MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 12

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are inserted at the back of each register.

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SPECIAL NOTICE AND TABLE SECTION

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DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PLUMBERS

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TO: All Interested Persons.

The notice of proposed amendments and adoption published in the Montana Administrative Register on May 17, 1984, issue number 9, is amended as follows because the required number of persons designated therein have requested a public hearing:

1. On July 19, 1984, at 9:00 a.m., a public hearing will be held in downstairs conference room, of the Department of Commerce, 1424 9th Avenue, Helena, Montana to consider the amendments and adoption of the above-stated rules.

2. The amendments and adoption are the same as proposed in the original notice.

3. The rules are proposed for amendments and adoption for the reasons as stated in the original notice.

4. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Plumbers, 1424 9th Avenue, Helena, Montana 59620-0407, no later than July 26, 1984.

5. The board or its designee will preside over and conduct the hearing.

6. The authority of the board to make the proposed rule amendments and adoption is based on sections 37-69-202, 37-1-134, MCA, and the rule implements 37-1-134, 37-69-202, 303, 304, 305, 306, 307, MCA.

BOARD OF PLUMBERS
DON KRISTENSEN, CHAIRMAN

BY: _____
GARY BUCHANAN, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, June 18, 1984.

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of Rules governing maternity leave under the Montana Human Rights Act	)))	NOTICE OF PUBLIC HEARING FOR ADOPTION OF RULES GOVERNING MATERNITY LEAVE

TO: All Interested Persons:

The notice of proposed agency action published in Montana Administrative Register on March 29, 1984, is amended as follows because of a request for public hearing which was granted by the Commission.

1. On July 26, 1984, at 7:00 p.m., a public hearing will be held in room 136 of the Mitchell Building to consider the adoption of proposed rules governing maternity leave.

2. The rules as proposed are published at pages 482-485 of the 1984 Montana Administrative Register published on March 29, 1984, Issue No. 6.

3. The Commission proposes the rules in order to establish procedures and guidelines to govern the Commission's enforcement of the maternity leave provisions of the Montana Human Rights Act.

4. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Anne L. MacIntyre, Human Rights Division, Capitol Station, Helena, Montana, 59620, no later than July 26, 1984.

5. Margery H. Brown has been designated to preside over and conduct the hearing.

6. The authority of the Commission to make the proposed rules is based on Section 49-2-204, MCA, and the rules implement Sections 49-2-310 and 49-2-311, MCA.

HUMAN RIGHTS COMMISSION
MARGERY H. BROWN, CHAIR

By: Anne L. MacIntyre
Anne L. MacIntyre
Administrator
Human Rights Division

Certified to the Secretary of State June 18, 1984.

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

IN THE MATTER of Proposed amendment of rules regarding Public Service Commission fees, and proposed adoption of new fee rules regarding motor carrier, railroad and utility fees.	)))))))	NOTICE OF PROPOSED AMENDMENT OF 38.3.202(1)(e), 38.3.203(3), 38.3.402(a), 38.3.502(3), 38.3.801(1), 38.3.805(1), 38.3.2014(2), 38.3.2101(1) AND PROPOSED ADOPTION OF NEW FEE RULES PERTAINING TO MOTOR CARRIER, RAILROAD AND UTILITY FEES NO HEARING CONTEMPLATED

TO: All Interested Persons

1. On July 30, 1984 the Montana Public Service Commission proposes to amend and adopt new rules pertaining to motor carrier, railroad, and utility fees.

2. The rules proposed to be amended provide as follows:

38.3.201 INTRASTATE CARRIERS (1) (a), (b), (c), (d), (e), (f) No change.

(g) payment of an annual ~~and other fees, including~~ vehicle registration fees of five dollars ($5) for which an identification stamp will be issued which shall be attached to an identification cab card furnished by the Commission, which card, with affixed stamp, shall be carried in the vehicle at all times (69-12-421, 69-12-423, MCA);

(h), (i), (j), (k), (l), (m) No change.

(n) additional fees (69-12-423, MCA).

AUTH: 69-12-201, MCA, IMP: 69-12-421 and 69-12-423, MCA

38.3.202 INTERSTATE AND FOREIGN CARRIERS (1) (a), (b), (c), (d) No change.

(e) payment of an annual ~~fee requirements~~ vehicle registration fee of five dollars ($5) for which an identification stamp will be issued which shall be attached to an identification cab card, which card with affixed stamp, shall be carried in the vehicle at all times (69-12-421, 69-12-423, MCA);

(f), (g) No change.

AUTH: 69-12-201, 69-12-401, 69-12-402, MCA, IMP: 69-12-421 and 69-12-423, MCA

38.3.203 REGISTRATION OF INTERSTATE AUTHORITIES (1) No change.

(2) Such registration of certificate and vehicle shall be accepted and permit granted upon payment of the appropriate filing fee of twenty-five dollars ($25), as prescribed by the Interstate Commerce Commission rules under PL. 89-170.

(3) No change.

AUTH: 69-12-201, MCA, IMP: 69-12-103, MCA

38.3.502 APPLICATIONS FOR TEMPORARY OPERATING AUTHORITY (1), (2), (3) No change.

(4) Fees applicable to permanent operating authority as provided in ARM 38.3.402(1) are applicable to requests for

temporary operating authority and are to be paid as provided in ARM 38.3.801(2).

(5) No change

AUTH: 69-12-201, MCA, IMP: 69-12-207, 69-12-423, MCA

38.3.801 FEES (1) Fees due the Commission, ~~unless otherwise provided for,~~ are as contained in Title 38, Chapter 3 of the Administrative Rules of Montana ~~69-12-421 and 69-12-423, MCA~~.

AUTH: 69-12-201, MCA, IMP: 69-12-421, 69-12-423, MCA

38.3.805 REPORTS AND UNIFORM SYSTEM OF ACCOUNTS

(1) Reports due this Commission from motor carriers operating within the state of Montana are as required in 69-12-407, MCA. Annual reports shall be submitted to the Commission accompanied by a filing fee of twenty-five dollars ($25). Annual reports forms are available upon request at the Commission office, ~~1227 11th~~ 2701 Prospect Avenue, Helena, Montana ~~59601~~ 59620. Information relative to the uniform system of accounts or any uniform reports may be had by contacting the Commission office.

(2), (3) No change.

AUTH: 69-12-201, MCA, IMP: 69-12-407, 69-12-423, MCA

38.3.2014 LEASE OF CERTIFICATES OF AUTHORITY - GENERAL

(1) No change.

(2) All leases of certificates of public convenience and necessity or permits shall be in writing and accompanied by a filing fee of fifty dollars ($50). The leases shall be submitted to the Commission for approval and shall not have any force or effect until approved by the Commission.

(3) No change.

AUTH: 69-12-201, MCA, IMP: 69-12-326, 69-12-423, MCA

38.3.2101 SALE OR TRANSFER OF CERTIFICATE OF AUTHORITY

(1) As authorized by 69-12-325, MCA, Public Service Commission certificates or permits may be sold or transferred. Every application for the sale or transfer of a certificate of public convenience and necessity must be accompanied by an application filing fee of one hundred dollars ($100), and shall be paid to the Commission as provided in ARM 38.3.801(2). The application should be addressed to the Commission, must be sworn to and contain the following information:

(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (2), (3) No change.

