime by mutual

consent of the lessee and the department. Such termination shall not excuse the lessee of his duty to perform obligations which have accrued prior to such termination. Termination shall be effective at a date agreed upon by the lessee and the department.

8. If the lessee fails to comply with any applicable state or federal law, or rules adopted pursuant to such laws or the provisions of this lease, the department shall give lessee written notice specifying such failure and may cancel this lease if the failure is not cured within sixty days. The lessee of the cancelled lease may appeal such cancellation pursuant to the Montana Administrative Procedure Act.

9. The lessee agrees not to contract for sale any of the coal produced or to be produced under this lease to any foreign interests. If such contract for sale to a foreign interest is established at a department hearing, this lease shall immediately terminate. Foreign interests is defined as states or governmental subdivisions of states foreign to the United States, other than Canada or Mexico; business entities organized under the laws of any state foreign to the United States, other than Canada or Mexico; and persons who are citizens of any state foreign to the United States, other than Canada or Mexico.

10. The lessee may enter into operating agreements for mining and other operations under this lease. However, such operating agreements are not binding unless approved by the department.

11. This lease is subject to the conditions that the coal shall be mined, handled, and marketed in a manner that will prevent as far as possible all waste of coal and that the mining operations shall be conducted in a systematic and orderly manner that will not make subsequent mining operations more difficult. A violation of these conditions is grounds for cancellation or forfeiture of this lease.

12. The lessee shall conduct all operations subject to such inspections as the department may make and shall carry out at the lessee's expense all reasonable orders and requirements of the department relative to the prevention of waste and preservation of property. If the lessee fails to carry out such orders and requirements, the department shall have the right to enter on the property, repair damages or prevent waste at the lessee's expense. These remedies are not exclusive and do not limit the lessor's other remedies available at law.

13. Upon termination of this lease for any cause, the lessee shall remove all machinery, fixtures, improvements, buildings and equipment belonging to him from the premises within six months of the date of termination. Any machinery, fixtures, improvements, buildings and equipment be-

longing to the lessee remaining on the premises six months after the termination date shall become the property of the state of Montana. The department may allow a reasonable extension of time for removal under special circumstances.

14. This lease shall be conditioned upon compliance with all applicable mine reclamation laws in effect now or in the future, including Title 77, Chapter 4, Parts 1 and 2 MCA (Title 50, Chapters 10 and 16, R.C.M. 1947).

15. It is understood and agreed that this lease is issued only under such title as the state of Montana may now have or hereafter acquire and that the lessor shall not be liable for any damages sustained by the lessee, nor shall the lessee be entitled to or claim any refund of rentals or royalites theretofore paid to the lessor in the event the lessor does not have the title to the coal in the leased land.

16. In the event the lessor shall institute and prevail in any action or suit for the enforcement of any provision of this lease, lessee shall pay to lessor a reasonable sum for costs incurred on account thereof.

17. SPECIAL PROVISIONS:

18. All covenants and agreements herein set forth between the parties hereto shall extend to and bind their successors, heirs, executors and assigns.

IN WITNESS WHEREOF, the state of Montana, and the lessee have caused this lease to be executed in duplicate and the Commissioner of State lands, pursuant to the authority granted him by the Board of Land Commissioners of the state of Montana has hereunto set his hand and affixed the seal of the Board of Land Commissioners this _____ day of _____, 19_____.

_____
Lessee

By _____

_____
Address

_____ _____
Commissioner of State Lands Title

(4) The rules are proposed in order to clarify and establish procedures and policies concerning coal leasing on

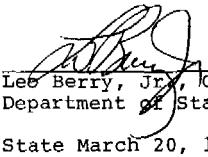
state land.

(5) Interested parties may submit their views or arguments concerning the proposed rules by writing to Leo Berry, Jr., Commissioner, Department of State Lands, Capitol Station, Helena, MT 59601 no later than May 1, 1979.

(6) If a person who is directly affected by the proposed adoption wishes to express his 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 to Leo Berry, Jr., Commissioner, Department of State Lands, Capitol Station, Helena, MT 59601 no later than May 1, 1979.

(7) If the commissioner receives requests for a public hearing on the proposed adoption from more than 10% or 25 or more persons who are directly affected by the proposed rules, or from the Administrative Code Committee of the Legislature, a hearing will be held at a later date. Notice of hearing will be published in the Montana Administrative Register.

(8) The authority of the board to make the proposed rules is based on section 77-3-303 MCA (section 81-507 R.C.M. 1947).



Leo Berry, Jr., Commissioner
Department of State Lands

Certified to the Secretary of State March 20, 1979.

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

IN THE MATTER of the Amendment of Rule 38-2.6(1)-S6000 Insurance.	)	NOTICE OF PROPOSED AMENDMENT OF RULE 38-2.6(1)-S6000 NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On April 28, 1979, the Department of Public Service Regulation proposes to amend rule 38-2.6(1)-S6000 Insurance.

2. The rule, as proposed to be amended, provides as follows (stricken material is interlined, new material is underlined):

38-2.6(1)-S6000 INSURANCE (1) Pursuant to the requirements of statute concerning insurance coverage (~~8-113~~ 69-12-402), every motor carrier regulated by this act must file with this ~~board~~ Commission evidence of insurance prior to any motor carrier operations upon the public highways of this state. Failure to so file the appropriate insurance will prohibit any carrier from conducting a transportation movement on the highways of this state. Every Class A, Class B, Class C or Class D intrastate carrier, or any interstate or foreign commerce carrier must file with this ~~board~~ Commission evidence of complying with the minimum insurance requirements of this Commission as applicable to public liability, and property damage. ~~and cargo insurance.~~ In addition each Class A or Class B intrastate carrier must file with this Commission evidence of complying with the minimum insurance requirements of this Commission as applicable to cargo insurance. Policies of insurance in regard to public liability, property damage, and cargo insurance, proof of which are submitted to this Commission by way of certificates of insurance ~~(see Form 1 and 2)~~ must be written by insurance companies who are authorized to conduct business within the state of Montana, as required by the state commissioner of insurance. Insurance policies themselves need not be filed. All certificates of insurance submitted by those insurance companies to this Commission on behalf of the respective carriers must be executed by the appropriate company and all certificates of insurance submitted for carriers holding Montana intrastate authority must be countersigned by a resident Montana agent for the respective insurance companies.

(2) Certificate of Insurance filings must be submitted only on the following forms:

(a) Intrastate - Public Liability, Property Damage - Form 2.

(b) Intrastate - Cargo Insurance - Form 1.

(c) Interstate - Public Liability, Property Damage - Form 2 or 5.

~~(2)~~ (3) No change.

~~(3)~~ (4) No change.

~~(4)~~ (5) No change.

~~(5)~~ (6) No change.

3. This rule is being amended to bring it into conformity with Montana statutes dealing with countersigning by Montana resident agents.

4. Interested parties may submit their data, views or arguments, orally or in writing, concerning the proposed rules to James C. Paine, 1227 11th Avenue, Helena, Montana 59601, phone 449-3415. Written comments must be received not later than April 26, 1979, in order to be considered.

5. Any interested person wishing to express or submit data, views or arguments at a public hearing must request the opportunity to do so, and submit this request to James C. Paine, 1227 11th Avenue, Helena, Montana 59601, no later than April 26, 1979.

6. The Montana Consumer Counsel, 34 West Sixth Avenue, Helena, Montana 59601 (Telephone 449-2771), is available and may be contacted to represent consumer interests in this matter.

7. Authority of the Department to make the proposed amendment is based on Sections 69-12-201, 2-4-302 and 2-4-305, MCA. (Sections 8-103, 82-4204 and 82-4204.1, R.C.M. 1947).

GORDON E. BOLLINGER, Chairman

CERTIFIED TO THE SECRETARY OF STATE March 20, 1979.

FORM E
UNIFORM MOTOR CARRIER BODILY INJURY AND PROPERTY DAMAGE LIABILITY CERTIFICATE OF INSURANCE
(Executed in Triplicate)

Filed with ..... (hereinafter called Commission)
(Name of Commission)

This is to certify, that the .....
(Name of Company)

(hereinafter called Company) of .....
(Home Office Address of Company)

has issued to ..... of .....
(Name of Motor Carrier) (Address of Motor Carrier)

a policy or policies of insurance effective from ..... 12:01 A.M. standard time at the address of the insured stated in said policy or policies and continuing until canceled as provided herein, which, by attachment of the Uniform Motor Carrier Bodily Injury and Property Damage Liability Insurance Endorsement, has or have been amended to provide automobile bodily injury and property damage liability insurance covering the obligations imposed upon such motor carrier by the provisions of the motor carrier law of the State in which the Commission has jurisdiction or regulations promulgated in accordance therewith.

Whenever requested, the Company agrees to furnish the Commission a duplicate original of said policy or policies and all endorsements thereon.

This certificate and the endorsement described herein may not be canceled without cancellation of the policy to which it is attached. Such cancellation may be effected by the Company or the insured giving thirty (30) days' notice in writing to the State Commission, such thirty (30) days' notice to commence to run from the date notice is actually received in the office of the Commission.

Countersigned at .....
(Street Address) (City) (State) (Zip Code)

this ..... day of ..... 19.....

.....
Authorized Company Representative

Insurance Company File No. .....
(Policy Number)

C-12799 PRINTED IN U.S.A. IRB 35398 971

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

IN THE MATTER of the Proposed Amendments of ARM 40-3.26(6)-S2640) Set and Approve Requirements and Standards; ARM 40-3.26(6)-S2670 Examinations; ARM 40-3.26(6)-S2690 Reciprocity; ARM 40-3.26(6)-S26000 Renewals, sub-sections (1)) and (2); and ARM 40-3.26(6)-S26020 Investigations.	NOTICE OF PROPOSED AMENDMENT OF ARM 40-3.26(6)-S2640 SET AND APPROVE REQUIREMENTS AND STANDARDS; ARM 40-3.26(6)-S2670 EXAMINATIONS; ARM 40-3.26(6)-S2690 RECIPROCITY; ARM 40-3.26(6)-S26000 RENEWALS; AND ARM 40-3.26(6)-S26020 INVESTIGATIONS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 28, 1979, the Board of Chiropractors proposes to amend ARM 40-3.26(6)-S2640 concerning requirements and standards; ARM 40-3.26(6)-S2670 concerning examinations; ARM 40-3.26(6)-S2690 concerning reciprocity; ARM 40-3.26(6)-S26000 concerning renewals and ARM 40-3.26(6)-S26020 concerning investigations.

2. The amendment to ARM 40-3.26(6)-S2640 reads as follows: (new matter underlined, deleted matter interlined)

"(1) Educational Requirements: The admission to examination for licensure shall be based upon proof that the applicant has completed two years of college in addition to graduation from an approved Chiropractic college ~~and applications reviewed on an individual basis with approval at the discretion of the Board~~ that has status with the Council on Chiropractic Education (C.C.E.). Applications will be reviewed on an individual basis with approval at the discretion of the Board."

3. The Board is proposing amendment of this rule to further explain what is meant by "approved Chiropractic College". The Board has ruled that in order for a Chiropractic College to be approved by Montana, that college must have status with the Council on Chirporactic Education.

4. The amendment to ARM 40-3.26(6)-S2670 amends (1) and (2), the subjects of the written examination remain the same. The amendment reads as follows: (New matter underlined, deleted matter interlined)

"(1) In the absence of an applicant's score in the National Board Examinations, which may be accepted, examination for licensure shall be made by the Board according to the method deemed necessary to test the qualifications of applicants.

During the examination, no applicant will be permitted to have on the table whereupon he is writing, any paper or object other than the examination questions and paper. ~~a blotter furnished by the Board, pen and ink, erasure and a watch.~~

Communication by the applicants will be strictly prohibited and will disqualify any applicant so doing. Disclosure of the examination number will disqualify the applicant. Applicants must rely solely upon their own judgement as to the meaning of each question and on their own knowledge of the subject in answering.

(2) The Secretary of the Board will keep examination papers on file for such a length of time as may be deemed necessary and/or one year. ~~The Secretary shall make the report sheets of examiners a permanent record, and the results marked, entered thereon shall be transferred into the examination records for final compilations of the complete record of each specific examination.~~ Those individuals who sat for the examination and were successful or unsuccessful shall be recorded in the minutes and become part of the permanent record. The written examinations have been given in the following subjects which have been required since 1934: ...."

5. The Board is proposing the amendment because they no longer provide the blotter, pen, ink, erasure and watch for the exam applicants. The amendment in sub-section (2) is proposed because the Board has deemed it necessary to keep the examination papers for one year or longer, if needed in special cases. The minute book lists the individuals who passed or failed the examination and the license numbers issued to those individuals who are successful.

6. The proposed amendment to ARM 40-3.26(6)-S2690 will read as follows: (New matter underlined, deleted matter interlined)

" (1) Applicants for reciprocity whose applications are complete and whose preliminary and professional education meets the general requirements of the Montana Chiropractic Act, and wherein the standard of such states is not in any degree or particular less than were the requirements for the State of Montana in the same year of application and educational standards required by the rules of the Board ~~shall~~ may be granted administration through licensure with or without ~~examination~~ the clinical proficiency examination. Reciprocity, however, is only effective with those states where the Board has established a mutual agreement or at the discretion of the Board."

7. The Board is proposing the amendment to give the Board discretion in issuing licenses by reciprocity. The Board also feels there may be instances when an individual, licensed in another state, may not be required to take the clinical proficiency examination.

8. The proposed amendment to ARM 40-3.26(6)-S26000 amends sub-section (1) and adds a new sub-section (2)(b), the current (b) and (c) become (c) and (d) with no changes in text, (2)(a) remains as is. The proposed amendment to sub-section (1) and the new sub-section (2)(b) will read as follows:

"(1) The Chiropractic Act provides that every licensee pay an annual renewal fee of from $5.00 to ~~$25.00~~ $50.00. ~~Said~~ The fee is due on or before ~~the first day of~~ September 1st each year. The licensee must present ~~and the presentation of~~ evidence, satisfactory to the ~~said~~ Board that they have, ~~that the said licensee~~ in the year preceding the application for renewal, attended at least ~~one of the two day educational programs as conducted by the M.C.A. provided upon a~~ ten (10) hours of education from an instructor with an accredited college. The Board may authorize issuance of a renewal, but not consecutive renewals, after showing satisfactorily to said Board that attendance ~~upon~~ at the educational programs was unavoidably prevented. ~~, provided that new~~ Those licensees licensed by examination during the six (6) months preceding September 1st, ~~by examination~~ shall be granted renewal without attending said educational programs. Failure for a licensee to comply with this rule will constitute reason for revocation of their license.

(2)(b) Classroom time shall be monitored by Board member(s) and/or a delegate."

9. The Board is proposing the amendment to the above rule as the Chiropractic Act states the renewal fee cannot be more than $50.00, not $25.00 as stated in the current rule. Also, the Board feels that it is necessary to expand on the rule in regard to the continuing education requirement. The Board feels that when a person fails to comply with the law and rules in regard to renewal of their license, that is reason for revocation of their license. The amendment of sub-section (2)(b) is being proposed as the board also feels that the classroom time at the State Convention should be monitored by a Board member and/or their delegate to guarantee actual attendance.

10. The proposed amendment of ARM 40-3.26(6)-S26020 deletes the present rule in its entirety and replaces it with the following:

"(1) The Board will review all complaints and may authorize the Department of Professional and Occupational Licensing to investigate."

11. The Board is proposing the amendment as there is no longer a Peer Review Committee. The Board at present authorizes the Department of Professional and Occupational Licensing to investigate any complaints they feel warrant investigation.

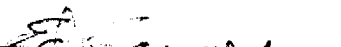
12. Interested parties may submit their data, views or arguments concerning the proposed amendments of the rules in writing to the Board of Chiropractors, Lalonde Building, Helena, Montana 59601, no later than April 26, 1979.