AUTH: 69-12-201, MCA, IMP: 69-12-325, 69-12-423, MCA

3. The new rules proposed to be adopted provide as follows:

RULE I. RAILROAD APPLICATION AND PETITION FEES

(1) Every application or petition filed with the Commission by any railroad operating in the State of Montana shall be accompanied by a filing fee as prescribed in Rule I(2). A filing fee of one hundred fifty dollars ($150) shall accompany applications or petitions that normally require a public hearing be conducted. A filing fee of fifty dollars ($50) shall accompany applications or petitions that normally do not

require a public hearing be conducted.

(2) Applications or petitions which shall be accompanied by a filing fee include, but are not limited to:

(a) Request to abandon or discontinue a station agency; $150.

(b) Request to remove a station agent; $150.

(c) Request to remove or abandon station agency facilities including depot buildings and loading facilities; $150.

(d) Request to remove or abandon railroad spur trackage or side trackage; $50.

(e) Request to combine station agency service including but not limited to, dualizations, trializations, consolidations, centralizations or direct service agencies; $150.

AUTH: 69-14-111, MCA, IMP: 69-14-111, MCA

RULE II. ANNUAL REPORTS AND FEES (1) Every railroad owning, operating or having any line of railroad in the State of Montana is required to file an annual report with the Commission pursuant to 69-14-251, MCA. Each annual report shall be accompanied by a filing fee of twenty-five dollars ($25).

AUTH: 69-14-111, MCA, IMP: 69-14-251, MCA

RULE III. RATE TARIFF FILING FEE (1) Every utility which changes its tariff sheets for rates, tolls and charges, pursuant to 69-3-302, MCA, shall file the tariff sheets with the Commission accompanied by a filing fee of five dollars ($5) per tariff page up to a maximum filing fee of $500 per tariff filing.

(2) The tariff filing fee shall also apply to interim or temporary tariff rate filings.

AUTH: 69-3-103, MCA, IMP: 69-3-204, 69-3-301, 69-3-302, 69-3-304, MCA

RULE IV. ANNUAL REPORTS AND FEES (1) Every utility is required to file an annual report with the Commission pursuant to 69-3-203, MCA. Each annual report, except those for municipally-owned utilities, shall be accompanied by a filing fee of twenty-five dollars ($25).

(2) Each municipally-owned utility, as defined in Title 69, Chapter 7, MCA, shall file an annual report with the Commission accompanied by a filing fee, the amount of which will be determined as follows:

(a) First class city; $25

(b) Second class city; $20

(c) Third class city; $15

(d) A town; $ 10

AUTH: 69-3-103, MCA, IMP: 69-3-203, 69-3-204, MCA

4. RATIONALE: In September, 1982, the Office of the Legislative Auditor concluded its sunset performance audit of the Montana Public Service Commission and the Department of Public Service Regulation. One of the findings of the audit was that the Commission's fees for various forms and services were not commensurate with processing costs. Specifically the audit found that the Utility Division's fees for filing utility annual reports, rate schedules and classifications for utili-

ties, and the Transportation Division's fees for certificates, annual reports, tariff filings, time schedules and commodity classifications were not commensurate with related processing costs.

During the 1983 legislative session, the Legislature passed Senate Bill No. 436 which provides that the Public Service Commission has the authority to set and charge fees commensurate with costs, except for those fees set by federal statute. The Statement of Intent for SB 436 provides that the Commission's fees should be set in an amount sufficient to provide funds to administer the function for which the fee is charged, but not so high as to generate revenue in excess of expenses. The Legislature also provided that none of the fees set by the Commission may exceed $500.

For motor carriers, the legislative change means that carriers will no longer be charged specific fees for the issuance of operating certificates, or the filing of tariffs or time schedules.

The Legislature also provided that utilities would not be assessed a filing fee for their rate request applications.

38.3.201 - This rule is amended to include language to clarify that annual fees for intrastate carriers are the $5 vehicle registration fees collected by the Commission. The inclusion of (n) is to include the same language as provided in ARM 38.3.202(1)(f) for interstate carriers.

38.3.202(1)(e) - This rule is amended to include language, as provided in ARM 38.3.201(1)(g) for intrastate carriers, to clarify that annual fees for interstate carriers are the $5 vehicle registration fees collected by the Commission.

38.3.203(3) - The rule is amended to indicate that the I.C.C. filing fee is $25. Since this filing fee is set at the federal level, no amendment to the amount of the fee was made.

38.3.502(3) - Subsection (3) is amended to clarify that a motor carrier applying for temporary operating authority must pay an application fee, the amount of which is determined in the same manner as the amount of a permanent application fee. ARM 38.3.801(2) is cross-referenced as it provides for the methods to remit the application fee to the Commission.

38.3.801 - Language is added to alert the reader that specific fees are located throughout the Motor Carrier administrative rules. With the Legislature's statutory amendments, Sections 69-12-421 and 69-12-423, MCA, no longer provide specific statutory fee amounts; now fees are set by administrative rule.

38.3.805(1) - The rule was amended to provide that the $25 filing fee for annual reports must accompany the report. Previously Section 69-12-423, MCA, had provided that the annual report filing fee was $5. The Transportation Division also had charged each carrier an additional $1 to cover the annual report form; that form charge is now included in the $25 filing fee. The rule provides the Commission's new office address.

38.3.2014 - Amendments clarify that any motor carrier seeking to lease its certificate of public convenience and

necessity must send the written lease agreement along with a $50 filing fee to the Commission for review.

Previously the Commission did not require a filing fee for proposed certificate leases.

38.3.2101 - Amendments clarify that any motor carrier which wants to sell or transfer its certificate of public convenience and necessity must pay a $100 filing fee which is to accompany the sale/transfer application to the Commission.

Previously the Commission did not require a filing fee for such applications.

(Railroads) Rule I - The proposed rule provides that any railroad application or petition filed with the Commission must now be accompanied by a filing fee. The amount of the filing fee is determined by whether or not the application or petition normally requires the Commission to hold a public hearing to make its final decision or not.

Previously the Commission did not require such filing fees.

(Railroads) Rule II - The proposed rule provides that the annual report filing fee will be $25 rather than $5.

(Utility) Rule III - The proposed rule provides for a filing fee to accompany any rate schedule changes proposed by a utility. The rule will require a utility to pay a fee of $5 per tariff page for any tariff and/or schedule changes that a utility proposes. Each page that requires the seal of the Commission be affixed by the Commission Secretary shall be considered one page.

Previously the Commission had a filing fee of $2 for tariff and/or schedule changes.

(Utility) Rule IV - The proposed rule provides that utilities' statutorily required annual report must be accompanied by a filing fee of $25, which includes the charge for the annual report form. Previously the Commission had an annual report filing fee of $5. This rule provides for a different annual report fee schedule for municipally-owned utilities based on a municipality's class as defined in 7-1-4111, MCA. This fee schedule attempts to gear fee payments to the municipality's ability to pay, and to reflect the fact that utility service provision by municipalities is partially deregulated as provided in Title 69, Chapter 7, MCA.

5. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to Opal Winebrenner, 2701 Prospect Avenue, Helena, Montana 59620, no later than July 26, 1984.

6. If a person who is directly affected by the proposed adoption and amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Opal Winebrenner, 2701 Prospect Avenue, Helena, Montana 59620, no later than July 26, 1984.

7. If the agency receives requests for a public hearing on the proposed adoption, amendment and repeal from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the Administrative Code Committee of the legislature; from a governmental sub-division or agency; or from an association having not less than 25 members who will be directly affected, 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 98 persons based on the fact that there are approximately 650 certificated Montana motor carriers, approximately 330 regulated utilities and 1 railroad.

8. The Montana Consumer Counsel, 34 West Sixth Avenue, Helena, Montana 59620 (Telephone 444-2771) is available and may be contacted to represent consumer interests in this matter.

THOMAS J. SCHNEIDER, CHAIRMAN

CERTIFIED TO THE SECRETARY OF STATE JUNE 18, 1984.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the ADOPTION OF A RULE establishing a State Plan of Operation for distribution of federal surplus property	NOTICE OF THE ADOPTION OF RULE 2.5.801

TO: All Interested Persons.

1. On May 17, 1984, the Department of Administration published notice of a proposed adoption of a rule establishing a State Plan of Operation for distribution of federal surplus property at page 746 of the 1984 Montana Administrative Register, issue number 9.

2. The agency has adopted the rule as proposed.

3. No comments or testimony were received at the hearing on the proposed adoption.

4. The authority of the department to adopt the proposed rule is based on section 18-5-202, MCA, and the rule implements section 18-5-202, MCA.

Morris L. Brusett
Morris L. Brusett, Director
Department of Administration

Certified to the Secretary of State June 15 1984

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of new rules, the amendment of rules and the repeal of rules relating to the administration of moving and relocation expenses	))))))))	NOTICE OF ADOPTION OF NEW RULES, AMENDMENT OF RULES 2.21.4907, 2.21.4911, AND 2.21.4914, AND REPEAL OF RULES 2.21.4912 AND 2.21.4913 RELATING TO MOVING AND RELOCATION EXPENSES

TO: All Interested Persons.

1. On May 17, 1984, the department of administration published notice of the proposed adoption of new rules, the amendment of rules 2.21.4907, 2.21.4911 and 2.21.4914 and the repeal of rules 2.21.4912 and 2.21.4913 relating to the administration of moving and relocation expenses at page 735 of the 1984 Montana Administrative Register, issue number 9.

2. The department received one comment and as a result of the comment the rules have been adopted with the following changes:

2.21.4909 COVERED MOVES (1) When a state agency requires an employee to move to another location at a distance of 50 ~~map~~ road miles or more, the agency shall pay moving and relocation expenses. A move to a location less than 50 ~~map~~ road miles away may be paid at the agency's discretion. A move required by an agency includes the relocation of an employee where the agency:

(a) - (c) Same as proposed rules.

(2) (a) - (c) Same as proposed rules.

(d) the move of an employee to a location less than 50 ~~map~~ road miles away whether or not the move is required by the agency. The granting of and extent of moving and relocation expenses paid for moves not required by the agency is at the agency's discretion, shall be administered consistent with this policy and will not exceed established maximums.

By _____
Morris L. Brusett, Director
Department of Administration

Certified to the Secretary of State, June 18, 1984.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the repeal of rules 2.21.6501 through 2.21.6504 relating to discipline handling and the adoption of new rules	)))))	NOTICE OF THE REPEAL OF RULES 2.21.6501 THROUGH 2.21.6504 RELATING TO DISCIPLINE HANDLING AND THE ADOPTION OF NEW RULES

To: All Interested Persons.

1. On May 17, 1984, the department of administration published notice of the proposed repeal of rules 2.21.6501 through 2.21.6504, relating to discipline handling, and the adoption of new rules at page 740, MAR issue number 9.

2. The rules have been repealed and new rules adopted with the following change:

2.21.6505 POLICY AND OBJECTIVES (1) (a)-(c) Same as proposed rule.

(2) It is the objective of this policy to establish procedures for taking formal disciplinary action~~ against an employee~~.

3. A public hearing on the proposed rules was conducted June 11, 1984. The following comments and testimony were received during the comment period and at the hearing.

COMMENT: Delete the phrase "against the employee" in 2.21.6505(2) (Rule II) because it is unnecessary and is punitive in tone.

RESPONSE: The department has amended the rule as suggested.

COMMENT: Additional explanation of the phrase "disruption of agency operations" in the definition of just cause found in Rule 2.21.6507 (Rule III) would be helpful due to the subjective nature of the concept.

RESPONSE: Disruption of agency operations may range from behaviors such as absenteeism which interferes with work flow to intoxication or fighting at the worksite. In making the determination that there is disruption, an agency should consider the full definition of "just cause" which states it includes "violation of an established agency standard, legitimate order, policy or labor agreement, failure to meet applicable professional standard or a series of lesser violations." The department believes the definition as proposed should not be changed, but will attempt to provide additional

guidance in training and guide material on discipline handling.

COMMENT: Rule 2.21.6515 (Rule VI) should not prohibit the filing of a grievance based on oral warning or corrective counseling. Those commenting expressed concern that an employee could be harassed through the use of informal disciplinary actions, but have no recourse to the grievance procedure. The employee might feel forced to resign because of harassment or an agency could move from informal actions directly to discharge and there would have been no progressive discipline.

RESPONSE: The department believes there must be the option for internal "constructive, corrective action" presented in a "positive, non-threatening manner" prior to the initiation of a formal disciplinary action. In practice most discipline problems are resolved by these means. Making oral warnings and corrective counseling grievable issues would require formal documentation which would become a permanent part of the employee's personnel file. The informal action could essentially become a formal written warning. The department disagrees with the suggestion to make these actions grievable. In regard to the possibility of an agency moving from informal actions directly to discharge, it would be difficult to support such action because of safeguards built into these rules. Rule 2.21.6509 (Rule V) states in paragraph (6) "Discharge should not be an initial (emphasis added) disciplinary action, except in severe cases of unsatisfactory performance or behavior that disrupts agency operations." The definition of just cause also requires that the action be "reasonable."

COMMENT: In rule 2.21.6507 (Rule III), the phrase in the definition of just cause "if the employee would reasonably be expected to have knowledge that the action or omission may result in disciplinary action" is unclear.

RESPONSE: A reasonableness standard is included here because, while it is the responsibility of an agency to inform its employees of its standards, an agency is not required to identify in advance and inform each employee of all behaviors it finds unacceptable where such actions are commonly known to be unacceptable. For example, it would be reasonable to expect an employee to know that stealing agency property is an offense which may lead to disciplinary action. The agency need not promulgate a

policy informing employees of the possible consequences of stealing.

COMMENT: The definition of employee in 2.21.6507 (Rule III) should include persons in a probationary status. Does exclusion of persons who have not attained permanent status mean an agency may not take disciplinary action against the employee?

RESPONSE: The department does not agree that employees who have not attained permanent status should be included under these rules. This rule extends employment rights to employees, including the right to a grievance. The probationary period traditionally is used to assess an employee's fitness for a particular job. Management needs flexibility during the first months of employment to make this assessment and to be able to remove an unsatisfactory employee. The definition of employee does not prevent an agency from disciplining a probationary employee.

BY: _____
Morris L. Brusett, Director
Department of Administration

Certified to the Secretary of State June 18, 1984.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PUBLIC ACCOUNTANTS

In the matter of the amendment of rules 8.54.401 through 8.54.403, 8.54.405 through 8.54.411, 8.54.415, 8.54.601, 8.54.603 through 8.54.616, 8.54.801 through 8.54.806, 8.54.808 through 8.54.812, 8.54.816 through 8.54.818, 8.54.820 through 8.54.822, repeal of rule 8.54.602 concerning definitions, and adoptions of new rules under sub-chapter 2 concerning definitions, under sub-chapter 6 concerning professional conduct, under sub-chapter 7 concerning positive enforcement rules.	)))))))))))))	NOTICE OF AMENDMENTS OF RULES 8.54.401 through 8.54.403, 8.54.405 through 8.54.411, 8.54.415, 8.54.601, 8.54.603 through 8.54.616, 8.54.801 through 8.54.806, 8.54.808 through 8.54.812, 8.54.816 through 8.54.818, 8.54.820 through 8.54.822, REPEAL OF 8.54.602 DEFINITIONS, AND ADOPTIONS OF RULES UNDER SUB-CHAPTER 2, 8.54.204 DEFINITIONS, UNDER SUB-CHAPTER 6, 8.54.617 OTHER TECHNICAL STANDARDS, 8.54.618 FORM OF PRACTICE AND NAME, UNDER SUB-CHAPTER 7 POSITIVE ENFORCEMENT RULES, 8.54.701 through 8.54.705

TO: All Interested Persons:

1. On April 26, 1984, the Board of Public Accountants published a notice of hearing for the amendments, repeal and adoption of the above-stated rules at pages 632 through 664, 1984 Montana Administrative Register, issue number 8.

2. The hearing was held on May 22, 1984, in the auditorium of the Scott Hart Building, 303 Roberts, Helena, Montana. In addition to staff and board members, 28 persons attended the hearing. Fifteen letters were received. Based on comments and testimony offered, the board is amending, repealing and adopting the rules as proposed with the following changes: (new matter underlined, deleted matter interlined)

Rules 8.54.401, 8.54.402, 8.54.403 are amended as proposed. Rule 8.54.405 is amended with the following change:

"8.54.405 CONSECUTIVE EXAMINATIONS AND RE-EXAMINATION REQUIREMENTS (1) ...

(a) A candidate who passes 2 or more parts of the uniform certified public accountants examination may be re-examined in the remaining subjects for the 5 consecutive examinations following the examination in which he establishes a condition, with credit being given for the parts successfully passed, provided that;

(i) ...

(ii) the applicant attained a minimum grade of 50 on each part not passed at that sitting~~;~~. However, the minimum grade requirement is waived if three parts are passed at one sitting or if a hardship exception is approved by the board.

(iii) ...

(iv) in order to receive credit for passing additional parts in any such subsequent sitting, the applicant attains a minimum grade of 50 on each part written, but not passed on such sitting. The minimum grade requirement is waived if a hardship exception is approved by the board.

(v) Hardship exceptions will include illness, death in the immediate family, or other extenuating circumstances as determined by the board.

Accounting practice will be considered 2 parts.

(b) ..."

Rules 8.54.406 and 8.54.407 are amended as proposed. Rules 8.54.408, 8.54.409, 8.54.410 are amended with the following changes:

"8.54.408 EDUCATION REQUIREMENTS (1) A candidate for certification as a certified public accountant or licensing as a licensed public accountant must have graduated with a concentration in accounting from a college or university accredited to offer a baccalaureate degree, ~~with a concentration in accounting;~~ or

(a) ...

(3) A concentration in accounting will be interpreted by the board to include 24 semester hours (36 quarter hours) of accounting, ~~and~~ auditing and tax courses, and 18 semester hours (27 quarter hours) in other areas of business such as business law, management, marketing, economics and finance. The 18 semester hours (27 quarter hours) shall include no more than 6 semester hours (9 quarter hours) in one area.

(4) ..."

"8.54.409 ACCOUNTING AND AUDITING EXPERIENCE REQUIREMENTS

(1) Accounting and auditing experience will be considered adequate by the board if satisfactory evidence is presented of having performed ~~for at least 12 months (2,000) hours of~~ accounting and auditing functions ordinarily required in the practice of public accounting, provided this experience:

(a) be ~~under the supervision of a~~ attested to by a holder of a permit to practice, and

(b) ...

(c) (i) includes at least 12 calendar months (2000 hours actual work experience with ~~includes~~ at least 500 hours of attest oriented ~~audit~~ experience requiring application of generally accepted standards and issuance of reports requiring application of generally accepted accounting principles. The prescribed experience may be fulfilled from a combination of attest experience having as its objective

financial audits, compliance audits, reviews and compilations or internal financial audits, or:

~~The demonstration of this experience by the applicant shall have as its objective that upon the issuance of the permit that the applicant shall have obtained sufficient, diversified experience to enable him to conduct an examination of the financial statements of an entity and report thereon with a minimum of supervision.~~

(ii) includes at least 24 calendar months (4,000 hours actual work experience) of private, governmental or public accounting work acceptable to the board."

8.54.410 FEE SCHEDULE

(1) ...

(6) Annual fee for permit to practice...~~65.00~~ 60.00

(7) ..."

Rules 8.54.411, 8.54.415, 8.54.601, 8.54.603, 8.54.604, 8.54.605, 8.54.606, 8.54.607, 8.54.608, 8.54.609, 8.54.610 are amended as proposed. Rule 8.54.611 is amended with the following change:

"8.54.611 FORECASTS (1) A firm or permit holder shall not in the performance of professional services permit his name to be used in conjunction with any forecast or projection of future transactions in a manner which may reasonably lead to the belief that the firm or permit holder vouches for the achievability of the forecast or projection.

(2) This rule does not prohibit a firm or permit holder from preparing, or assisting a client in the preparation of, forecasts or projections of the results of future transactions. When a firm or permit holder's name is associated with such forecasts or projections, there shall be the presumption that such data may be used by parties other than the client. Therefore, full disclosure must be made of the sources of the information used and the major assumptions made in the preparation of the statements and analyses, the character of the work performed by the firm or permit holder, and the degree of the responsibility he is taking."

Rules 8.54.612, 8.54.613, 8.54.614, 8.54.615, 8.54.616, 8.54.801 are amended as proposed. Rule 8.54.802 is amended with the following change in subsection (2):

8.54.802 BASIC REQUIREMENT (1)...

(2) At least 24 hours of the aforementioned 120 hours of acceptable continuing education credit must consist of subjects related to the reporting on financial statement as defined in rule ~~1~~ ARM 8.54.204 (1) ~~(d) and (i)~~ (e) and (j) in these regulations. The purpose of this requirement is to have permit holders participate in a minimum amount of

continuing education in the area of reporting on financial statements which is an area of responsibility specifically given to permit holders in section 37-50-301 (6) ~~of the law~~, MCA.