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 Chiropractors, Lalonde Building, Helena, Montana 59601, no later than April 26, 1979.

14. If the Board receives requests for a public hearing on the proposed amendments from more than 10% of those persons who are directly affected by the proposed amendments, or from the Administrative Code Committee of the Legislature, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 17 persons based on the 174 licensed chiropractors in Montana.

15. The authority of the Board to make the proposed amendments is based on section 37-12-201 MCA (66-503 R.C.M. 1947). The amendments implement the following sections 37-12-302 MCA (66-505 R.C.M. 1947); 37-12-304 MCA (66-506 R.C.M. 1947); 37-12-305 MCA (66-515 R.C.M. 1947); 37-12-307 MCA (66-512 R.C.M. 1947); and 37-12-322 MCA (66-510.2 R.C.M. 1947).

BOARD OF CHIROPRACTORS
JARL HOKLIN, D.C., PRESIDENT

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

Certified to the Secretary of State, March 20, 1979.

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 46-2.6(2)-S6180G(1)(o) pertaining to licensing procedures for child care agencies.	)))))))	NOTICE OF PROPOSED AMENDMENT OF RULE 46-2.6(2)-S6180G(1)(b) pertaining to licensing procedures for child care agencies. NO PUBLIC HEARING CONTEMPLATED.

TO: All interested persons

1. On May 1, 1979, the Department of Social and Rehabilitation Services proposes to amend ARM 46-2.6(2)-S6180G(1)(o) which pertains to licensing procedures for child care agencies.

2. The rule as proposed to be amended in 46-2.6(2)-S6180G(1)(o) provides as follows:

(1)(o) A statement on each employee, to be provided by the employee or the employee's physician, establishing the employee's physical health;

3. This amendment is needed to bring state licensing procedures of child care agencies into compliance with the child care agency's representatives' intent when originally drafting the current standards.

4. Interested parties may submit their data, views or arguments concerning the proposed rule in writing to the Office of Legal Affairs, P. O. Box 4210, Helena, MT 59601, no later than April 30, 1979.

5. The Department's authority to make and implement this proposed amendment is found in Section 53-2-201, MCA (71-210, R.C.M.).

Keith L. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 20, 1979.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the adoption of rules for the conduct of vocational education programs, particularly in secondary schools	NOTICE OF PUBLIC HEARING FOR ADOPTION OF RULES FOR VOCATIONAL EDUCATION PROGRAMS

TO: All Interested Persons:

1. On April 21, 1979 at 10:00 a.m., a public hearing will be held in the Regent's Conference Room 33 So. Last Chance Gulch, Helena, Montana, to consider the adoption of rules which outline the requirements to be met by local educational agencies in order for the Board of Public Education to be able to approve their programs of vocational education for state and/or federal funding.

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

3. The proposed rules provide in summary the criteria for approval of secondary programs of agricultural education, business and office education, marketing and distributing education, health occupations education, trade and industrial education, wage earning home economics, consumer and homemaking education, and industrial arts education programs. Rules and additional information are included for other vocational education programs in special vocational needs, program improvement, cooperative education, adult vocational education, VIEW, and sex equity in vocational education. A copy of the entire text of proposed requirements is available in the booklet Guidelines for Vocational Education in Montana which can be obtained by contacting the Office of Public Instruction, Division of Vocational and Occupational Services, State Capitol, Helena, Montana.

4. The Board of Public Education proposes to adopt these rules to provide direction for the conduct of vocational education programs which receive funding support from state and/or federal sources earmarked for vocational education. Effective date is July 1, 1979 to coincide with the beginning of fiscal year 1980. The program requirements are designed to ensure that participating local education agencies organize and conduct programs that meet the intent of applicable state and federal legislation which provide funds for vocational education. Although not previously printed in the Montana Administrative Code, requirements for vocational education programs were included each year in the Montana State Plan for Vocational Education prior to FY 78. Guidelines for Vocational Education in Montana will serve to provide requirements and other information in concise form separate from the State Plan.

5. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written statements will be accepted until April 30. These should be sent to the Department of Vocational and Occupational Services, Office of Public Instruction, State Capitol, Helena, Montana 59601.

6. Jeff Wulf, Industrial Education Consultant, Office of Public Instruction, has been designated to preside over and conduct the hearing.

7. The authority of the Board of Public Education to adopt these rules in based on Section 20-7-301, Montana Codes Annotated. (Sec. 75-7702, R.C.M. 1947)

Harriett Meloy
Chairperson, Board of
Public Education

By Marilyn Miller
Assistant to the Board

CERTIFIED TO THE
SECRETARY OF STATE March 20, 1979

6-3/29/79

MAR Notice No. 48-3-14

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 12-2.26(1)-S2600 relating to public use regulations	)))	NOTICE OF PROPOSED AMENDMENT OF RULE 12-2.26 (1)-S2600

TO: All Interested Persons:

1. On January 25, 1979, the Fish and Game Commission published notice of a proposed amendment of a rule relating to public use regulations on page 13 of the 1979 Montana Administrative Register, Issue No. 2.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The commission has amended the rule to strengthen the "pet animal" rule, to permit charging for group use activities in some cases, to limit the length of stay in special problem areas from 14 to 7 days, and to make small housekeeping changes.

Joseph J. Klabunde, Chairman
Montana Fish & Game Commission

Certified to Secretary of State March 15, 1979

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of the amendment of rule ARM 16-2.14(1)-S14041, a rule establishing procedures for hearings on proposed ambient air quality standards) NOTICE OF THE AMENDMENT OF RULE 16-2.14(1)-S14041, ESTABLISHING PROCEDURES FOR HEARINGS ON PROPOSED AMBIENT AIR QUALITY STANDARDS

TO: All Interested Persons:

1. On January 25 and February 28, 1979, the Board of Health and Environmental Sciences published notice of proposed amendments to rule 16-2.14(1)-S14041, concerning the procedure for hearings on proposed ambient air quality standards, at page 25 of the 1979 Montana Administrative Register, issue number 2, and page 181 of the 1979 Montana Administrative Register, issue number 4.

2. The agency has amended the rule with the following changes:

16-2.14(1)-S14041 Procedures for hearings on proposed Ambient Air Quality Standards. The following procedures shall be followed with respect to the hearings before the Board of Health and Environmental Sciences and its presiding officer for the establishment of ambient air quality standards in the State of Montana:

(1) The testimony of interested parties shall be prefiled ~~on or before April 18, 1979~~ within thirty (30) days after the date of mailing of the final environmental impact statement, with copies going to all parties on the service list. Thereafter, within ~~forty-seven (47)~~ forty-nine (49) days ~~or before June 4, 1979~~, all responses thereto shall be prefiled with the Board or its presiding officer. The prefiling of direct testimony and response testimony applies to both expert witnesses and policy witnesses, if any.

The opening statements of the direct testimony or responses thereto must contain a description of the witnesses' qualifications. The description of qualifications shall include but not be limited to the following:

(a) Educational background and experience:

(b) Description of any post-graduate training and professional career since graduation;

(c) Identification of ~~all~~ pertinent publications authored by the witness; and

(d) A disclosure of group representation, if any

(2)-(10) Same as present rule.

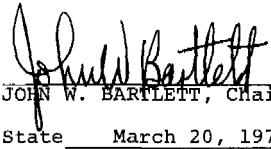
(11) Written testimony shall be accompanied by a summary of its subject matter, approximately 100 words in length.

3. At the public hearing March 9, Mike Roach, representing the Air Quality Bureau, requested that the rule be amended to state no specific dates when prefiled testimony will be due, but to allow those dates to be triggered by whatever date the ambient standards EIS will be issued,

since there was a chance that it would be delayed beyond the projected April 6 mailing date. The Board agreed and, there being no opposition, so amended the rule.

Clancy Gordon, Professor of Botany, University of Montana, requested that the requirement that witnesses identify publications be limited to those publications which were pertinent to the ambient standards rule subject matter. There was no objection, and the Board amended the rule accordingly.

Professor Gordon also suggested that witnesses be required to disclose the fees they were receiving to provide testimony. The Board declined to do so on the grounds that the information was primarily of interest value to the general public and not of direct informative value to the Board in its deliberations. It also felt that such a provision did not need to be in the procedural rule and that the Board members could ask such questions during the hearing if they so desired.



JOHN W. BARTLETT, Chairman

Certified to the Secretary of State March 20, 1979

BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 16-2.14(2)-S14200, a rule adopting federal regulations, Food, Drug and Cosmetic Act.	NOTICE OF AMENDMENT OF ARM 16-2.14(2)-S14200, (FOOD, DRUG AND COSMETIC ACT).

TO: All Interested Persons

1. On January 25, 1979, the Department of Health and Environmental Sciences published notice of a proposed amendment to rule ARM 16-2.14(2)-S14200 concerning the Montana Food, Drug and Cosmetic Act at page 20 of the 1979 Montana Administrative Register, issue number 2.

2. The Department has amended the rule as proposed.

3. As noticed, no public hearing was contemplated, nor held, and no written comments were received. The Department has amended the rule to incorporate by reference federal regulations pertaining to food quality and labeling standards which have been adopted or revised since this rule was last amended. Former subsection (2) was deleted because it unnecessarily repeated statutory language found in section 27-714, R.C.M. 1947 (50-31-305, MCA). Former subsection (3) was deleted because the new subsection (1) specifically enumerates which labeling regulations have been incorporated by reference.

A. C. KNIGHT, M.D., F.C.C.P
Director

Certified to the Secretary of State, March 20, 1979.

BEFORE THE DEPARTMENT OF HIGHWAYS
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 18-2.10(14)-S10120, Special Permits, relating to issuance of Single Trip and Term Overwidth permits; movement on Saturdays prior to 12 noon; and flagman escort requirements.	NOTICE OF THE AMENDMENT OF RULE 18-2.10(14)-S10120

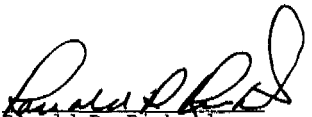
To: All Interested Persons

1. On February 15, 1979, the Department of Highways published notice of a proposed amendment to Rule 18-2.10(14)-S10120, subsections (1), (7), (8), and (11) concerning Special Permits at pages 62 through 65 of the 1979 Montana Administrative Register, issue number 3.

2. The Department has amended the rule as proposed.

3. No comments or testimony were received. The Department has amended the rule to allow issuance of Term (Annual) Special Permits up to and including 10 feet in width, allow movement on Saturdays until 12 noon, change requirements of flagmen escorts, and allow equipment trailers to carry a load of lesser width than the vehicle.

4. These amendments will become effective April 2, 1979.



Ronald P. Richards
Director of Highways

Certified to the Secretary of State March 20, 1979.

BEFORE THE DEPARTMENT OF HIGHWAYS
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 18-2.10(14)-S10170, Mobile Homes, relating to sub-section (3)(f), Wide Load Signs.	NOTICE OF THE AMENDMENT OF RULE 18-2.10(14)-S10170

To: All Interested Persons

1. On February 15, 1979, the Department of Highways published notice of a proposed amendment to Rule 18-2.10 (10)-S10170, subsection (3)(f) concerning "Wide Load" Signs at pages 66 and 67 of the 1979 Montana Administrative Register, issue number 3.

2. The Department has amended the rule as proposed.

3. No comments or testimony were received. The Department has amended the rule to remove the contradiction with subsection (3)(m) and clarify that toters drawing a mobile home 10 feet wide and under do not require a "Wide Load" Sign on front of the toter.

Ronald P. Richards
Director of Highways

Certified to the Secretary of State March 20, 1979.

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

In the Matter of the Proposed Adoption of New Rules Regarding the Granting of Interim Utility Rate Increases	))))	NOTICE OF ADOPTION OF NEW RULES ON INTERIM UTILITY RATE INCREASES

TO: All Interested Persons

1. On October 26, 1978, the Department of Public Service Regulation published notice of proposed new rules on interim rate increases at pages 1471-1473 of the 1978 Montana Administrative Register, issue no. 14. Pursuant to a request for a public hearing on the proposed rules, the Department of Public Service Regulation published notice of a public hearing on December 14, 1978 at page 1581 of the 1978 Montana Administrative Register, issue no. 17. The public hearing was held January 4, 1979 pursuant to that notice.

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

RULE I. (38-2.14(18)-S14830) DEFINITION (1) An interim rate increase is an increase granted by the Commission prior to a hearing or after a hearing and before a final decision. Interim rate increases are designated "temporary" rate increases in the enabling statute, MCA 69-3-307.

C O M M E N T: This addition was suggested by the Montana Power Company (MPC) to avoid possible confusion.

Rule II. (38-2.14(18)-S14840) PREREQUISITE TO INTERIM RATE INCREASE REQUEST (1) No change.

Rule III. (38-2.14(18)-S14850) NOTICE (1) The Commission will issue notice of all applications for interim rate increases. The notice will be transmitted to the Consumer Counsel, and all parties to the permanent rate case of which the request for temporary relief is a part, to ~~all~~ media of general dissemination in the area affected by the increase in rates, and to ~~all intervening~~ interested parties ~~participating~~ that participated in the most recent general rate increase application ~~involving~~ of the particular utility. The notice shall emphasize that any response should be made speedily.

C O M M E N T: This rule was amended because of concerns of MPC, Montana-Dakota Utilities (MDU), and the Commission. The amendment requires notice to all parties to a coincident permanent rate case while notice to media and other interested parties was made more flexible. The last sentence was added to inform people that interim rate requests usually are handled in an expedited manner. Great Western Sugar Company (GW) suggested that the notice also appear in the Montana Administrative Register; this was rejected as time consuming and of no benefit to any potentially interested party.

Rule IV. (38-2.14(18)-S14860) HEARINGS

(1) No change.

(2) An interim rate increase requested to meet increased costs of a ~~single~~, clearly measurable expense item(s) (tracking

case) may be granted prior to hearing; however, a contested case hearing will be held if requested by an interested person before the interim increase is authorized as a permanent increase.

C O M M E N T: MDU questioned paragraph (1) but the Commission has determined that this is to be its general policy, and in any case, the rule may be waived in special circumstances. Paragraph (2) was amended to MDU's suggestion to allow for tracking cases involving more than one expense item. GW suggested two specific changes which would have made hearings prior to decisions on interim increases mandatory. The Commission rejected these suggestions as contrary to statutory intent and Commission policy.

Rule V. (38-2.14(18)-S14870) SUPPORTING MATERIAL (1) Any application for interim authority to increase utility rates sought as part of a general (other-than-tracking) rate increase shall only be deemed filed when all ~~material~~ prefiled direct testimony and exhibits supporting the general rate increase request ~~has~~ have been submitted.

(2) For every interim rate increase request, the applicant shall file the original and ~~6~~ 8 copies of the letter of transmittal, application, and exhibits, with the Commission; 2 copies of the letter of transmittal, the application and any exhibits shall be simultaneously filed with the Montana Consumer Counsel; copies of the letter of transmittal, application, and any exhibits shall also be filed with all parties to any coincident permanent rate case.

(3) No change.

(a) No change.

(b) No change.

(c) No change.

(d) No change.

(e) No change.

(f) Statements ~~of operating income, and rate of return, and return on average equity,~~ showing effects of proposed adjustment, including operating income, rate of return, and return on average equity.

(g) No change.

(4) Filings made under this rule and those contemplated by Rule VII are not subject to the standards set forth in the Commission's Minimum Rate Case Filing Standards ARM 38-2.14(6)-S14160 through 38-2.14(6)-S14740.

C O M M E N T: In paragraph (1) MDU suggested a clarification of "material." MPC suggested the change in paragraph (2). MDU expressed concern that section (3) (f) contemplated jurisdictional allocations etc. It does not; estimated and system-wide figures may be accepted. The definition of general added to (1) and the sentence added at the end of the rule were both suggestions of Great Falls Gas (GFG) intended to clarify any questions about the relation of these rules to the Commission's Minimum Rate Case Filing Standards.

Rule VI. (38-2.14(18)-S14880) CRITERIA FOR APPROVAL OF

REQUEST (1) Consideration of an application to increase rates on an interim basis in a general rate increase proceeding will be guided by the facts in the ~~whole~~ record and generally established principles of utility rate regulation.

(2) No change.

(a) A ~~clear~~ showing that the expense item concerned is a ~~significant~~ clearly identifiable cost to the utility;

(b) A clear showing that the proposed rate increase precisely matches the known increased expenses;

(c) A clear showing that deferred rate relief would result in ~~unreasonable and~~ irreparable ~~loss of income~~ financial harm to the petitioning utility; and

(d) Supporting material as enumerated in Rule ~~IV (1)~~ V (3).

(3) No change.

(a) No change.

(b) No change.

(i) No change.

(ii) No change.

(iii) That deferred rate relief until a final order can be issued would result in ~~unreasonable and~~ irreparable ~~loss of revenue~~ financial harm to the petitioning utility; and

(iv) No change.

C O M M E N T: MDU questioned (1), but that part of the rule has been agreed upon by the Commission as its policy, although the word "whole" was stricken to make clear the possibility of a decision on an interim increase at the close of the general hearing. MPC had several questions regarding the inclusion of a tracking case in a general case. The Commission feels that the difficulty of drafting and applying rules to this situation would make a request for waiver of these rules appropriate.

In (2)(a) "significant" was replaced by a less ambiguous and restrictive term at the suggestion of GW and MDU. GFG suggested that (2)(b) be changed to allow matching rate increases to "known future expense increases." The Commission only added the word "known," but contemplates a matching of rates to expenses as soon as expense increases occur.

MDU suggested replacing "unreasonable and irreparable loss of income" with "irreparable financial harm," in (2)(c) and (3)(b)(iii). GW advocated the elimination of (3)(b)(iii), but offered no reasoning.

Rule VII. (38-2.14(18)-S14890) DEPENDENT UTILITIES (1) In the case of utilities dependent on other regulated utilities for significant portions of their fuel supplies, any application for interim rate relief made in response to an interim increase granted another utility will not be subject to these rules.

C O M M E N T: This rule was added to speak concerns voiced by GFG and other small utilities who depend on MPC and who have a quite specific problem when MPC is granted an interim rate increase.

Rule ~~VII~~ VIII. (38-2.14(18)-S14900) WAIVER (1) The Commission, in its discretion, may at anytime, waive any or all of these rules.

C O M M E N T: Both Great Western Sugar and the Montana Consumer Counsel expressed concern that Rule VIII defeated the purpose of the other rules. The Commission considers it necessary.

G E N E R A L C O M M E N T: The Commission benefited greatly from the participation of the Montana Consumer Counsel and other parties not specifically mentioned.

3. The authority for the Commission to make these rules is based on Sections 69-3-103 and 69-3-304, MCA. (Sections 70-113 and 70-104, R.C.M. 1947).

GORDON E. BOLLINGER, Chairman

CERTIFIED TO THE SECRETARY OF STATE March 20, 1979.

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

In the matter of the Amendments to ARM 40-3.54(18)-S54100 sub-sections (5) and (6) Emergency Medical Technician - Basic and ARM 40-3.54(18)-S54120 Sub-section (1)(d) Suspension or Revocation of Certification	NOTICE OF AMENDMENTS OF ARM 40-3.54(18)-S54100 (5) and (6) EMERGENCY MEDICAL TECHNICIAN - BASIC; ARM 40-3.54(18)-S54120 (1) (d) SUSPENSION OR REVOCATION OF CERTIFICATION

TO: All Interested Persons:

1. On February 15, 1979, the Board of Medical Examiners published a notice of proposed amendments to rules ARM 40-3.54 (18)-S54100 sub-sections (5) and (6) concerning basic emergency medical technicians and ARM 40-3.54(18)-S54120, sub-section (1) (d) concerning suspension or revocation of certification at pages 84 and 85 of the 1979 Montana Administrative Register, issue number 3.

2. The Board has amended the rules exactly as proposed.

3. No comments or testimony were received. The Board proposed the amendments since the Board of Medical Examiners is utilizing the National Registery criteria as the basis for re-certification, the amended rule changes were necessary to make the state of Montana rules more compatible with the National Registry and their policies.

BEFORE THE BOARD OF MORTICIANS

In the matter of the Amendments of ARM 40-3.58(6)-S5840 (1) applications and ARM 40-3.58(6)-S5870 Renewals	NOTICE OF AMENDMENTS OF ARM 40-3.58(6)-S5840 (1) APPLICATION AND ARM 40-3.58(6)-S5870 RENEWALS

TO: All Interested Parties:

1. On February 15, 1979 the Board of Morticians published a notice of proposed amendments to rules ARM 40-3.58(6)-S5840 sub-section (1) by including an application fee and ARM 40-3.58 (6)-S5870 concerning renewal fees at pages 86 and 87 of the 1979 Montana Administrative Register, issue number 3.

2. The Board has amended the rules exactly as proposed.

3. No comments or testimony were received. The Board has amended the rules because sections 37-19-301 MCA (66-2707 R.C.M. 1947), 37-19-303 (66-2709 R.C.M. 1947), 37-19-304 (66-2710 R.C.M. 1947), 37-19-306 (66-2712R.C.M. 1947) and 37-19-403 MCA (66-2713 R.C.M. 1947) provide for maximum renewal, application, and inspection fees and allows the Board to set the fee within that maximum. The Board reviewed its cost of operation and determined that the fees stated in the rule amendments were necessary and adequate to cover these costs.

ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State, March 20, 1979.

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of Rule ARM 46-2.10(14)-S11091 pertaining to AFDC assistance after return of absent parent and the repeal of ARM 46-2.10(14)-S11090 pertaining to AFDC assistance during adjustment period.	NOTICE OF ADOPTION OF RULE 46-2.10(14)-S11091 pertaining to AFDC assistance after return of absent parent and the REPEAL OF RULE 46-2.10 (14)-S11090

TO: All Interested Persons:

1. On February 15, 1979, the Department of Social and Rehabilitation Services published notice of a proposed adoption of a rule pertaining to AFDC assistance after return of absent parent and the proposed repeal of Rule 46-2.10(14)-S11090 pertaining to AFDC assistance during adjustment period at pages 138 and 139 of the 1979 Montana Administrative Register, issue number 3.

2. The agency has adopted and repealed the rules as proposed.

3. No comments or testimony were received. The agency has adopted the rule to encourage family reconciliation by allowing AFDC assistance payments to continue for 90 days after an absent parent returns to the family, to give the family time to develop a means of self-support. This adopted rule will replace the repealed rule which specified the circumstances of return of the parent which would qualify the family for such continued assistance, and which allowed up to 180 days to assistance. The rule changes are intended to conform the Montana rule to federal requirements.

Keith P. Colby
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 20, 1979.

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 46-2.10(14)-S11130(1)(b) pertaining to protective and/or vendor payments	))))	NOTICE OF AMENDMENT OF RULE 46-2.10(14)-S11130(1)(b) pertaining to protective and/or vendor payments

TO: All Interested Persons:

1. On February 15, 1979, the Department of Social and Rehabilitation Services published notice of a proposed amendment to a rule pertaining to protective and/or vendor payments at pages 136 and 137 of the 1979 Montana Administrative Register, issue number 3.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to bring the rule into compliance with the federal regulations on protective payees, 45 C.F.R. Section 234.60.

Keith P. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 20, 1979.

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rules 46-2.10(14)-S11240, 46-2.10(14)-S11250, 46-2.10(14)-S11260, and 46-2.10(14)-S11280 all pertaining to work registration requirements (WIN).	NOTICE OF THE AMENDMENTS OF RULES 46-2.10(14)-S11240, 46-2.10(14)-S11250, 46-2.10(14)-S11260, and 46-2.10(14)-S11280 all pertaining to work registration requirements (WIN)

TO: All Interested Persons:

1. On February 15, 1979, the Department of Social and Rehabilitation Services published notice of a proposed amendment to rules pertaining to work registration requirements (WIN) at pages 133-135 of the 1979 Montana Administrative Register, issue number 3.

2. The authority of the Department to make the amendment to the rules is based on Section 53-4-212, MCA (Section 71-503(e), R.C.M. 1947). The implementing authority is based upon Title 53, Chapter 4 part 2, MCA (Title 71, Chapter 5, R.C.M. 1947).

3. The agency has amended the rules as proposed.

4. No comments or testimony were received. The agency has amended the rules to bring about federal compliance in this program.

Keith P. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of the State March 20, 1979.

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE STATE OF MONTANA

In the matter of the adoption of six rules pertaining to reimbursement for skilled nursing and intermediate care services and repeal of 46-2.10(18)-S11450A, 46-2.10(18)-S11450B, 46-2.10(18)-S11450C, 46-2.10(18)-S11450D, 46-2.10(18)-S11450E, 46-2.10(18)-S11450F, 46-2.10(18)-S11450G, 46-2.10(18)-S11450H, 46-2.10(18)-S11450I, 46-2.10(18)-S11450J, 46-2.10(18)-S11450K.	) NOTICE OF THE ADOPTION OF) RULE 46-2.10(18)-S11451A,) RULE 46-2.10(18)-S11451B,) RULE 46-2.10(18)-S11451C,) RULE 46-2.10(18)-S11451D,) RULE 46-2.10(18)-S11451E,) And RULE 46-2.10(18)-) S11451F. AND THE REPEAL) OF 46-2.10(18)-S11450A,) 46-2.10(18)-S11450B,) 46-2.10(18)-S11450C,) 46-2.10(18)-S11450D,) 46-2.10(18)-S11450E,) 46-2.10(18)-S11450F,) 46-2.10(18)-S11450G,) 46-2.10(18)-S11450H,) 46-2.10(18)-S11450I,) 46-2.10(18)-S11450J,) 46-2.10(18)-S11450K.

TO: All interested Persons

1. On December 14, 1978, the State Department of Social and Rehabilitation Services published notice of the proposed adoption of six rules and the repeal of 46-2.10(18)-S11450A, 46-2.10(18)-S11450B, 46-2.1(18)-S11450C, 46-2.10(18)-S11450D, 46-2.10(18)-S11450E, 46-2.10(18)-S11450F, 46-2.10(18)-S11450G, 46-2.10(18)-S11450H, 46-2.10(18)-S11450I, 46-2.10(18)-S11450J, 46-2.10(18)-S11450K concerning skilled nursing and intermediate care services at pages 1594-1609 of the 1978 Montana Administrative Register, issue number 17.

2. The agency hereby adopts the six rules in order to meet federal requirements (Title XIX of the Social Security Act including Section 249 of Public Law 92-603 and 42 CFR 447 et seq) and to succeed all rules (46-2.10(18)-S11450A through 46-2.10(18)-S11450K) governing reimbursement for skilled nursing and intermediate care services currently found in the Administrative Rules of Montana at pages 46-94.7H through 46-94.7Q.

3. The rules adopted read as follows:

46-2.10(18)-S11451A REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, CLOSEOUT OF PRIOR RULES SINCE APRIL 1, 1978 AND TRANSITION

(1) The rules in effect between April 1, 1978 and March 31, 1979, provide for determining prospective rates based on costs represented in cost reports ending March 31, 1978. The Department will process and settle the March 31, 1978, cost reports and provide the appropriate reimbursement for the period April 1, 1978 through March 31, 1979.

(2) The prospective rates determined under rules in effect between April 1, 1978 and March 31, 1979, are hereby modified to allow for ~~an~~ inflationary adjustments not

anticipated when the April 1, 1978 rules were established. The prospective rates established for April, 1978, will be adjusted October 1, 1978, and January 1, 1979, to reflect the changes in the CPI and MPI during the ~~six~~ months following April 1, 1978, that were not anticipated in the 7.5 percent adjustment percentage determined in Rule 46-2.10(18)-S11450D (2)(a)(i)(ab) of the April 1, 1978 rules. The annualized adjustment percentage to be effective October 1, 1978, has been determined to be 9.2 percent, and the annualized adjustment percentage to be effective January 1, 1979, has been determined to be 9.3 percent. ~~This~~ These percentages will be multiplied by the average of per diem adjusted operating costs as determined in Rule 46-2.10(18)-S11450D(2) (a)(i)(aa) of the April 1, 1978, rules to determine the amount of the inflation adjustment. This amount will be added to each provider's per diem adjusted operating cost as determined in Rule 46-2.10(18)-S11450D(2) (a)(i)(aa) of the ~~April 1, 1978, rules~~ governing rules in effect between April 1, 1978 and March 31, 1979 which, in turn, is added to per diem property costs as determined in Rule 46-2.10 (18)-S11450D(2) (b)(i) of the ~~April 1, 1978, rules~~ governing rules in effect between April 1, 1978 and March 31, 1979 to yield the prospective rate effective October 1, 1978, and January 1, 1979.

(3) Beginning April 1, 1979 rules 46-2.10(18)-S11451A through 46-2.10(18)-S11451F are hereby promulgated and implemented. Rules 46-2.10(18)-S11450A through 46-2.10(18)-S11450K as set forth in the Administrative Register of Montana at pages 46-94.7H through 46-94.7Q are hereby specifically repealed as of April 1, 1979. ~~Beginning April 1, 1979, the new prospective rate described in Rules II through VI will be implemented.~~

46-2.10(18)-S11451B REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, PURPOSE AND DEFINITIONS

(1) Reasonable cost related reimbursement for skilled nursing and intermediate care facility services is mandated by Section 249 of Public Law 92-603, the 1972 amendment to the Social Security Act.

The purpose of the following rules is to meet the requirements of Title XIX including Section 249 of Public Law 92-603 and 42 CFR ~~450~~ 447 et seq, while treating the eligible recipient, the provider of services, and the Department fairly and equitably.

The rates determined under the following rules exclude costs estimated to be in excess of those necessary in the efficient delivery of needed health services, but shall not be set lower than the level which the Department reasonably finds to be adequate to reimburse in full actual allowable costs of a provider operating economically and efficiently and having no deficiencies.

(2) As used in these rules governing nursing home care

reimbursement the following definitions apply:

(a) "CPI" means the All Items figure from the Consumer Price Index for all Urban Consumers published monthly by the Bureau of Labor Statistics, U.S. Department of Labor.

(b) "Labor index" means the Average Hourly Earnings, of production or nonsupervisory workers of nursing and personal care facilities published by the Bureau of Labor Statistics, U.S. Department of Labor. Such earnings amount shall be utilized as an index. ~~"MPI" means the Medical Care component of the CPI.~~

(c) "Department" means the Montana Department of Social and Rehabilitation Services.

(d) "Facility" means a long-term care facility which provides skilled nursing or intermediate care, or both to two or more persons and which is licensed as such by the Montana Department of Health and Environmental Sciences.

(e) "Patient day" means an individual present and receiving services in a nursing home facility for a whole 24-hour period. Even though an individual may not be present for a whole 24-hour period on day of admission, such day will be considered a patient day. When Department rules provide for the reservation of a bed for a patient who takes a temporary leave from a facility to be hospitalized or make a home visit, such whole 24-hour periods of absence will be considered patient days. ~~"Provider Group" means the classification of providers by reference to their operation of a free-standing nursing home, a combined hospital and nursing home, or a facility licensed and serving the mentally ill or retarded, for purposes of determining cost limits.~~

(f) "HIM 15" means Provider Reimbursement Manual, Health Insurance Manual 15, Part I, 1967. ~~as updated from time to time.~~

(g) "HIM ~~18~~ 16" means the Audit Manual for Extended Care Facilities under the Health Insurance for the Aged Act, Title XVIII. ~~as updated from time to time.~~

(h) "Routine ~~"N~~nursing care services" means skilled or intermediate nursing care as defined in rules for nursing home care in ARM 46-2.10(18)-S11443 and S11444.