(3) ..."

Rules 8.54.803 and 8.54.804 are amended as proposed. Rule 8.54.805 is amended with the following changes:

"8.54.805 EXCEPTIONS - NOT PRACTICING PUBLIC ACCOUNTING (1) An applicant for a permit to practice who does not intend to ~~engage in the practice of public accounting~~ hold themselves out as a CPA or LPA should be informed that ~~a permit to practice is only required when the applicant practices public accounting. Accordingly,~~ the application ~~should~~ could be withdrawn and there is no continuing education requirement for this license or certificate holder."

Rules 8.54.809, 810, 811, 812, 816, 817, 818, 820, 821, and 822 are amended as proposed. Rule 8.54.602 is repealed as proposed. New rule I now 8.54.204 is amended with the following change:

8.54.204 DEFINITIONS (1) ...

(b) 'Non-practice of public accounting' - a certificate or license holder not in the practice of public accounting but providing financial or consulting services to the public must have a permit to practice, if they hold themselves out to the public as a CPA or LPA in any manner.

CPA's or LPA's working for a non-public accounting employer shall not use their CPA or LPA designation when presenting employer reports to outside parties unless they maintain a permit to practice.

(c) ...

(j) 'Financial statement' - A presentation of financial data, ~~including accompanying notes,~~ derived from accounting records and intended to communicate an entity's economic resources or obligations at a point in time, or the changes therein for a period of time, ~~in accordance with generally accepted accounting principles~~. Financial forecasts, projection and similar presentations, and financial presentations included in tax returns are not financial statements for purposes of this definition. The following financial presentations are examples of financial statements: ..."

Rules II, III, and IV are adopted as proposed as rules 8.54.617, 8.54.618, and 8.54.701. Rules V, VI, are being adopted as 8.54.702 and 8.54.703 with the following changes:

8.54.702 ENFORCEMENT AGAINST PERMIT HOLDERS (1) ...

(a)...

(h) performance of any fraudulent act in the practice of the profession while holding a certificate, license, or permit issued under Title 37, Chapter 50, MCA;

~~(i) any conduct reflecting adversely upon the permit holder's fitness to engage in the practice of public accountancy; and~~

~~(j)~~ (i) failure to meet the continuing education requirements established by the board.

(j) Reasons (a), (b), (d), (e), (f) and (g) are statutory reasons set forth in section 37-50-321, MCA.

(2) In lieu of or in addition to any ~~causes~~ disciplinary actions specifically provided in subsection (1) of this section, the board may require of a permit holder:

(a) ...

(3) The board may publish the enforcements implemented against permit holders under subsections (1) and (2) of this section whenever the board determines that the public's ~~need~~ right to know outweighs the permit holder's ~~need for confidentiality~~ right of privacy."

8.54.703 ENFORCEMENT PROCEDURES - INVESTIGATIONS (1) ...

(2) The board may designate any person not a board member to serve as positive enforcement coordinator to conduct an investigation. During the investigative process, t ~~T~~he report of the positive enforcement coordinator, the testimony and documents gathered in the investigation and the pendency of the investigation shall be treated as confidential information by the board and its designees, and shall not be disclosed except to the extent deemed necessary in order to conduct the investigation or in compliance with section 37-1-135, MCA, for the public's right to know provided by Article II, Section 9 of the Montana Constitution.

(3) ...

(4) ~~The board may review the professional work of a permit holder on a general and random basis, without any requirement of a formal complaint or suspicion of impropriety on the part of any particular such person. In the event that as a result of such review the board discovers grounds for a more specific investigation, the board may proceed according to these rules.~~ The board may initiate investigation based upon a complaint or upon their own motion.

(5) ..."

Rule VII and VIII are being adopted as proposed as rules 8.54.704 and 8.54.705.

3. Comments and board response from the hearing are as follows:

COMMENT: Opposing testimony and comments were received regarding the proposal of a minimum grade of 50% on parts of the CPA exam not passed, in order to keep a "condition".

Opponents feel that the rule is too restrictive and would work a hardship on many candidates, particularly those who have been out of school for a while prior to sitting for the exam, who are employed and cannot study for all parts of the exam at one time.

RESPONSE: After listening to testimony, the board agreed that the rule as proposed was too restrictive and has changed it to allow a waiver of the minimum grade if 3 parts are passed and to allow for a hardship exception from the rule. However, the board feels that the restriction will protect a candidate's reciprocity with other states and will ensure minimum competency at the entry level.

COMMENT: A comment had been received regarding 8.54.408 (2) accredited schools, that by accepting another state's determination of accreditation recognition of a school for certification purposes, the board is allowing them to set Montana's standards.

RESPONSE: In the board's opinion, this is avoided by the word "may" that is in the rule. While the board may accept another state's accreditation, they are not required to do so and can deny what is inadequate by Montana standards.

COMMENT: Testimony and comments indicated that the proposed rule 8.54.408 (4) and (5) is too restrictive for those who may already have a degree but wish to pursue a second career in accounting and that five years of experience to meet an equivalency in education is excessive.

RESPONSE: The board is adopting rule 8.54.407 as proposed because they feel the minimum entry level competency must be met to protect the public and feel that these provisions are not unduly restrictive since in lieu of experience, the educational requirement can be substituted, which could be met in two quarters. The number of hours in courses required was not changed so as to prevent discrimination to any of the various accounting courses offered at the Montana colleges and universities.

COMMENT: The main opposing testimony and comments were regarding the proposed rule 8.54.409 Accounting and Auditing Experience Requirements. Clarification of 8.54.409 (1) was suggested to avoid confusion as to what constitutes one calendar year of experience. Objection was also voiced in requiring the experience to be under the supervision of a permit holder and to require 500 hours of attest experience in order to meet the experience requirement.

RESPONSE: The board deleted the reference to the 12 calendar months from 8.54.409 (1) to eliminate the confusion it may cause and defined what constituted a year's experience by re-wording 8.54.409 (1)(c) and adding a second subsection to it. The board also changed 8.54.409 (1)(a) to "attested to by a holder of a permit to practice" because they felt that "under the supervision of a holder of a permit to practice" was too difficult for governmental agencies to meet but they

also feel that the person who attests to the experience function must be responsible to the board. Permit holders have to have met minimum competency requirements, must keep CPE current, and comply with all board rules. The board changed 8.54.409 (1)(c) to answer objections from the governmental and private sector in the restriction for entry level experience requirements.

COMMENT: A few comments were received concerning the fee schedule, questioning the need for the raise in the permit to practice fee and the need for a transfer of grades fee.

RESPONSE: The board's position is that the maintenance of an effective program requires adequate funding to succeed. The establishment of a two-tier licensing system requires a change in the fee schedule to reflect the difference in licensing. The proposed fees were worked out commensurate with costs and the board does not feel that they are excessive. However, since governmental employees will probably join those in public practice in obtaining a permit to practice, the board has decided to lower the permit fee from $65.00 to $60.00.