(i) "ICF/MR" means a facility certified to provide intermediate care for patients who are mentally retarded according to federal regulations under 42 CFR 442.400.

~~(i)~~ (j) "Owner" means any person, agency, corporation, partnership or other entity which has an ownership interest, including a leasehold or rental interest, in assets used to provide nursing care services pursuant to an agreement with the Department.

~~(j)~~ (k) "Provider" means any person, agency, corporation, partnership or other entity which has entered into an ~~contract~~ agreement with the Department for the providing of nursing care services.

~~(k)~~ (l) "Administrator" means the person, including an owner, salaried employee, or other provider, with day-to-day responsibility for the operation of the facility. In the case

of a facility with a central management group, the administrator, for the purpose of these rules, may be some person (other than the titled administrator of the facility), with day-to-day responsibility for the nursing home portion of the facility. In such cases, this other person must also be a licensed nursing home administrator.

~~(l)~~ (m) "Related parties" for purposes of interpretation hereunder, shall include the following:

(i) An individual or entity shall be deemed a related party to his spouse, ancestors, descendants, brothers and sisters, or the spouses of any of the above, and also to any corporation, partnership, estate, trust, or other entity in which he or a related party has a substantial interest or in which there is common ownership.

(ii) A substantial interest shall be deemed an interest directly or indirectly, in excess of ten percent (10%) of the control, voting power, equity, or other beneficial interest of the entity concerned.

(iii) Interests owned by a corporation, partnership, estate, trust, or other entity shall be deemed as owned by the stockholders, partners, or beneficiaries.

(iv) Control exists when an individual or entity has the power, directly or indirectly, whether legally enforceable or not, to significantly influence or direct the actions or policies of another individual or entity, whether or not such power is exercised.

(v) Common ownership exists when an individual has substantial interests in two or more providers or entities serving providers.

~~(m)~~ (n) "Fiscal year" and "fiscal reporting period" both mean the facility's Internal Revenue tax year.

~~(n)~~ (o) "Property Costs" are amounts allowable for facility or equipment depreciation, ~~and~~ interest on ~~property~~ loans for a facility or equipment, and leases or rental of a facility or equipment.

~~(o)~~ (p) "Operating costs" are the difference between total allowable cost and property costs.

~~(p)~~ (q) "Certificate of Need" is the authorization to proceed with the making of capital expenditures under Section 1122, Title XI of the Social Security Act~~,~~ and MCA, Sections 50-5-101 through 50-5-307 (R.C.M., 1947, Sections 69-5201 through 69-5212).

~~(q)~~ (r) "New facility" means an entirely newly constructed facility which has not provided nursing care services long enough to have a cost report with a complete audit as provided under ~~Rule IV(6)~~ 46-2.10(18)-S11451E(6) covering a twelve-month fiscal reporting period.

~~(r)~~ (s) "New provider" means a provider who acquires ownership or control of a skilled nursing or intermediate care facility whether by purchase, lease, rental agreement, or in any other way, subsequent to the effective date of this rule.

~~(s)~~ (t) "Date of interest" is the date to be used in determining changes in the prospective rate. When computing

changes in the CPI the dates of interest are the beginning date of a prospective rate period and the ending date of a prospective rate period. The date of interest related to adding a trend ~~GPI/MPI adjustment~~ factor to cost per day is the beginning date of a prospective rate period.

~~(t)~~ (u) References to laws and regulations refer to citations current as of March ~~January 31,~~ 20, 1978~~,~~9. ~~and shall be deemed to include all successor provisions.~~

46-2.10(18)-S11451C REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, PARTICIPATION REQUIREMENTS

The skilled nursing and intermediate care facilities participating in the Montana Medicaid program shall meet the following basic requirements to receive payments for services:

(1) Maintain a current license under the rules of the State Department of Health and Environmental Sciences for the category of care being provided.

(2) Maintain a current certification for Montana Medicaid under the rules of the Department for the category of care being provided.

(3) Maintain a current agreement with the Department to provide the care for which payment is being made.

(4) Have a licensed Nursing Home Administrator or such other qualified supervisor for the facility as statutes or regulations may require.

(5) Accept, as payment in full for all operating and property costs, the amounts calculated and paid in accordance with the reimbursement method set forth in these rules.

46-2.10(18)-S11451D REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, REIMBURSEMENT METHOD AND PROCEDURES

(1) Reimbursable Cost. Reimbursable cost is the amount the Department pays for routine nursing home services provided to a Medicaid patient~~s~~. Reimbursable cost for the applicable period is determined by multiplying the prospective rate times Medicaid patient days~~,~~ and deducting therefrom the amount a patient participates in the cost of care.

(2) Prospective Rates. Prospective rates are determined as follows and shall be announced no later than the beginning date of the period for which the prospective rate is to be effective:

(a) The prospective rate for each facility is the sum of its cost per day (see 46-2.10(18)-S11451D(2)(c) ~~Rule IV(2)(b)~~), a trend ~~GPI/MPI adjustment~~ factor (see 46-2.10(18)-S11451D(2)(d) ~~Rule IV(2)(c)~~), adjustments for property cost increases ~~a maximum-return-over-cost factor~~ (see 46-2.10(18)-S11451D(2)(i) ~~Rule IV(2)(d)~~), ~~and~~ a performance incentive factor (see 46-2.10(18)-S11451D(2)(f) ~~Rule IV(2)(e)~~)~~,~~, and an occupancy adjustment factor (see 46-2.10(18)-S11451D(2)(e)). The prospective rates are subject to a maximum prospective rate ~~an adjusted-cost-per-day limit~~ (See 46-2.10(18)-

S11451D(2)(g) ~~Rule IV(2)(f)~~) and to private pay limitations (see 46-2.10(18)-S11451D(2)(h) ~~Rule IV(2)(g)~~). Prospective rates are effective for periods beginning on or after April 1, 1979, and will be updated by the trend ~~CPI/MPI adjustment~~ factor at the beginning of each six-month period thereafter, or until rebasing under 46-2.10(18)-S11451D(2)(b) establishes a new initial date.

(b) Prospective rates are based on cost reports that represent nursing home costs for facilities participating in the program during a base period. The initial base period will include the most recent fiscal year cost report ending on or before November 30, 1977 for each facility participating in the program during that period. Rates beginning on April 1, 1979 will be based on cost reports from this initial base period. Subsequent base periods will be established when the end date of the oldest cost report used to establish rates is more than three years old. (For example, the oldest cost reports used for the initial base period will be three years old on December 31, 1979. A more current base period will be established upon which to determine rates effective January 1, 1980.)

~~(b)~~ (c) Cost per day is the allowable cost for a facility divided by related total patient days. ~~If the occupancy rate is less than 90 percent, related total patient days will be computed on the basis of a 90 percent occupancy rate. Allowable cost is determined from each facility's most recent fiscal year cost report ending on or before November 30, 1977. For facilities that do not have a fiscal year cost report ending on or before November 30, 1977, allowable cost is determined from that facility's most recent fiscal year cost report available at the time that facility's initial prospective rate is being determined and deemed acceptable for the purposes of rate determination.~~

(i) A facility's cost per day for the initial base period shall be computed utilizing the most recent cost report of the facility ending on or before November 30, 1977. Those facilities not having submitted cost reports from which the Department can obtain the requisite cost information will be assigned an estimated cost per day as determined by the Department. This estimate will be revised based on a cost report containing the requisite information to be filed no later than October 1, 1979. If such a cost report is not made available by that date, the provider's total reimbursement shall be withheld. Any amounts withheld under these circumstances will be payable to the provider upon submission of cost report containing the requisite information and applicable to the base period then in effect.

(ii) Each facility's cost per day for subsequent base periods shall be based on cost reports applicable to that particular base period.

(iii) If the total patient days represented in the cost report used to determine cost per day represents an occupancy rate of less than 85 percent, cost per day for that cost

report will be computed on the basis of 85 percent occupancy.

~~(c)~~ (d) The trend ~~CPI/MPI adjustment~~ factor is an amount that is added to cost per day at a date of interest to reflect changes in the CPI and labor index ~~MPI~~. This factor is determined by deriving the mean operating cost per day from the ~~for each provider group using~~ costs per day determined in 46-2.10(18)-S11451D(2)(c) ~~Rule IV(2)(b)~~ after such costs per day have been adjusted by the CPI and labor index to the end date of the base period. ~~MPI to a common date. Eighty percent of the mean cost per day is deemed attributable to operating costs.~~ The mean operating cost per day is multiplied by a percentage based 30% ~~2/3~~ on the CPI percentage change between two dates of interest and 70% ~~1/3~~ on the labor index percentage ~~MPI~~ change between the same two dates of interest to yield the trend ~~CPI/MPI adjustment~~ factor percentage. The change in the CPI and labor index ~~MPI~~ is determined by using the index established for the fourth ~~two~~ months previous to the date of interest. For example, to determine the trend ~~CPI/MPI adjustment~~ factor percentage to be applied to prospective rates beginning on October 1, 1979, the index for the months ending July ~~January~~ 31, 1979~~7~~ (four months before the cost report date of November 30, 1977) and May ~~July~~ 31, 1979 (four months before the date of interest, October 1, 1979), would be used.

(e) The occupancy adjustment factor is an amount that will be added to or deducted from a facility's next prospective rate should the occupancy rate during any six-month period after April 1, 1979 vary more than 3 percentage points from the occupancy rate used to determine a facility's base period cost per day. Any computatons under this section shall be subject to the 85 percent occupancy factor as described in 46-2.10(18)-S11451D(2)(c)(iii). This factor will be determined as follows:

(i) The percentage of variance in total patient days for each period shall be determined. Such percentage shall be reduced by 56 percent, which is deemed to be the portion related to costs that vary with occupancy.

(ii) When the prospective rate is being updated as called for in 46-2.10(18)-S11451D(2)(d) the prospective rate will be increased or decreased by the adjusting percentage determined in (2)(e)(i) of this rule.

(iii) All providers shall submit monthly occupancy reports on forms provided by the Department. Such reports shall be filed within fifteen days of the close of each month. If the report is late and not received by the next date of reimbursement, the provider's total reimbursement shall be withheld. All amounts so withheld will be payable to the provider upon submission of a complete and accurate occupancy report.

~~(d) The maximum return over cost is 20 percent of allowable cost. Cost reports with periods ending April 1,1979, and reviewed according to Rule V(6) will be evaluated for the difference between the reimbursable cost paid during~~

~~the cost reporting period and the allowable cost determined for the cost report. Any amount of the difference exceeding 20 percent of allowable cost will be converted to a per diem amount. This amount shall be subtracted from the cost per day as adjusted by Rule IV(2)(e) for each subsequent six-month rate determination period until the results of the next review of the facility's cost reports according to Rule V(6) determine a new maximum-return-over-cost factor.~~

~~(e)~~ (f) The performance incentive factor is determined by a facility's relation to the 80th percentile of costs per day~~. for its provider group~~. If the facility's cost per day is at or above the 80th percentile, its performance incentive factor is zero. If the facility's cost per day is less than the 80th percentile, the performance incentive factor is 50 percent of the difference between the 80th percentile of all costs per day ~~in its provider group~~ and its cost per day up to $1.50 per patient day.

~~(f)~~ (g) The ~~adjusted-cost-per-day limit is the~~ maximum prospective rate that will be allowed any facility~~. This limit~~ is the cost per day as adjusted by 46-2.10(18)-S11451D(2)(d) ~~Rule IV(2)(e)~~ that is applicable to the facility that is at the 80th percentile~~. for its provider group~~.

~~(g)~~ (h) The prospective rate for any facility shall not exceed private pay limitations, except that a state or county facility charging nominally is not subject to the private pay limitation. The lowest scheduled charges for similar nursing care services to private paying patients in effect at any time during the period for which the prospective rate applies excluding the first month after the rate is in effect shall be used when determining whether the prospective rate is limited or not. The provider shall be responsible for notifying the Department immediately if or when the prospective rate exceeds the private pay rate.

~~(h)~~ (i) Prospective rates shall be adjusted for property cost increases needed for routine nursing care services implemented after the period covered by the cost report used to determine cost per day in 46-2.10(18)-S11451D(2)(c) ~~Rule IV(2)(b)~~ provided those increases have been approved through the Certificate of Need process. Cost per day in 46-2.10(18)-S11451D(2)(c) ~~Rule IV(2)(b)~~ shall be adjusted accordingly. However, ~~such adjustments~~ the cost per day so adjusted shall ~~not affect~~ be subject to the same performance incentive factor determined in 46-2.10(18)-S11451D(2)(f) ~~Rule IV(2)(e)~~ and the maximum prospective rate in 46-2.10(18)-S11451D(2)(g) during the interim between rebasing dates.

~~(i) Because intermediate care facilities for the mentally retarded are so few, an 80th percentile cannot be calculated, and these providers shall have Rules IV(2)(d) and (e) determined with reference to the intermediate care facility for the mentally retarded with the highest cost perday.~~

(j) New facilities participating for the first time in

the program will be given an initial prospective rate based on the sum of the mean operating cost per day determined in 46-2.10(18)-S11451D(2)(d) ~~Rule IV(2)(e)~~ (adjusted by the change in CPI and labor index ~~MPI~~ according to that rule to the beginning date of the initial prospective rate period) and property expenses using an 85 90 percent occupancy factor. Property expenses will be established on the basis of costs defined under Certificate of Need procedures. A subsequent prospective rate based on the provider's first twelve-month cost report will be determined for the period following completion of the audit of that cost report.

(k) An individual who is a new provider by reason of his purchase or lease of a facility which is currently participating in the program will receive the prospective rate set for the previous provider, except for that portion determined by property costs. The prospective rate will be adjusted for property cost increases due to sale or lease according to 46-2.10(18)-S11451D(2)(i). Depreciation allowed the previous owner will not be recaptured on sales in effect after April 1, 1979.

(3) Intermediate Care Facilities for the Mentally Retarded. If a facility is certified to provide care for patients under federal and state ICF/MR regulations, then the reimbursable cost for such a facility shall be allowable costs covering the period of reimbursement, subject to the limits provided below.

(a) An ICF/MR shall receive interim rates based on estimated costs. The rates shall be determined for an ICF/MR's fiscal year and shall be developed in two parts.

(i) Part one shall identify routine nursing care services and determine a rate for this part that shall not exceed the prospective rate for such services during the same period that would be allowed under 46-2.10(18)-S11451D(2).

(ii) Part two shall identify services applicable to the mentally retarded patients over and above the costs of routine nursing care services, and determine a rate for these incremental ICF/MR services, provided the estimated costs for such services are deemed reasonable and necessary.

(iii) Cost of providing services to patients will be reimbursed according to the appropriate interim rates depending on what level of care has been established for each patient by the Montana Foundation for Medical Care.

(b) Interim rates may be updated from time to time.

(i) Part one rates will be updated for rebasing or other adjustments as provided in 46-2.10(18)-S11451D(2).

(ii) Part two rates will be updated upon request from a facility provided sufficient documentation is submitted to support the necessity of an increase.

(c) Final reimbursement will be determined when cost reports for the period have been audited according to 46-2.10(18)S11451E(6). Reimbursement attributable to routine nursing care services shall be limited to the reimbursement

that would be allowed for the same period according to 46-2.10(18)-S11451D(2). Reimbursement attributable to ICF/MR services over and above those allowed as routine nursing care services shall be paid as allowable costs determined under 46-2.10(18)-S11451D(4).

~~(3)~~ (4) Allowable Cost. Allowable costs for cost reports with ending dates before April 1, 1979 shall be determined according to rules for allowable cost then in effect. Allowable costs for cost reports with ending dates after April 1, 1979 will be determined in accordance with HIM 15 subject to the exceptions and clarifications herein provided, including the following:

(a) Return on equity will not be an allowable cost.

(b) Costs incurred in the provision of routine nursing care services to the extent such costs are reasonable and necessary are allowable. Routine services include regular room, dietary services, nursing services, minor medical and surgical supplies, and the use of equipment and facilities. ~~Excluded from such services is social service consultation acknowledging such consultation is provided by the Department~~. Examples of routine nursing care services are:

(i) All general nursing services including but not limited to administration of oxygen and related medications, hand-feeding, incontinent care, tray service, and enemas;

(ii) Items furnished routinely and relatively uniformly to all patients without charge, such as patient gowns, water pitchers, basins and bed pans;

(iii) Items stocked at nursing stations or on the floor in gross supply and distributed or used individually in small quantities without charge, such as alcohol, applicators, cotton balls, bandaids, antacids, aspirin (and other non-legend drugs ordinarily kept on hand), suppositories, and tongue depressors;

(iv) Items which are used by individual patients which are reusable and expected to be available, such as ice bags, bed rails, canes, crutches, walkers, wheelchairs, traction equipment, and other durable medical equipment;

(v) Special dietary supplements used for tube feeding or oral feeding such as elemental high nitrogen diet;

(vi) Laundry services whether provided by the facility or by a hired firm, except for patients' personal clothing which is dry cleaned outside of the facility.

(c) Allowable property cost shall be limited to the property cost per day ~~amount allowed~~ for the 90th percentile facility identified ~~non-leased/non-rent property cost determined allowable~~ in a ~~sample of~~ cost reports for ~~the Department deems representative of all~~ Montana facilities participating in the Medicaid program during a base ~~study~~ period. The initial base ~~study~~ period shall utilize those cost reports filed with the Department that demonstrate the requisite data and are the most recent twelve-month cost reports available through November 30, 1977. Subsequent base

~~study~~ periods will use the same cost reports used for rebasing in 46-2.10(18)-S11451D(2)(b). ~~be conducted every seven years and shall utilize the most recent twelve-month cost reports available through November 30th of those years.~~ In order to apply the property cost limit test, the 90th percentile ~~non-lease/non-rent~~ property cost per day from the most recently available base ~~study~~ period ~~results~~ shall be indexed using the CPI to the end date of the cost report being reviewed, ~~shall be converted to a per diem figure, and thencompared with~~ which amount shall then limit the ~~per diem amount for the~~ property cost per day in the cost report being reviewed. That portion of property costs related to a Certificate of Need under 46-2.10(18)-S11451D(2)(i) shall not be subject to this property cost limit until the next rebasing date. ~~After comparison, any property cost amount in excess of the limitshall be disallowed.~~

(d) Administrators Compensation:

(i) Administrators compensation is limited to the amounts allowed according to HIM 15. ~~following schedule of compensation based on bed size of facility.~~

~~No.-Beds~~	~~Compensation~~
~~0--50~~	~~$19,000~~
~~51-100~~	~~22,000~~
~~101-and-over~~	~~25,000~~

~~This schedule shall be adjusted annually by percentage change in CPI for the previous year.~~

(ii) Administrators compensation and the reporting of administrators' compensation shall include:

~~(aa)~~ (A) Salary amounts paid to the administrator for managerial, administrative, professional and other services.

~~(ab)~~ (B) Employee benefits excluding employer contributions required by state or federal law--FICA, WCI, FUI, SUI. For a self-employed administrator, an amount equal to what would have been the employer's contribution for FICA and WCI may be excluded from such employee benefits.

~~(ac)~~ (C) Deferred compensation either accrued or paid.

~~(ad)~~ (D) Supplies, services, special merchandise, and the cost of assets paid or provided for the personal use or benefit of the administrator.

~~(ae)~~ (E) Wages of a domestic or other employee who works in the home of the administrator.

~~(af)~~ (F) Personal use of a car owned by business.

~~(ag)~~ (G) Personal life, health, or disability insurance premium paid.

~~(ah)~~ (H) A portion of the physical plant occupied as a personal residence.

~~(ai)~~ (I) Other types of remuneration, compensation fringe benefits or other benefits whether paid, accrued, or contingent.

(e) Employee benefits:

(i) Employee benefits are defined as amounts paid to or

on behalf of an employee, in addition to direct salary or wages, and from which the employee or his beneficiary derives a personal benefit before or after the employee's retirement or death.

(ii) All employer contributions which are required by State or federal law, including FICA, WCI, FUI, SUI are allowable employee benefits. In addition, employee benefits which are uniformly applicable to all employees are allowable. A bona fide employee benefit must directly benefit the individual employee, and shall not directly benefit the owner, provider or related parties.

(iii) Costs of activities or facilities which are available to employees as a group, such as condominiums, swimming pools or other recreational activities, are not allowable.

(iv) For purposes of this subsection, an employee is one from whose salary or wages the employer is required to withhold FICA. Stockholders ~~or~~ who are related parties to the corporate providers, officers of a corporate provider, and partners owning or operating a facility are not employees even if FICA is withheld for them.

(v) Paid vacation and sick leave shall be considered employee benefits to the extent that the facility has in effect a written policy which is uniformly applicable to all employees within a given class of employees, and paid vacation and sick leave are reasonable in amount.

(f) Bad debts, charity and courtesy allowances are deductions from revenue and shall not be allowable as costs.

(g) Revenues received for services or items provided to employees and guests are recoveries of cost and shall be deducted from the related cost.

(h) Dues, membership fees or subscriptions to organizations unrelated to the provider's provision of nursing care services are not allowable costs.

(i) Charges for services of a chaplain are not an allowable cost.

(j) Fees for management or professional services (e.g., management, legal, accounting or consulting services) are allowable to the extent they are identified to specific services, and the hourly rate charged is reasonable in amount. In lieu of compensation on the basis of an hourly rate, the provider may compensate for professional services on the basis of a reasonable retainer agreement which specifies in detail the services to be performed. Documentation that such services were in fact performed shall be provided by the provider. No cost in excess of the agreed upon retainer fee shall be allowed for services specified under the fee.

(k) Transportation costs for travel related to patient care are allowable in accordance with Internal Revenue guidelines for items of expense. Vehicle operating costs will be pro-rated between business and personal use based on mileage logs or a prior approved percentage derived from a sample mileage log or other method acceptable to the

Department. For vehicles used primarily by the administrator, any portion of vehicle costs disallowed on pro-ration shall be included as compensation subject to the limits specified in ~~Rule IV (3) (e)~~ 46-2.10(18)-S11451D(4)(d). Depreciation shall be allowed on a straight-line basis (subject to salvage value) with a minimum of 3 years. Depreciation and interest or comparable lease costs may not exceed $2,400 per year. Other reasonable vehicle operating expenses will be allowed. Public transportation costs will be allowable at tourist or other available commercial rate (not first class).

(1) Purchases from related parties. Costs applicable to services, facilities and supplies furnished to a provider by parties related to that provider shall not exceed the lower of costs to the related party or the price of comparable services, facilities or supplies purchased elsewhere. Providers shall identify such related parties and costs in the annual cost report (42 CFR 250.30(a)(3)iii(D)).

~~(4)~~ (5) Ancillaries. Ancillary medical supplies and services are not allowable costs. The provider shall be paid for ancillary medical supplies and services in addition to the reimbursement rate determined by this rule provided that the ancillary medical supplies and services have been previously authorized by the Montana Foundation for Medical Care to signify that the item is medically necessary and the bills for these items have the authorization on the face of the claim form. Payment for ancillary medical supplies and services are limited to the medical supplies and services needed to provide nursing care to patients who are required by doctor's orders to received extraordinary care, and shall be the actual cost the provider incurred. The provider must maintain a separate cost center or centers for ancillary medical supplies and services. Revenues received from the Department and/or patients for ancillary medical supplies or services are recoveries of cost and shall be deducted from the related cost when determining allowable cost. Any cost remaining after offsetting the related revenues must be eliminated from the cost report before determining allowable costs.

Ancillary medical supplies and services shall be billed by the provider licensed to provide such supplies or services and shall be designated on bills using codes established by the Department and are limited to the following: oxygen (code 932-3308-00), wheelchairs customized with special design for a unique condition (code 932-3242-00), wheelchairs that are standard but motorized (code 932-3237-00), wheelchairs for children and are motorized (code 932-3241-00), helmets (code 932-3315-00), disposable colostomy appliances (code 932-4210-00), colostomy shield appliances (code 932-4213-00), disposable lelostomy appliances (code 932-4219-00), catheters (urethral, rubber or silicone) (code 932-4233-00), catheters (indwelling Foley balloon retention) (code 932-4234-00), miscellaneous catheters (code 932-4235-00), scrotal truss (code 932-6101-00), umbilical truss (code 932-6102-00), shoulder braces (code 932-6103-00),

sacroiliac supports (code 932-6104-00), lumbosacral supports (code 932-6105-00), post hernia truss (code 932-6106-00), hinged joint steel knee cap (code 932-6707-00), wrist support leather (code 932-6108-00), corsets (code 932-6109-00), abdominal supports (code 932-6110-00), dorso lumbar supports (code 932-6111-00), orthopedic braces (code 932-6113-00), elastic stockings (sheer type, Jobst or comparable) (code 932-6201-00), elastic stockings (surgical type, Jobst or comparable) (code 932-6201-00), prescription drugs: occupational, speech, physical and other therapy; x-rays~~.~~ ; supplies that are not required as a part of routine nursing care services for a particular patient and not otherwise compensated under 46-2.10(18)-S11451D.

46-2.10(18)-S11451E REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, COST REPORTING

The procedures and forms for maintaining cost information and reporting are as follows:

(1) Accounting Principles. Generally accepted accounting principles shall be used by each provider to record and report costs. As part of the cost report these costs will be adjusted in accordance with these rules to determine allowable costs.

(2) Method of Accounting. The accrual method of accounting shall be employed, except that, for governmental institutions that operate on a cash method or a modified accrual method, such methods of accounting will be acceptable.

(3) Cost Finding. Cost finding means the process of allocating and prorating the data derived from the accounts ordinarily kept by a provider to ascertain its costs of the various services provided. In preparing cost reports, all providers shall utilize the step down method of cost finding described at 42 CFR 405.453(d)(1) which is hereby incorporated and made a part of this rule by reference. Notwithstanding the above, distinctions between skilled nursing and intermediate care need not be made in cost finding.

(4) Uniform Financial and Statistical Report. Provider costs are to be reported based upon the provider's fiscal year using the Financial and Statistical Report Form provided by the Department. The use of the Department's Financial and Statistical Report Form is mandatory for participating facilities. These reports shall be complete and accurate; incomplete reports or reports containing inconsistent data will be returned to the provider for correction.

(a) Filing Period -- Cost reports must be filed within 90 ~~60~~ days after the end of the provider's fiscal year.

(b) Late Filing -- In the event a provider does not file within 90 ~~60~~ days of the closing date of its fiscal year, or files an incomplete cost report, an amount equal to 10 percent of the provider's total reimbursement for the following month shall be withheld by the Department. If the report is overdue or incomplete a second month, 20 percent shall be withheld. For each succeeding month the report is overdue or incomplete,

the provider's total reimbursement shall be withheld. All amounts so withheld will be payable to the provider upon submission of a complete and accurate cost report. Unavoidable delays may be reported with a full explanation and a request made for an extension of time limits prior to the filing deadline. However, there is a maximum limitation of a ~~one~~ 30-day extension.

(c) Cost reports shall be executed by the individual provider, a partner of a partnership provider, the trustee of a trust provider, or an authorized officer of a corporate provider. The person executing such reports shall sign under penalties of false swearing, that he has examined the report including accompanying schedules and statements, and that to the best of his knowledge and belief, the report is true, correct, and complete, and prepared consistent with governing laws and regulations.

(d) Cost reports shall be signed by the preparer stating that the report has been prepared based on all information of which he has knowledge. The preparer shall be deemed to be any individual who prepares for compensation any cost reports or a portion thereof. If more than one individual participates in preparation of the report, each participating individual shall sign as preparer. Clerical assistants who furnish typing, reproducing, or other routine assistance shall not be deemed preparers.

(5) Maintenance of Records. Records of financial and statistical information supporting cost reports shall be maintained by the provider and the Department for three ~~five~~ years after the date a cost report is filed, or the date the cost report is due, whichever is later.

(a) Each provider facility will maintain, as a minimum, a chart of accounts, a general ledger and the following supporting ledgers and journals: revenue, accounts receivable, cash receipts, accounts payable, cash disbursements, payroll, general journal, patient census records identifying the level of care of all patients individually, all records pertaining to private pay patients and patient trust funds.

(b) To support allowable costs, all business records of any related party, including any parent or subsidiary firm, which relate to a provider under audit, shall be available at the facility for audit. ~~by the Department or its designated representative upon reasonable notice to the provider.~~ To support allowable costs, the owner's or related party's personal financial records relating to the facility shall be made available for audit. ~~by the Department or its designated representative upon reasonable notice given by the Department.~~

(c) Cost information as developed by the provider shall be current, accurate and in sufficient detail to support payments made for services rendered to beneficiaries and recorded in such a manner to provide a record which is auditable through the application of reasonable audit procedure. This includes all ledgers, books, records and

original evidences of cost (purchase requisitions, purchase orders, vouchers, checks, invoices, requisitions for materials, inventories, labor time cards, payrolls, bases for apportioning costs, etc.) which pertain to the determination of reasonable cost.

(d) All of the above records and documents shall be available at the facility at all reasonable times after reasonable notice and subject ~~at all reasonable times~~ to inspection, review or audit by the Department, the federal Department of Health, Education and Welfare, the Montana Legislative Auditor, and other appropriate governmental agencies. Upon refusal of the provider to make available and allow access to the above records and documents, the costs which are based upon the withheld data will be deemed unsupported and not allowable for reimbursement purposes. If payments have been made based upon interim information the applicable amounts shall be recovered by the Department. In addition, the Department may at its option terminate any such contracts between the Department and provider if any such records and documents are withheld.

(e) The data contained in the cost reports is financial information particular to the facility and therefore is confidential and exempts such information from disclosure under the Freedom of Information Act.

(6) Audits. Department audit staff will perform a desk review of cost statements prior to rate setting and may conducts on-site audits of provider records. Where appropriate, audit procedures defined in the HIM ~~18~~ 16 shall be adopted by the Department but the Department shall not be confined to these guidelines and may utilize other methods.

(a) Desk review of cost reports will determine the adjustments to be applied to reported costs for rate determination. Incomplete reports, or inconsistency in reported costs will cause the return of the cost report to the facility for correction and may result in withholding payment as set forth in the (4) (b) of this rule.

(b) On-site audits of provider detailed records shall be made to assure validity of reports, costs and statistical information in conformity with federal laws and regulations (42 CFR 447.292 and 42 CFR 447.293). On site audits of the financial and statistical records will be conducted at a minimum of one-third of the facilities each year until all providers are audited by December 31, 1980. After that time, on site audits will be conducted yearly in at least 15 percent of the facilities. Ten percent of these facilities will be selected using factors established by the Department. The remaining five percent will be chosen at random.

(c) On conclusion of a review of a cost report, an exit conference may be held in which evidential facts can be submitted and reviewed, following which a summary of findings and recommendations shall be mailed to the provider.