The transfer of grade fee is not new. Previously, it was included with the reciprocity fee but for clarification purposes, it was felt that it should be separated. This fee is also commensurate with costs.

COMMENT: There was a comment opposing the changing of the grace period from February 28 to January 31. The suggestion was made to change the system rather than shortening the grace period in order for the system to meet the needs rather than the other way around.

RESPONSE: It is the board's position that the system is a good one, as is, and if renewals are submitted on a timely basis, the shortening of the grace period poses no problem. Also, the renewal process is only one of many programs of the system and must be completed as soon as reasonably possible so other phases and reports may be accomplished. A two month grace period is excessive in comparison with other boards, some of which have no grace period at all or only fifteen days.

COMMENT: There was a comment that if a fee is charged for registering professional corporations, it would seem that there should also be one for registering partnerships and partners.

RESPONSE: The new statute that requires registration of professional corporations also gives the board authority to establish a fee for this. However, the accountancy law 37-50-316, MCA prohibits other license fees.

COMMENT: Comment was made that 8.54.609 Auditing Standards and 8.54.610 Accounting Principles should list examples to demonstrate the rule.

RESPONSE: The board had considered including some examples but decided that the listing of some examples may be

interpreted to mean that only those examples listed were acceptable, which would not be the case, and to list all acceptable sources would be too lengthly.

COMMENT: Comment was also made that 8.54.611 Forecasts is confusing since forecasts and projections have different meanings and it is unclear whether the rule applies to just forecasts or to both.

RESPONSE: The board agrees with this comment and has added the word "projection" to the rule to avoid confusion.

COMMENT: A comment was submitted that there should be more examples of discreditable acts under 8.54.614 (1)(b).

RESPONSE: State of Montana statutes cover other discreditable acts that are not included in this rule. (Title 37, Chapter 1, MCA)

COMMENT: Several comments were received concerning 8.54.805 Exceptions - Not Practicing Public Accounting. The wording of the proposed rule seems to discourage licensees from keeping current, if they wish to do so, because of the use of the word "should" within the rule.

RESPONSE: The board agrees with the comment and did not intend to indicate that. They have changed the wording of the rule, in addition to changing "should" to "could". Their intent is to advise that those who do not hold themselves out as CPA/LPA's are not required to obtain a permit to practice.

COMMENT: Comments were given on I, Definitions (now 8.54.204), (1)(a) and (b), as being adverse to the interest of both practicing and non-practicing accountants and the public.

RESPONSE: The board is adopting these two definitions as proposed, without change, because there is a need for a definition of both that appropriately fits both the practicing and non-practicing accountant and the rule, as proposed best fits Montana accountants' needs. The board has added the phrase "unless they maintain a permit to practice" in (b) second paragraph for better understanding.

COMMENT: Comment on 8.54.204, Definitions, (j) was submitted that the definition of a "financial statement" is too restrictive, since they do not necessarily all have accompanying notes with them and are still recognized as financial statements and also that some financial statements are not in accordance with generally accepted accounting principles, but rather are prepared on bases other than GAAP, and the term should be deleted.

RESPONSE: The board agrees with both comments and has accordingly deleted both terms.

COMMENT: Comments were received in reference to the proposed Positive Enforcement rules, primarily from David Niss of the Administrative Code Committee, referring to several areas where he felt the board was violating state law in the wording of some of the rules.

RESPONSE: Upon the advice of the board's legal counsel, all changes in the proposed positive enforcement program rules

were made as recommended by counsel, in order to satisfy the Code Committee's concerns.

DEPARTMENT OF COMMERCE
BEFORE THE MILK CONTROL BUREAU

In the matter of the amendment of rule 8.79.101 (8) as it relates to reporting of butterfat test results.	)	NOTICE OF AMENDMENT OF RULE 8.79.101 TRANSACTIONS INVOLVING THE PURCHASE AND RESALE OF MILK WITHIN THE STATE - RULE DEFINITIONS
	)	DOCKET 70-84

TO: All Interested Persons:

1. On May 17, 1984, the Milk Control Bureau published a notice of amendment of the above-stated rule at pages 752 and 753, 1984 Montana Administrative Register, issue number 9.

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

3. No comments or testimony were received.

DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MILK CONTROL

In the matter of the amendment of rule 8.86.301 (6)(a),(b),(e),(f),(g),(h) and (i)(vi), as they relate to the class I price formulas	)	NOTICE OF AMENDMENT OF ARM 8.86.301 (6)(a),(b),(e),(f),(g),(h) and (i)(vi) PRICING RULES
	)	DOCKET 69-84

TO: All Interested Persons:

1. On March 15, 1984, the Board of Milk Control published a notice of amendment of rule 8.86.301 (6)(a),(b),(e),(f),(g),(h) and (i)(vi) relating to the Class I price formula at pages 411 through 417, 1984 Montana Administrative Register, issue number 5.

2. The hearing was held by the Board of Milk Control on their own motion to amend rule 8.86.301 (6) (a), (b), (e), (f), (g), and (h); and to consider a request by Stacey H. Auch d/b/a Misty Vale Dairy to amend rule 8.86.301 (6)(i)(vi) in the downstairs conference room of the Department of Commerce, 1424 9th Avenue, Helena, Montana on April 27, 1984.

3. Several comments were offered by proponents and other persons wishing to be heard. At the public hearing, Mr.

William E. Ross appeared on behalf of the Board of Milk Control to request Rule 8.86.301 (6)(a),(b),(e),(f),(g) and (h) to be amended as originally proposed. Mr. K. M. Kelly appeared representing Montana Dairymen's Association, supporting the proposal to amend subsection (6)(a) as originally noticed. Mr. K. M. Kelly also appeared to testify on behalf of Cloverleaf Dairy Inc., Gate City Dairy and Equity Supply Company to request the Board of Milk Control amend subsection (6)(h) by substituting for the factors listed in the notice a factor of 55.597% and to add to the wholesale unit price for 1/2 pints of chocolate school milk products a cost of $.0115 for the chocolate powder additive. Mr. Stacey Auch d/b/a Misty Vale Dairy and Mr. Dale Johnson d/b/a Dales Dairy appeared in support of amending subsection (6)(i)(vi) exactly as published in the notice.

The board proposes to amend rule 8.86.301 (6)(a)(iii), (a)(i), (b), (e), (f), (g), (i)(vii) as originally noticed for the following reasons:

a. There was no testimony in opposition to the proposed changes.

b. That housekeeping changes to subsections (6) (a) (iii), (a) (i), (b), (e), (f), and (g) are in conformance with prevailing practices and conditions.

c. The board believed establishing a minimum on-the-farm price for all products would not cause problems in regulating the sale of other products.

d. The board believed consumers were entitled to purchase other products at a lower price if they were willing to drive out to the farm and purchase them.

The board chose not to amend subsections (6)(a)(vi) as originally noticed for the following reasons:

a. The proposal to amend the subsection was not in conformance with prevailing practices and conditions.

b. The record did not support a contention that $12.00 represented a just and reasonable charge to haul hay from the field to the dairy farmer.