~~(d)~~ (7) Administrative Review. Within 10 days of receipt of the written findings or recommendations the

provider may detail in writing, any objections or justifications concerning the findings, and may also request a conference. Such conference shall be held no later than 30 days after the Department receives the provider's written objections and justifications, and the request for a conference. The Department's Medical Assistance Bureau shall conduct the conference based on audit findings and recommendations and the provider's written objections and justifications. No later than 60 days following receipt of the written objections and justifications, or the conference, whichever is later, the Department's Medical Assistance Bureau, after consultation with the Audit Bureau and the Office of Legal Affairs, shall mail a written final determination concerning the provider's objections and justifications, and the position the Department takes concerning the audit findings.

(8) Overpayment and underpayment.

(a) Where the Department finds that the prospective rate was based on an erroneous cost report resulting in overpayment, the Department will correct the rate and notify the provider of overpayment.

(b) In the event of an overpayment the Department will, within 30 days after the day the Department notifies the provider that an overpayment exists, adjust the provider's rate and arrange to recover the overpayment by set-off against amounts paid under the adjusted rate or by repayments by the provider.

(c) If an arrangement for repayment cannot be worked out within 30 days after notification of the provider, the Department will make deductions from rate payments with full recovery to be completed within 120 days from date of the initial request for payment. Recovery will be undertaken even though the provider disputes in whole or in part the Department's determination of the overpayment. In the discretion of the Department such recovery may be delayed in whole or in part if a request for fair hearing under 46-2.10(18)-S11451F has been made.

(d) Errors in cost report data identified by the provider may be corrected and given consideration for rate adjustment if submitted within 30 days after rate notification. Adjustments will also be made for computational errors in rate determination review by the Department.

(e) In the event an underpayment has occurred, the Department will reimburse the provider promptly following the Department's determination of error.

(f) Court or administrative proceeding for collection of an overpayment or underpayment shall be commenced within five years following the due date of the original cost report or the date of receipt of a complete cost report whichever is later. In the case of a reimbursement or payment based on fraudulent ~~cost report,~~ information, recovery of overpayment may be undertaken at any time. Court costs, including attorneys' fees, in connection with court or administrative

proceedings shall be deemed allowable only when approved by the court or hearings officer.

(g) The amount of any overpayment constitutes a debt due the Department as of the date of initial request for payment and may be recovered from any person, party, transferee, or fiduciary who has benefited from the payment or a transfer of assets.

46-2.10(18)-S11451F REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, FAIR HEARING PROCEDURES

(1) Fair Hearing. In the event the provider does not agree with the rates determined following review by the department, the following fair hearing procedures will apply:

(a) The written request for a fair hearing shall be mailed or delivered to the Department of Social and Rehabilitation Services, Hearings Officer, Helena, Montana.

(b) The request shall be signed by the provider or his designee.

(c) The fair hearing request must be received not later than the 60th calendar day following the date of the rate notification, or within 30 days of a review conference. If it is filed later, justification for the delay must be given to the hearings officer who, for good cause, may waive the time limit.

(d) The fair hearing request shall identify the individual settlement items and amount in disagreement, give the reasons for the disagreement, and furnish substantiating materials and information.

(e) The hearings officer or board will provide copies of requests, notices and written decisions to the Department's Director, Audit Bureau, Medical Assistance Bureau, and Office of Legal Affairs.

(f) Within ten days of receipt of the request, the hearings officer shall notify the provider and other parties of the time and place for the prehearing conference, which shall be within 30 days of the receipt of the request. The notice will state the purpose of the prehearing conference and the issues to be resolved, stipulated to, or excluded. The hearings officer may waive the prehearing conference.

(g) Within ten days after the prehearing conference or its waiver, the hearings officer shall notify the provider and other parties of the time and place for the hearing, which shall be within 60 days of the receipt of the request.

(h) The hearings officer will reduce his decision to writing within ten days of completion of the hearing based upon evidence and other material.

(~~1~~2) Appeal. In the event the provider or Department disagrees with the hearings officer's decision, a Notice of Appeals may be submitted to the hearings office for forwarding to the Board of Social and Rehabilitation Appeals within ten days of the hearings officer's decision. The Notice of Appeals shall set forth the specific grounds for appeal.

(~~j~~a) All evidence in the record and offers of proof shall

be transmitted to the Board by the hearings officer. The decision of the Board shall be based solely on the record transmitted by the hearings officer. A legal brief or a legal argument based on the record may be presented personally or through a representative of the provider or the Department to the board.

(~~1~~b) The Board shall reduce its decision to writing and mail copies to the providers within ten days of completion of the hearing. The provider shall be notified of its right to judicial review under the provisions of MCA, Section 44-2-115 (Section 82-416, R.C.M. 1947).

~~(2) In the event the provider does not agree with anyone specific audit adjustment contained in the schedule of adjustments and made for purposes of determining allowable costs and provided the amount of the individual adjustment incontroversy is no less than $5,000.00 per prospective rate period, then and only then will the aforementioned fair hearing procedures apply.~~

4. On December 14, 1978, the Department gave notice of a hearing to be held on six rules governing reimbursement for skilled nursing and intermediate care. On January 11, 1979, a public hearing was conducted at which time comment was received on the six rules proposed by the Department. In addition, the Department requested and received further comment on the six proposed rules through February 28, 1979. The Department has thoroughly considered all commentary received both oral and written and responds to those comments as follows:

Comment: The effect of the January 1, 1979, minimum wage increase and other such increases on the nursing home industry.

Response: An inflationary adjustment to rates in effect between April 1, 1978, and March 31, 1979, will be made effective January 1, 1979. Such adjustment is based, as was the October 1, 1978 adjustment, on a 2/3 CPI - 1/3 MPI weighted average of percentage change. By utilizing the 2/3 CPI - 1/3 MPI adjustment through the month of January 1979, the contribution of minimum wage increase to nursing home costs has been accounted for under the April 1, 1978 reimbursement rules. For future periods the labor index will directly reflect minimum wage and resulting increases upon nursing home industry costs.

Comment: The effect of the newly promulgated rules on quality of nursing home care.

Response: If the rate under the six reimbursement rules causes delicensure or decertification due to poor quality of service or any other reason, the rate for that facility will be reviewed to determine its contribution to the adverse situation and adjusted accordingly per the mandates of Rule 46-2.10(18)-S11451B(1).

Comment: A definition for the term "patient day."

Response: Patient day has been defined in Rule 46-2.10 (18)-S11451B at section (2)(e).

Comment: The "nontreatment" of ICF/MR facilities.

Response: Such matter is now covered by Rule 46-2.10 (18)-S11451D(3).

Comment: The division of free-standing and combined facilities into distinct and separate provider groups.

Response: After receiving very substantial commentary in this area the Department has reviewed its position and believes there is no differential in the level of care and the costs related thereto provided by these groups. Accordingly there should be no differentiation for reimbursement purposes.

Comment: The use of a 90% occupancy factor and possible use of an occupancy adjustment factor.

Response: Reimbursement will be made on the basis of an 85% occupancy factor (see Rule 46-2.10(18)-S11451D(2)(c)(iii)). In addition, Rule 46-2.10(18)-S11451D(2)(e) addresses the matter of substantial variance in occupancy at a given facility and the adjustment factor to be applied in those instances. If for example during any six month period following April 1, 1979 the occupancy at any facility should drop more than 3 percentage points below the occupancy rate used to determine the facility's base period cost per day, the occupancy adjustment factor as defined in section (2)(e) will be added to the facility's next prospective rate.

Comment: The inclusion of a clause allowing only 20% of allowable cost as a maximum return over cost.

Response: The referenced clause has been removed in its entirety from the reimbursement rules.

Comment: The exclusion of social services consultations as an allowable cost.

Response: Reference to such exclusion has been eliminated from the rules and such consultations will be reimbursed as an allowable cost item.

Comment: Incorporation by reference of new federal regulatory materials.

Response: All language indicating incorporation by reference of newly issued federal regulations has been removed from the rules.

Comment: The inclusion of a section establishing maximum allowable compensation for administrators.

Response: The specific section has been deleted. Administrator compensation is limited in the final reimbursement rules only by HIM-15 definitions of allowability for administrator salary costs as has been in effect in previous rules.

Comment: The 60 day after facility year end time limit for submission of cost reports.

Response: As revised, the final reimbursement rules establish a 90 day after year end time limit for cost report submission. One 30 day extension due to unavoidable delays will be allowed before penalty provisions become effective.

Comment: The $5,000.00 item limitation on audit matters which may be submitted to fair hearing.

Response: All reference to such a limitation has been

removed from the April 1, 1979, rules.

Comment: The inclusion of Rule 46-2.10(18)-S11451C(5) as a necessary part of the reimbursement rules.

Response: Federal regulations (42 CFR 447.15) mandate that all state reimbursement plans must provide that the medicaid agency must limit participation in the medicaid program to providers who accept as payment in full the amounts paid by the agency.

Comment: The necessity of making records available at the facility for the conduct of departmental field audits.

Response: Field audits are of course conducted at the facility. It is believed that for the convenience of both parties the audit should take place in a reasonably short period of time. Therefore, Rule 46-2.10(18)-S11451E(5)(d) makes provision for the availability of all business records at the facility upon reasonable notice to the provider. The records do not have to be kept at the facility on a daily basis; they must only be present during the field audit.

Comment: The requirement of facilities to retain medicaid related business records for a 5 year period.

Response: Rule 46-2.10(18)-S11451E(5) now requires that records of financial and statistical information supporting cost reports shall be maintained by the provider for three years after the date a cost report is filed, or the date the cost report is due, whichever is later. Department record maintenance for the same period is also specified.

Comment: The proposed method of overpayment recoupment and possible due process denial problems.

Response: Where the Department finds the prospective rate was based on an erroneous cost report, the Department will correct the rate and notify the provider of overpayment. After that time an arrangement should be promptly agreed upon. The rules have been modified so that offset is not mandatory but discretionary with the Department while the matter of repayment is in the fair hearing process. The Department deems it necessary to have the right to offset payments due facilities with amounts due from them. Such offsets are consistent with normal commercial concepts and retaining offset authority appears to be required under MCA 17-4-105 (R.C.M., 1947, Sec. 79-101).

Comment: Rule 46-2.10(18)-S11451F(2)(a) which allows only the hearing by the Board of Social and Rehabilitation Appeals of evidence which is in the record.

Response: This section deals with a procedure which is purely appellate in nature. Only those legal issues remaining as a matter of record can be adjudicated by the Board of Social and Rehabilitation Appeals. Therefore any surprise or unrelated factual materials, which should have been addressed at the hearing level, will not be considered.

Comment: Rule 46-2.10(18)-S11451D(4)(d)(iv) as it relates to defining stockholders as nonemployees.

Response: The subsection in question has been rewritten to define stockholders who are related parties to the

corporate provider (and thus holders of a substantial interest in the corporation by previous definition) as nonemployees.

Comment: The possibility of computing private pay limitations on a month by month or weighted average basis.

Response: Rule 46-2.10(18)-S11451D(2)(h) has been modified so that facilities have one month after notification of their prospective rate to adjust their private pay rates so as to preclude limitations.

Comment: The possibility of notifying providers 30 days in advance of prospective rates for an upcoming period.

Response: Conflicts result in utilizing current data, allowing reasonable periods for submission of cost reports and providing maximum advance notification of respective rates. However, the department shall attempt to give facilities the maximum time possible so that budgeting and planning can be allowed.

Comment: The necessity for setting the maximum prospective rate of reimbursement for any facility at the cost per day (as adjusted by the trend factor) that is applicable to the facility at the 80th percentile.

Response: If half of the facilities providing medicaid related skilled nursing and intermediate care services in the state of Montana can do so at or below the declared rate of reimbursement it must be empirically assumed that the rate is sufficient to reimburse fully an economically and efficiently operated facility. The use of the 80th percentile is considered to be more than sufficient to allow for this standard. Some distinct point of maximum reimbursement must be set to exclude costs estimated to be in excess of those necessary for efficient delivery of needed health care services. A number of other states (Texas, Arkansas, Louisiana, Iowa, New Mexico and others) have established maximum reimbursement rates considerably lower than the eightieth percentile based upon the determination that such rates adequately compensate the economic and efficient provider of skilled nursing and/or intermediate care services. The federal government uses as a guideline the concept that if 50% of the facilities are reimbursed for their actual allowable costs, then the method of reimbursement satisfies federal standards. Such rates have been characterized as clearly "within the bounds of reasonableness and not "plainly erroneous or inconsistent with federal regulation."

Comment: The application of the incentive factor to nonprofit providers.

Response: The federal government has allowed incentive allowances for proprietary and non-proprietary facilities alike.

Comment: The rules' tendancy to deal with the industry as a whole and not on a facility by facility basis.

Response: The reimbursement program is based on the historic cost reports of each facility. Adjustments and limitations are largely based on industry-wide data. The Department believes this combination will fairly reimburse the

facility which is economically and efficiently operated and will also provide incentives to encourage efficiency.

Comment: The method of accounting to be employed by long term care case Medicaid providers.

Response: Federal regulations (42 CFR 447.274(c)) provide that allowable costs must be compiled on the basis of generally accepted accounting principles and the accrual method of accounting. In the case of public institutions the cash method of accounting is acceptable.

Comment: The definition and treatment of property costs.

Response: Property costs are now defined as amounts allowable for facility or equipment depreciation, interest on loans for a facility or equipment and leases or rental of a facility or equipment. Provisions have been made to allow increased payment for capital expenditures incurred through an approved certificate of need process which process may be used for any capial expenditures and is not limited to expenditures in excess of the statutory provisions. Rebasing at regular intervals will constantly update the data since it will consider newly approved certificates of need. A special exception has been granted for the interim period (46-2.10(18)-S11451D(4)(c)).

The new rules are substantially similar to the old (May, 1974) rules concerning property costs. A limit which can be exceeded for new construction has been placed at the 90th percentile of all property costs. However, depreciation recapture shall no longer apply in the event of sale. The concept of imputed rent based on appraised value has been considered by the Department; however the Federal Department of HEW has determined that such method of property reimbursement is unacceptable.

Comment: The use of 11/30/77 cost information to establish a base period.

Response: In connection with establishing a base period, the Department deemed it mandatory that reliable, audited information based on consistent data be utilized. Cost reports for periods ending in 1978 are still being filed. Obviously, reliable audited information cannot yet be available from these reports.

The March 31, 1978 cost reports are available but could not be used for a potentially long term reimbursement plan as they contain substantial variance of information (they cover periods ranging from three to fifteen months). Accordingly, the most recent period for which reliable, audited information is available is that period ending November 30, 1977.

In compliance with federal regulations there shall be a regular rebasing of this information beginning January 1, 1980. The period allowed in the Department's new rules is well within the guidelines of federal mandates. Initially and in the periods between rebasing, provisions have been made to update the information by adjusting reimbursement based on appropriate indexes and property cost increases.

Comment: The pass through of mandated costs as a

possible addition to the reimbursement rules.

Response: Costs such as minimum wage increases, taxes, insurance and utility increases are the causative factors in determining changes to the consumer price index and the labor index. Such external indicators are used by businesses to analyze past cost situations and to predict those changes forthcoming in future periods. It is the Department's position that the indexing method present in the April 1, 1979 reimbursement rules is as closely reflective of nursing home cost increases as possible at this date. As currently provided, rebasing on a regular basis will upgrade the cost data to actual allowable costs, and reasonable adjustments are to be made for interim periods.

Comment: The particular use of the 2/3 CPI - 1/3 MPI inflationary indexing method applicable every 6 months.

Response: Acknowledging the many comments of industry, the Department carefully reviewed the originally proposed indexing and searched for other methods that would more directly correlate to the industry concerned.

Since the industry has a substantial portion of its expenses in the labor area, the Department determined to utilize the relatively new U.S. Department of Labor statistics for nursing and personal care facilities average hourly earnings as an index to adjust the portion of reimbursement related to labor costs. Such index is applied to statistical averages computed by analysis of the Medicaid participating facilities in Montana.