The board proposes not to amend subsection (6)(h) as originally noticed for the following reasons:

a. Proponents offered an alternative procedure which administratively is easier to utilize.

b. Proponents alternative procedurally overall produces the same result as the board's proposal.

Mr. K. M. Kelly on behalf of his constituents urged the board to amend subsection (6)(h) by substituting for the factors published in the notice a factor of 55.597% and to add a cost of $.0115 per 1/2 pint on chocolate school milk products for the following reasons:

a. The proposal as submitted establishes minimum prices which enables distributors to recover their costs.

b. The above proposal is easier to administer.

The board accepted proponents argument regarding the factor of 55.597%, but rejected their argument to add the cost of chocolate to the minimum wholesale price on chocolate school milk products because that part of the proposal exceeds the scope of the notice.

Based on comments and testimony the board proposes to amend subsections (6)(h) with the following change: (new matter underlined, deleted matter interlined)

"8.86.301 PRICING RULES (1) ...

(6) ...

(h) Minimum jobber prices will be calculated by multiplying the difference between the wholesale price and raw product cost times ~~one of the~~ a factors of 55.597% ~~listed below~~ with the resulting answer being added to the current raw product cost. The jobber prices calculated will be a minimum jobber price.

~~Factors will be established by computing what percentage the distributor margin on jobber prices is in relation to the distributors margin on wholesale prices which existed on April 5, 1974. The percentages to be used appear as follows:~~

~~1/2 pts. (elementary & high school)~~	~~47.477%~~
~~1/2 pts.~~	~~68.940%~~
~~1/3 qts.~~	~~64.807%~~
~~pts.~~	~~62.097%~~
~~qts.~~	~~59.021%~~
~~1/2 gals.~~	~~56.172%~~
~~gals.~~	~~55.462%~~
~~cream items~~	~~65.886%~~

(i) ..."

NOTE: The Board of Barbers adoption notice published at page 813, 1984 Montana Administrative Register, issue number 9, stated a new rule entitled, "Qualification for Out-of-State Applicants" was being adopted as rule 8.10.406. This is a typographical error the rule is adopted as 8.10.407.

DEPARTMENT OF COMMERCE

BY: _____
GARY BUCHANAN, DIRECTOR

Certified to the Secretary of State June 18, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the adoption of rule 10.10.101 pertaining to obligating debts incurred for the purchase of property	))))	NOTICE OF ADOPTION OF RULE 10.10.101, OBLIGATION OF DEBTS INCURRED FOR THE PURCHASE OF PROPERTY

TO: All Interested Persons

1. On May 17, 1984 the Superintendent of Public Instruction published notice of a proposed adoption of a rule relating to obligating debts incurred for the purchase of property at page 754 of the Montana Administrative Register, issue number 9.

2. The Superintendent has adopted the rule as proposed.

3. No comments or testimony were received.

Ed Argenbright
Superintendent of Public Instruction

By Marilyn Miller
Marilyn Miller
Executive Assistant

Certified to the Secretary of State June 18, 1984.

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

In the matter of the amendment of rules 16.32.301, definitions; 16.32.306, setting minimum standards for blood banks and transfusion services; 16.32.309, setting minimum physical plant and equipment maintenance standards for health care facilities; 16.32.310, stating environmental controls required of all health care facilities; 16.32.380, setting administrative requirements for personal care facilities; 16.32.382, setting requirements for handling of medication in personal care facilities; and 16.32.385, stating furnishing, equipment, and supply requirements for personal care facilities; and the adoption of rules setting laundry and bedding requirements for health care facilities; minimum standards for an intermediate developmental disability care facility; general services/ administration, and food service requirements for adult day care centers; and residency application procedures, resident screening requirements, and screening decision appeal procedure for personal care homes	NOTICE OF THE AMENDMENT OF RULES 16.32.301, 16.32.306, 16.32.309, 16.32.310, 16.32.380, 16.32.382, and 16.32.385 AND THE ADOPTION OF NEW RULES 16.32.313, 16.32.347, 16.32.356, 16.32.357, 16.32.386, 16.32.387, and 16.32.388 (Health Care Facilities)

TO: All Interested Persons

1. On April 12, 1984, the department published notice at page 556 of the 1984 Montana Administrative Register, issue number 7, of proposed amendments of rules 16.32.301 concerning definition of "adult day care center"; 16.32.306 concerning minimum standards for blood banks and transfusion services; 16.32.309 concerning minimum physical plant and equipment maintenance standards for health care facilities; 16.32.310 concerning environmental controls all health care facilities must maintain; 16.32.380 setting administrative requirements for personal care facilities; 16.32.382 concerning requirements for handling of medication in personal care facilities;

and 16.32.385 concerning furnishings, equipment, and supplies required in personal care facilities; and the proposed adoption of rules 16.32.313 concerning laundry and bedding requirements for health care facilities; 16.32.347 setting minimum standards for an intermediate developmental disability care facility; 16.32.356 concerning general services/administration requirements for day care centers; 16.32.357 setting food service requirements for adult day care centers; 16.32.386 concerning residency application procedures for personal care homes; 16.32.387 setting personal care home resident screening requirements; and 16.32.388 setting personal care home screening decision appeal procedures.

2. The department has amended and adopted the rules with the following changes:

16.32.301 DEFINITIONS The following definitions apply in this sub-chapter:

(1) Same as existing rule.

(2) "Adult day-care center" means a facility as defined in Section 50-5-101(2), MCA, but does not include day habilitation programs for the developmentally disabled and handicapped or a program offered by a church or senior citizens organization for purposes other than ~~personal care~~ provision of custodial care necessary to meet daily living needs.

~~(2)~~ (3) through ~~(13)~~ (14) Same as existing rule, except for renumbering.

AUTHORITY: Sec. 50-5-103 MCA
IMPLEMENTING: Title 50, Chapter 5, Parts 1 and 2, MCA

16.32.306 MINIMUM STANDARDS FOR ALL HEALTH CARE FACILITIES -- BLOOD BANK AND TRANSFUSION SERVICES
Same as proposed.
AUTHORITY: Sec. 50-5-103, 50-5-404 MCA
IMPLEMENTING: Sec. 50-5-103, 50-5-204, 50-5-404 MCA

16.32.309 MINIMUM STANDARDS FOR ALL HEALTH CARE FACILITIES -- PHYSICAL PLANT AND EQUIPMENT MAINTENANCE

(1) through (4) Same as proposed.

(5) Carpets are prohibited in bathrooms, ~~dining rooms,~~ kitchens, laundries, ~~storage rooms,~~ or janitor closets.

(6) through (8) Same as proposed.

AUTHORITY: Sec. 50-5-103, 50-5-404 MCA
IMPLEMENTING: Sec. 50-5-103, 50-5-204, 50-5-404 MCA

16.32.310 MINIMUM STANDARDS FOR ALL HEALTH CARE FACILITIES -- ENVIRONMENTAL CONTROL

(1) through (4) Same as proposed.