To provide adjustments for other operating costs, the Department believes that the CPI is the best available index to reasonably reflect changes. No factor of operating costs, other than labor, is of substantial proportions, and accordingly, a general index is deemed appropriate.

The MPI was originally considered, but after review of the component items, there appears to be minimal correlation to industry expenses once the labor cost factor is taken into account. It is interesting to note that during calendar year 1978, the CPI rose by 9.0%, while the MPI rose by only 8.8%.

Indexing shall apply every six months, which is within the Federal regulation which requires at least annual redetermination of rates. The Department believes that more frequent evaluation might not be as accurately reflective of substantive economic movement. It is noted that most states provide for annual adjustment; a few provide for semi-annual; apparently none have more frequent adjustments.

Since the adjustments are applied to the individual costs reports, the basic data considers individual facilities. Some tempering on an industry-wide standard then appears appropriate.

Comment: The absence of a profit or return on equity factor.

Response: The rules contain an opportunity for facilities to make a profit by keeping costs below the rate being paid. The rate includes an incentive allowance for

facilities with historical costs below the 80th percentile. Depreciation and interest expense are allowable costs. This method gives the efficient provider the opportunity to earn an amount of money in excess of his actual costs because of the utilization of prudent business practices. Therefore, other methods of providing for profit such as a formula return on equity are not included.

Comment: The $2,400 limitation on depreciation and interest or comparable lease costs as they relate to allowable transportation costs.

Response: The $2,400 limit on depreciation and interest or comparable lease costs is compatible with existing industrial standards for transportation costs. Depreciation on a straight line basis is consistent with HIM-15 accounting practices. The rule allows other reasonable vehicle operating expenses. Limitations on transportation costs are appropriate because they reflect business transportation usage within the nursing home industry.

Comment: The reimbursement rules' relationship to strict cost containment.

Response: The original mandate for new reimbursement regulations followed from federal statutory changes directing states to provide a cost related plan. Several proposals have been formulated and in each prior case very substantial objection has been raised by the nursing home industry to them. Accordingly temporary provisions were made to meet minimum federal requirements until a more comprehensive plan could be adopted. These rules present what the Department believes is a reasonable and cost related plan which fairly reimburses a provider operating economically and efficiently. Such considerations constituted the guidelines under which the April 1, 1979 reimbursement rules were drawn. Recent budgeting considerations and resulting augmentation have been a result of the estimated costs of nursing home reimbursement plan revision.

Comment: An alternative plan of reimbursement advocated by the Montana Nursing Home Association.

Response: Two primary distinctions are readily apparent when the Department rules and the alternate plan are compared. 1) The alternate plan supports the imputed rent concept. HEW officials at the regional and Washington, D.C. level have indicated on several occasions that under current statute and regulation the imputed rent concept of property costs based on appraised values is unacceptable. The Department's revised version of the property reimbursement section 46-2.10(18)-S11451D(4)(c), the elimination of depreciation recapture, and rebasing (46-2.10(18)-S11451D(2)(b) constitute an equitable solution to property reimbursement. 2) The alternate plan also supports the concept of capping individual cost centers rather than creating an overall ceiling rate. The use of an overall ceiling for the rate was selected at this time because accurate data consistently defined throughout the nursing home industry for more subtle cost centers is not available. The

opportunity to consider such cost center ceilings will be available for subsequent rule changes as the return of data under the uniform reporting provisions of these rules becomes available.

It is interesting to note that the alternate plan contains several features which appeared in other testimony to be objectionable to the Montana Nursing Home Industry. A few of those features are: 1. unilateral overpayment recovery, 2. no effective return on equity, 3. administrator salary caps, 4. 60 day after year end cost report filing, and 5. five year maintenance of records. The revised Department plan has eliminated or altered (pro industry) all of these features with the exception of return on equity.

Keith L. Colbo

Keith L. Colbo, Director
Social & Rehabilitation Services

Certified to the Secretary of State March 20, 1979.

BEFORE THE SUPERINTENDENT OF PUBLIC
INSTRUCTION OF THE STATE OF MONTANA

In the matter of the amendment of Rule 48-2.18(22)-S18390 relating to the establishment of resource instruction and services for the handicapped.	)))))	NOTICE OF AMENDMENT OF RULE 48-2.18(22)-S18390 RELATING TO THE ESTABLISHMENT OF RESOURCE INSTRUCTION AND SERVICES FOR THE HANDICAPPED

TO: All interested persons:

1. On February 15, 1979, the Superintendent of Public Instruction published notice of a public hearing on March 7, 1979, at 1:30 p.m., in the conference room at 1300 Eleventh Avenue, Helena, Montana on the proposed amendment of rule 48-2.18(22)-S18390 relating to the establishment of resource instruction and services for the handicapped. The notice was published at pages 140 and 141 of the 1979 Montana Administrative Register, Issue No. 3.

2. The Superintendent has amended the rule with the following changes:

(1) Remains the same.

(2) Caseload of a Resource Service. ~~(a)~~ A teacher of a resource service should have a minimum caseload of ~~eight~~ ~~twelve~~ eight handicapped students per day before establishing a first full-time service. The maximum number of students assigned to each resource service ~~is to be determined by the school administration utilizing the recommendations of the child study teams. The recommended maximum is 15 students per day.~~ should not exceed twenty-five students per week. In situations where fewer than ~~eight~~ ~~twelve~~ eight students per day can be documented for a first full-time service or where fewer than twenty-five students per week can be documented~~,~~ in an established service, the Full-Time Equivalent to be approved ~~is to~~ shall be negotiated with the Office of Public Instruction based on special education needs of the children~~.~~, utilizing the recommendation of the child study teams.

(3) Adding Resource Services. ~~(a)~~ If a school district is considering adding resource services, the district must first establish the maximum number of handicapped students able to be accommodated in existing services. Once each resource service is filled to the maximum, the school may provide service on a part-time basis by prorating the number of additional handicapped students until ~~the minimum of eight is reached. At that time,~~ an additional full-time resource service ~~may be utilized.~~ is justified.

(4) Remains the same.

(5) Remains the same.

(6) Remains the same.

3. The public hearing was conducted as scheduled. Two persons appeared to make comments. The Office of Public Instruction being aware of a number of persons who wanted to comment, the hearing was continued until March 14, 1979, at 3:30 p.m. A notice of the time of the rescheduled hearing and a copy of the proposed amendment were mailed to persons who were thought to have an interest. Comments and testimony were received from several of the persons who appeared at the hearing on March 14, 1979. Written comments have been received and included in the record of the hearing.

(a) (1) Comment: Three persons submitted letters which supported the proposed amendment. The testimony and the balance of the comments expressed opposition. While stated several different ways, the primary objection is that the proposed amendment will restrict the flexibility administrators now have in delivering resource services which meet the needs of special education children. The commentators submitted that the proposed amendment will not allow consideration of problems unique to rural and urban areas, of the differences between elementary and secondary special education, of the different levels and skills of the children, of the different categories of handicaps, of services to regular teachers, of scheduling problems, and the number of contact hours the resource teacher has with the children. One commentator is concerned the proposed amendment will weaken the recommendations of child study teams and will prevent the children from receiving an appropriate education in the least restrictive setting. The commentators proposed delaying the amendment or writing the amendment in terms of contact hours rather than numbers of students.

(2) Response: The concerns about flexibility in delivering resource services which meet the needs of special education children and about the recommendations of child study teams being weakened have merit. The amendment was not proposed to limit flexibility in delivering resource services or to weaken the recommendations of child study teams.

Resource services should be based upon the needs of the children as determined by the child study teams and consideration should be given to the recommendations of the teams. The last sentence of rule 48-2.18(22)-S18390(2) has been rewritten to clearly incorporate these principles.

Rules 48-2.18(22)-S18390(2) and (3) have been rewritten to insure that the concept of flexibility has been retained. These rules, in the original form, provided guidelines for establishing a full-time resource service and for adding services. The rules also allowed negotiation with the Office of Public Instruction if the circumstances warranted services even though the minimum and maximum number of students were not in the program. No one single factor, such as number of students or contact hours, should dictate the extent of resources available. Instead, all circumstances should be considered including the matters identified by the commentators. The only difference between the rules in the original and amended forms is the guideline for the maximum number of students has been increased from fifteen per day to twenty-five per week. This change allows for more flexibility in the structure of each resource services program so that the needs of the children are met and maximum utilization of the program is realized.

(b) Rule 48-2.18(22)-S18390(3) was amended to be consistent with the intent of the amendment to rule 48-2.18(22)-S18390(2).

4. The authority of the agency to make the amendment is section 20-7-402, MCA (Section 75-7802, R.C.M. 1947).

Georgia Rice

Georgia Rice
Superintendent of Public
Instruction

Certified to the Secretary of State on March 20, 1979.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of subchapter 18, Chapter 10, Title 48, revising procedures for hearing requests for revocation or suspension of teacher certificates	)))))	NOTICE OF THE AMENDMENT OF SUBCHAPTER 18, CHAPTER 10, TITLE 48

TO: All Interested Persons:

1. On October 12, 1978, the Board of Public Education published notice of a proposed amendment to Subchapter 18, Chapter 10, Title 48 revising procedures for hearing requests for revocation or suspension of teacher certificates at pages 1419-1423 of the 1978 Montana Administrative Register, issue number 13.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to clarify the rule's language and to bring the rule into compliance with the Administrative Procedures Act.

Harriett C. McCoy

HARRIETT C. MELOY, CHAIRPERSON
BOARD OF PUBLIC EDUCATION

BY _____
ASSISTANT TO THE BOARD

Certified to the Secretary of State March 15, 1979.

VOLUME NO 38 OPINION NO. 11

ADOPTION Relinquishment of children to private placement agencies, Foster care services for relinquished children, payment for costs of;
COUNTIES - Boards of Public Welfare, Departments of Public Welfare, determination of eligibility for foster care services, applicability of state laws and regulations, public welfare payments for foster care;
DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES - Relinquished children, provision of foster care services for, liability for retroactive foster care payments;
JUVENILES - Foster home placement for relinquished children, relinquishment to private placement agencies, foster care payments on behalf of;
PARENT AND CHILD - Voluntary relinquishment of children for adoption through private placement agencies.

HELD: 1. County departments of public welfare may not deny foster care payments solely because the child receiving foster care has been relinquished to a private placement agency and, if eligibility is established, county departments of public welfare are required to approve such payments to a foster home on behalf of a child who has been relinquished to a private placement agency.

2. In the absence of a determination that foster care assistance was improperly denied, neither a county department of public welfare nor the Department of Social and Rehabilitation Services is required to retroactively pay foster care costs on behalf of a relinquished child. Where such a determination is made, only the foster home involved is entitled to such payments.

6 March 1979

Mr. Jon Meredith, Chief Counsel
Office of Legal Affairs
Department of Social and
Rehabilitation Services
P.O. Box 4210
Helena, Montana 59601

Dear Mr. Meredith:

You have requested my opinion on the following questions:

1. Are county departments of public welfare required to provide foster care payments on behalf of a child who has been relinquished to a private placement agency?

2. If county departments of public welfare and/or the Department of Social and Rehabilitation Services are required to provide foster care payments on behalf of a child who has been relinquished to a private placement agency, is either the county department in question or SRS required to retroactively reimburse private placement agencies for foster care costs where county departments have denied payments for such costs?

Your questions concern payments to foster family homes which provide foster care services to children who are voluntarily relinquished by their parent or parents to private placement agencies for adoption. Background information you have furnished discloses that a child may be relinquished to a private placement agency or to the state and that in either case the child is usually cared for in a licensed foster home until placed with an adoptive family. The kind of foster care provided by the foster home is the same whether the child has been relinquished to a private placement agency or the state and, in some instances, the same foster home takes in children relinquished to either.

Where a child has been relinquished to the state, the Department of Social and Rehabilitation Services (hereinafter SRS) and the department of public welfare of the child's county of residence provide public assistance in the form of foster care payments on behalf of the child to the foster home involved. Where a child is relinquished to a private placement agency, however, some county welfare departments have refused to approve public assistance for foster care services and therefore the foster homes involved have not received foster care payments from the state on behalf of such children.

Your first question is whether county welfare departments are required to approve public assistance for the foster care of children relinquished to private as well as public placement agencies.

Under section 41-3-302, MCA (10-1315, R.C.M. 1947), SRS and county welfare departments have primary responsibility for providing protective services for dependent youth. Section 41-3-103(3), MCA (10-1301, R.C.M. 1947), defines "dependant youth" and includes the following:

> A child may be considered dependent and legal custody transferred to a licensed agency if the parent or parents voluntarily relinquish custody of the child.

Under section 41-3-104, MCA (10-1320, R.C.M. 1947), SRS is authorized to pay foster care costs on behalf of a dependent child pursuant to agreements entered into by SRS. The county welfare department of the county of the child's residence is required to reimburse SRS for the county's one-half share of such payments thereafter.

Foster care for relinquished children is also addressed in Title 53, Chapter 4, MCA (Title 71, R.C.M. 1947). Under section 53-2-201(1), MCA (71-210, R.C.M. 1947), SRS is generally directed to:

> (b) administer or supervise all child welfare activities, including * * * the care of dependent, neglected and delinquent children in foster family homes, especially children placed for adoption or those of illegitimate birth;

Section 53-4-112, MCA (71-709, R.C.M. 1947), specifically provides:

> The department [SRS] shall make provision for establishing and strengthening child welfare services, including protective services, and for care of children in family foster homes. When funds are available for that purpose, the department may make agreements for the payment of compensation for keeping children in family foster homes.

The above statutes do not distinguish between children relinquished to public and private agencies in addressing the foster care needs of relinquished children in general. Regulations SRS has adopted pursuant to those statutes also indicate that relinquishment to either a public or private placement agency has no direct bearing on a decision to provide assistance for foster care services. Under A.R.M.

46-2.6(2)-S6010, eligibility for foster care services turns on the need and dependency of the child and the appropriateness of foster care placement. The local administration of all forms of public assistance is the responsibility of county welfare departments and is governed by policies and rules established by county welfare boards. However, county departments and boards of public welfare are required to conform to SRS policies and rules and state and federal law. Sections 53-2-306 and 53-2-307, MCA (§§71-221 and 71-216, R.C.M. 1947). Therefore, in determining eligibility for foster care assistance, local welfare authorities must follow the guidelines set forth in ARM 46-2.6(2)-S6010 and the general provisions of the statutes discussed above. The corollary to this principle is that foster care assistance may not be denied at the local level where SRS rules or the statutes do not support such a denial.

The Montana Supreme Court has not addressed the matter in issue here. In a decision on a closely related question the Court rejected a State policy which denied assistance to expectant mothers who sought and received counseling and adoptive services from private placement agencies. In that case, Montana State Welfare Board v. Lutheran Social Services, 156 Mont. 381, 480 P.3d 181 (1971), the Court held that an expectant mother who qualifies for public assistance cannot be deprived of that assistance because she chooses a private rather than a public placement agency. Prior to that decision the State Welfare Board had refused assistance for the medical, hospital and foster home care expenses of expectant mothers who would relinquish their children to private placement agencies while approving such assistance for mothers who used public adoptive services.

The Court noted that the law regulating private placement agencies does not require them to assume financial responsibility for the prenatal expenses of mothers who use their services. The Court found no distinction between a woman who needs and requests assistance from a private or public placement agency and therefore no justification for denying public assistance to the former.

That reasoning applies here as well. No statute requires private placement agencies to provide foster care services or treats relinquishment to a private placement agency as dispositive of the state's responsibility to supply foster care assistance. A child relinquished to a private placement agency is not for that reason alone less dependent than a child relinquished to the state or less in need of foster

care services authorized by law. The provision of foster care payments for board, room and personal expenses is one of the authorized foster care services. For the reasons previously discussed, such payments may not be denied solely because a child has been relinquished to a private rather than a public placement agency.

Your other question concerns reimbursement in cases where a private placement agency has paid foster homes which were refused foster care payments by county welfare departments. You ask if SRS or the county welfare department or both of them are required to reimburse the private placement agency for such payments.

It should be noted initially that where foster care payments on behalf of a child relinquished to a private agency are approved upon request, such payments are made to the foster home involved, not the placement agency. While the agency may arrange the foster care placement and advise the foster home concerning an application for assistance, the agency itself is not entitled to foster care payments.

There is a fair hearing procedure under the Administrative Procedure Act, Title 2, Chapter 4, MCA (Title 82, Chapter 42, R.C.M. 1947), set forth in ARM 46-2-2(2)-P230 through P2040, to determine the propriety of a denial of foster care payments. Where it is found that a denial of assistance was incorrect, SRS is directed to make corrected payments to the claimant retroactively to the date the request for assistance was denied. ARM 46-2.2(2) - P2060(5). However, unless a private placement agency is a "claimant" for purposes of foster care assistance, and there is no authority to that effect, the agency itself could not receive foster care payments retroactively even if it is found that payments should have been approved upon the foster home's initial application.

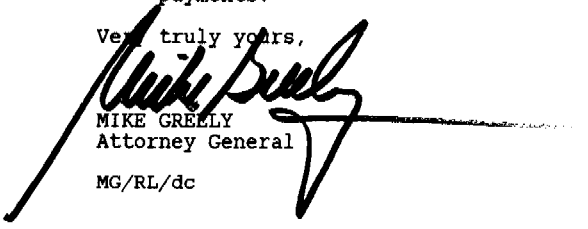
The issue of retroactive payment does not arise in any event until eligibility is determined on review. It appears that no such review has been sought by any of the parties involved in the present dispute. Since foster care assistance may be denied for reasons related to any of several eligibility factors, all the facts relevant to a denial must be considered. It is beyond the scope of this opinion to conclude that any particular denial of foster care assistance necessarily triggers a right to retroactive payments which could be asserted by a properly designated claimant.

THEREFORE IT IS MY OPINION:

1. County departments of public welfare may not deny foster care payments solely because the child receiving foster care has been relinquished to a private placement agency and, if eligibility is established, county departments of public welfare are required to approve such payments to a foster home on behalf of a child who has been relinquished to a private placement agency.

2. In the absence of a determination that foster care assistance was improperly denied, neither a county department of public welfare nor the Department of Social and Rehabilitation Services is required to retroactively pay foster care costs on behalf of a relinquished child. Where such a determination is made, only the foster home involved is entitled to such payments.

Very truly yours,



MIKE GREELY
Attorney General

MG/RL/dc

VOLUME NO. 38 OPINION NO. 12

APPOINTMENT - Public office, effect on county employees' rights to accumulated leave benefits;
COUNTY EMPLOYEES - Entitlement to accumulated leave benefits upon election or appointment to county office;
ELECTION - Public office, effect on county employees' rights to accumulated leave benefits;
LEAVE BENEFITS - Right of county employees to accumulated leave benefits when elected or appointed to public office;
PUBLIC OFFICE - Appointment or election, effect on right of county employees to accumulated leave benefits;
MONTANA CODE ANNOTATED - Sections 2-8-601(2), 2-18-611, 2-18-617, 2-18-618, 2-18-620, 7-4-2203.

HELD: County employees who are elected or appointed to public offices of the state, county, or city are entitled to receive accumulated vacation and sick leave benefits, as provided in sections 2-18-617 and 2-18-618(5), MCA, unless they fall within the mandatory leave provision of section 2-18-620.

7 March 1979

Mr. J. Fred Bourdeau
Cascade County Attorney
Cascade County Courthouse
Great Falls, Montana 59401

Dear Mr. Bourdeau:

You have requested my opinion on the following question:

> Are county employees who are elected or appointed to public office entitled to receive vacation and sick leave benefits accumulated during the course of their employment with the county?

Sections 2-18-611 and 2-18-628, MCA (sections 59-1001 and 59-1008, R.C.M. 1947) provide for sick leave and annual vacation leave credits for employees of the state or any county or city thereof. Such employees may accumulate their leave credits and, upon termination of employment, receive payment for unused vacation leave and accrued sick leave credits. Sections 2-18-617 ad 2-18-618(5), MCA (sections 59-1002, 59-1003, 59-1008(1) & (5), R.C.M. 1947). The question presented here is whether county employees may collect accumulated leave benefits when they are elected or appointed to public office - that is, whether the assumption

of public office constitutes a termination of employment under Sections 2-18-617 and 2-18-618(5), MCA.

Section 2-18-601(2), MCA (section 59-1007, R.C.M. 1947), specifically states that the term 'employee,' as used in the section on leave time, does not include elected state, county, or city officials, or schoolteachers. Although the statute does not specifically mention persons appointed to public office, the logical interpretation of section 2-18-601(2) is that its definitional exclusion refers to the nature of the office held, rather than to the means of selection. For example, persons appointed to fill midterm vacancies in elective offices must logically be viewed as "elected officials," although they may never have run for office. Similarly, those county officers who, according to section 7-4-2203, MCA (section 16-2406, R.C.M. 1947) may be either appointed or elected, have the status of elected officials, regardless of the method chosen for their selection. Therefore, it is my opinion that section 2-18-601(2) excludes all state, county and city officers having the legal status of elected officials from the definition of "employee" as used in part 6 of chapter 18.

Termination of employment means the termination of status as an employee. Because the definition of employee for purposes of employee leave benefits specifically excludes elected public officials and certain appointed officials, the assumption of those offices automatically terminates a person's previous status as an employee, unless that person falls within the 180-day mandatory leave provision of section 2-18-620, MCA (section 59-1011, R.C.M. 1947). Therefore, a former county employee who takes office as an "elected official" thereupon "terminates his employment" within the meaning of sections 2-18-617 and 2-18-6189(5), MCA, and is entitled to receive sick and vacation leave benefits accumulated during his employment.

THEREFORE IT IS MY OPINION:

> County employees who are elected or appointed to public offices of the state, county, or city are entitled to receive accumulated vacation and sick leave benefits, as provided in sections 2-18-617 and 2-18-618(5), MCA, unless they fall within the mandatory leave provision of section 2-18-620.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 38 OPINION NO. 13

PROBATION AND PAROLE - Parole Eligibility;
SENTENCES - Effect of Consecutive Sentences Upon Parole Eligibility; Sentencing for Crimes Committed By Prisoners Parolees and Furloughees;
MCA SECTIONS - 46-18-401(5); 46-23-201(1); 46-23-217; 46-23-218.
R.C.M. 1947, SECTIONS - 95-2213(e); 95-3214(1); 95-3214(5); 95-3221.
ARM SECTIONS - 20-3.10(6)-S10000; 20-3.10(6)-S10020.

HELD: 1. Section 46-23-217, MCA (§95-3221, R.C.M. 1947), was impliedly repealed by the 1977 enactment of section 46-18-401(5), MCA (§95-2213(e), R.C.M. 1947). Any sentences imposed with respect to a crime committed after July 1, 1977, by a prisoner imprisoned at the state prison or on parole or furlough, runs consecutively with the remainder of the prisoner's original sentence. Any crime committed on or before July 1, 1977, by a prisoner while on parole or conditional release runs concurrently with the prisoner's original sentence unless otherwise specified by the sentencing court.

2. If a prisoner who has received a new consecutive sentence under section 46-18-401(5), MCA (§95-2213(e), R.C.M. 1947), is paroled, the remaining time of his new and original sentences thereafter run concurrently.

3. A prisoner sentenced pursuant to section 46-18-401(5), MCA (§95-2213(e), R.C.M. 1947), must serve that term consecutively with the remainder of his original term. If the prisoner has not been designated a non-dangerous offender, he is ineligible for parole until he has served at least one-half of his new sentence in addition to any minimum time he must serve with respect to his original sentence.

8 March 1979

Nick A. Rotering
Legal Counsel
Department of Institutions
1539 Eleventh Avenue
Helena, Montana 59601

Dear Mr. Rotering:

You have requested an opinion concerning the following question:

> When does a sentence imposed for a crime committed by a prisoner run concurrently with the prisoner's original sentence?

A.

Initially, your question requires consideration of two separate and conflicting statutory provisions. The first is section 46-23-217, MCA (§95-3221, R.C.M. 1947), which provides:

> Service of term for additional crime. Any prisoner who commits a crime while at large upon parole or conditional release and who is convicted and sentenced therefor shall serve such sentence concurrently with the terms under which he was released unless otherwise ordered by the court in sentencing for the new offense. (Emphasis supplied.)

This section was enacted in 1955, Laws of Montana (1955), ch. 153, sec. 19, and has not been expressly repealed. However, in 1977 the legislature enacted a new provision which also governs sentences imposed for crimes committed by prisoners on parole or furlough. That provision was enacted as Laws of Montana (1977), ch. 340, sec. 2, and is codified at 46-18-401(5), MCA (§95-2213(e), R.C.M 1947). It provides:

> (5) Except as provided in this subsection, when a prisoner is sentenced for an offense committed while he was imprisoned in the state prison or

> while he was imprisoned in the state prison or while he was released on parole or under the prisoner furlough program, the new sentence runs consecutively with the remainder of the original sentence. The prisoner starts serving the new sentence when the original sentence has expired or when he is released on parole under chapter 23, part 2, of this title in regard to the original sentence, whichever is sooner. In the latter case, the sentences run concurrently from the time of his release on parole. (Emphasis added.)

The new section is mandatory and automatic. All sentences to which the section applies run consecutively. Thus, the new section is inconsistent and incompatible with section 46-23-217, which permits concurrent sentencing with respect to crimes committed by prisoners on parole or furlough. The conflict is direct and unavoidable and it is therefore my opinion that section 46-23-217 was impliedly repealed by the enactment of section 46-18-401(5). Where two statutes are "wholly inconsistent, incompatible and not capable of being reconciled," the later statute impliedly repeals the earlier one if it does not expressly do so. State ex rel. Jenkins v. Carisch Theatres, Inc., ___ Mont. ___, 564 P.2d 1316, 1319 (1977).

Caution should be used in applying section 46-18-401(5). The legislature has made specific provision for the implementation of this section, providing that it applies only to offenses committed after July 1, 1977. Laws of Montana (1977), ch. 340, sec. 5. Section 46-23-217 still applies to sentences imposed for crimes committed on or before July 1, 1977.

B

Although section 46-18-401(5) mandates that a sentence imposed for a crime committed by a prisoner run consecutively with the remainder of the prisoner's original sentence, the section goes on to provide that in the event the prisoner is "released on parole *** in regard to the original sentence," the new and old sentences will thereafter run concurrently. The transformation of the "consecutive" nature of the second sentence to a new status of "concurrent" is automatic upon a prisoner's release on parole. This feature, however, has created some confusion with respect to its application. The confusion is focused upon the implications which it might have with respect to parole eligibility. Specifically, it has been suggested that a sentence imposed under section 46-18-401(5) should be

disregarded for purposes of computing the minimum time which the prisoner must serve before he is eligible for parole. If this interpretation is correct, a parolee who is sentenced for a crime committed while on parole would be eligible for a new parole the moment he returned to prison, assuming he is subject to no other restrictions imposed by the Board of Pardons. The suggestion, however, is meritless.

On its face, section 46-18-401(5) does not concern parole eligibility. It merely specifies a consequence which flows from the granting of parole. Another statutory provision, specifically section 46-23-201(1), MCA (§95-3214(1), R.C.M. 1947), fixes the minimum time which a prisoner must serve before he is eligible for parole. In connection with crimes committed prior to July 1, 1977, that minimum time was generally one-quarter of the prisoner's "full term." See 38 OP. ATT'Y GEN. NO. 11. The section was amended in 1977 and now provides:

> Prisoners eligible for parole. (1) Subject to the following restrictions, the board shall release on parole by appropriate order any person confined in the Montana state prison, except persons under sentence of death and persons serving sentences imposed under 46-18-202(2), when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community:
>
> (a) No convict serving a time sentence may be paroled until he has served at least one-half of his full term, less the good time allowance provided for in 53-30-105; except that a convict designated as a nondangerous offender under 46-18-404 may be paroled after he has served one-quarter of his full term, less the good time allowance provided for in 53-30-105. Any offender serving a time sentence may be paroled after he has served, upon his term of sentence, 17 1/2 years.
>
> (b) No convict serving a life sentence may be paroled until he has served 30 years, less the good time allowance provided for in 53-30-105. (Emphasis added.)

The minimum time specified by section 46-23-201(1), MCA, is computed upon the prisoner's "full term."

A consecutive sentence is cumulative to any other sentence. It is a different and additional sentence and cannot be disregarded for purposes of section 46-23-201(1). Cf. State ex rel. Herman v. Powell, 139 Mont. 583, 367 P.2d 553 (1961). Therefore, a prisoner sentenced to a new consecutive sentence pursuant to section 46-18-40(5) and not designated a non-dangerous offender, is ineligible for parole until he has served at least one-half of his new sentence in addition to any time he must serve to become eligible for parole with respect to his first sentence. The transformation feature of second and third sentences of section 46-18-401(5) merely recognizes the possibility that a prisoner sentenced to a new consecutive term thereunder may become eligible for and be released upon parole prior to the expiration of his original sentence, see e.g., State ex rel. Herman v. Powell, supra, and makes provision that the remainders of the original and new sentences will thereafter run concurrently.

This does not mean that once a prisoner has served the minimum time prescribed under section 46-23-201(1), MCA, that he is automatically eligible for parole. "The granting of a parole is not a matter of right but is a matter of grace, privilege, or clemency granted to the deserving and withheld from the undeserving, as sound official discretion may dictate." Herman, supra, 139 Mont. at 589. The Board may require a prisoner who commits a new offense while in prison or on parole or furlough to serve a longer time than provided by section 46-23-201(1) before considering him for parole. For example, a prisoner may be required to serve to the discharge date of his original sentence before commencing his new sentence, and then serve the minimum required time of his second sentence before becoming eligible for parole. E.g. Petition of Ferguson, 146 Mont. 246, 405 P.2d 217 (1965). The Board is expressly empowered to adopt rules governing "the eligibility of prisoners for parole," Section 46-23-218, MCA (§95-3214(5), R.C.M. 1947), and in fact has adopted a number of rules with respect to parole eligibility. These rules may delay the parole eligibility of a prisoner committing a crime while in prison, or on parole or furlough, beyond the minimum time prescribed by section 46-23-201(1). See e.g. §§20-3.10(6)-S10000(3) and S10020, ARM.

THEREFORE, IT IS MY OPINION:

1. Section 46-23-217, MCA (§95-3221, R.C.M. 1947), was impliedly repealed by the 1977 enactment of section 46-18-401(5), MCA (§95-2213(e), R.C.M. 1947). Any sentences imposed with respect to a crime committed after July 1, 1977, by a prisoner imprisoned at the state prison or on parole or furlough, runs consecutively with the remainder of the prisoner's original sentence. Any crime committed on or before July 1, 1977, by a prisoner while on parole or conditional release runs concurrently with the prisoner's original sentence unless otherwise specified by the sentencing court.

2. If a prisoner who has received a new consecutive sentence under section 46-18-401(5), MCA (§95-2213(e), R.C.M. 1947), is paroled, the remaining time of his new and original sentences thereafter run concurrently.

3. A prisoner sentenced pursuant to section 46-18-401(5), MCA (§95-2213(e), R.C.M. 1947), must serve that term consecutively with the remainder of his original term. If the prisoner has not been designated a non-dangerous offender, he is ineligible for parole until he has served at least one-half of his new sentence in addition to any minimum time he must serve with respect to his original sentence.

Very truly yours,

MIKE GREELY
Attorney General

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