(5) ~~Toilet bowl brushes, mops, or sponges may be used only for cleaning toilet bowls or urinals and must be stored separately from any other cleaning devices.~~ Cleaning devices used for lavatories, toilet bowls, urinals, showers, ~~and~~ or

bathtubs may not be used for other purposes. Those utensils used to clean toilets or urinals must not be allowed to contact other cleaning devices.

(6) and (7) Same as proposed.

AUTHORITY: Sec. 50-5-103, 50-5-404 MCA
IMPLEMENTING: Sec. 50-5-103, 50-5-204, 50-5-404 MCA

16.32.313 MINIMUM STANDARDS FOR ALL HEALTH CARE FACILITIES -- LAUNDRY AND BEDDING (1) If a health care facility processes its laundry on the facility site, it must:

(a) Set aside and utilize a room solely for laundry purposes.

(b) Equip the laundry room with a mechanical washer and dryer (or additional machines if necessary to handle the laundry load), handwashing facilities, mechanical ventilation to the outside, a fresh air supply, and a hot water supply system which supplies the washer with water of at least 160° F. (71° C.) during each use.

(c) Sort and store soiled laundry in an area separate from that used to sort and store clean laundry.

(d) Provide well-maintained carts or other containers impervious to moisture to transport laundry, keeping those used for soiled laundry separate from those used for clean laundry.

(e) Dry all bed linen, towels, and washcloths in the dryer, or, in the case of bed linen, by use of a flatwork ironer.

(f) Protect clean laundry from contamination.

(g) Ensure that facility staff handling laundry cover their clothes while working with soiled laundry, use separate clean covering for their clothes while handling clean laundry, and wash their hands both after working with soiled laundry and before they handle clean laundry.

(2) and (3) Same as proposed.

AUTHORITY: Sec. 50-5-103, 50-5-404 MCA
IMPLEMENTING: Sec. 50-5-103, 50-5-204, 50-5-404 MCA

16.32.347 MINIMUM STANDARDS FOR AN INTERMEDIATE DEVELOPMENTAL DISABILITY CARE FACILITY Same as proposed.

AUTHORITY: Sec. 50-5-103 MCA
IMPLEMENTING: Sec. 50-5-103, 50-5-201, 50-5-204 MCA

16.32.356 ADULT DAY-CARE CENTERS -- GENERAL SERVICES AND ADMINISTRATION Same as proposed.

AUTHORITY: Sec. 50-5-103 MCA
IMPLEMENTING: Sec. 50-5-103, 50-5-201, 50-5-204 MCA

16.32.357 ADULT DAY-CARE CENTERS -- FOOD SERVICE

(1) An adult day-care center must provide at least one meal a day to clients who stay at the center up to 8 10 hours. The meal must be of suitable quality and quantity to supply

at least one-third of the recommended daily dietary allowances for the age and sex of the individuals served that meal which are established by the Food and Nutrition Board of the National Research Council, National Academy of Sciences, as of 1980.

(2) Clients who stay at the center over ~~8~~ 10 hours must be provided with 2 meals per day which, together, supply at least two-thirds of the recommended daily dietary allowances for the age and sex of the individuals served those meals which are established by the Food and Nutrition Board of the National Research Council, National Academy of Sciences, as of 1980.

(3) through (6) Same as proposed.

AUTHORITY: Sec. 50-5-103 MCA
IMPLEMENTING: Sec. 50-5-103, 50-5-201, 50-5-204 MCA

16.32.380 MINIMUM STANDARDS FOR A PERSONAL CARE FACILITY -- ADMINISTRATION

(1) through (8) Same as proposed.

(9) The facility shall provide recreational and social activities for residents, post a calendar of those activities where residents can see it, and retain a copy of each calendar for at least one year after the date of the last event recorded on it.

(10) The facility shall make adequate provisions for identification of resident's personal property and for safekeeping of valuables, including keeping an accounting of any personal funds handled for the resident by the facility.

(11) and (12) Same as proposed.

AUTHORITY: Sec. 50-5-103 MCA
IMPLEMENTING: Sec. 50-5-103, 50-5-204 MCA

16.32.382 MINIMUM STANDARDS FOR A PERSONAL CARE FACILITY -- MEDICATION (1) ~~The staff shall deliver medication at the proper time to each resident needing it, observe to ensure the dosage is correct, and record on the resident's record the time and amount of medication taken or the fact that medica- tion was refused and the reason why, if expressed.~~ All residents must take their own medication. The staff shall remind the resident to take his medication at the proper time and shall observe and record this activity on the resident's record.

(2) No staff member may remove medication from its bottle, administer injections, or otherwise administer medication.

(3) The facility ~~must ensure that all medications are kept in locked storage except when presented to residents for self- administration.~~ shall provide locked storage for all medications.

(4) All pharmaceutical containers having soiled or otherwise damaged or illegible labels shall be returned to the issuing pharmacy for relabeling.

(5) All medication must be left in the container in which it was provided to the resident by the pharmacist or physician.
AUTHORITY: Sec. 50-5-103, 50-5-227 MCA
IMPLEMENTING: Sec. 50-5-103, 50-5-204, 50-5-225 MCA

16.32.385 MINIMUM STANDARDS FOR A PERSONAL CARE FACILITY -- FURNISHINGS, EQUIPMENT, AND SUPPLIES (1) Each resident bedroom must satisfy the following requirements:

(a) No more than 4 residents may reside in a single bedroom.

(b) Exclusive of toilet rooms, closets, lockers, wardrobes, alcoves, or vestibules, each single bedroom must contain at least 100 square feet, and each multi-bedroom must contain at least 80 square feet per bed.

(c) Each resident must have a wardrobe, locker, or closet with minimum clear dimensions of 1'10" by 1'8". A clothes rod and ~~adjustable~~ shelf must be provided.

(d) Each resident must have access to a toilet room without entering another resident's room, kitchen, dining, or living area.

(2) Same as proposed.

(3) The facility must provide:

(a) - (f) Same as proposed.

(g) Enough total living/recreational and dining room area to allow at least thirty ~~Thirty~~ square feet per resident. ~~in each dining and living/recreation room.~~

(h) and (i) Same as proposed.

(4) and (5) Same as proposed.
AUTHORITY: Sec. 50-5-103 MCA
IMPLEMENTING: 50-5-103, 50-5-204 MCA

16.32.386 PERSONAL CARE FACILITIES -- RESIDENCY APPLICATION PROCEDURE As part of an initial application for residency in a personal care facility, the personal care facility must provide each prospective resident with the following:

(1) A written statement containing:

(a) and (b) Same as proposed.

(c) Notice that the personal care facility may not provide nursing services but that the resident may arrange to have needed care provided by a third party, including a home health agency or an owner, operator, or employee of the facility who is licensed to provide that care, so long as that individual does so under a service agreement separate from that between the resident and the personal care facility.

(d) A list of the services provided by the personal care facility.

(e) A list of the services, other than those provided by the facility, for which a resident may contract with an entity other than the personal care facility.

(2) Same as proposed.

(3) If the personal care facility determines that it may not admit the prospective resident, written notice of rejection of the application containing:

(a) The grounds for the rejection;

(b) the right to appeal the decision to the department within 15 days after receipt of the notice; and

(c) the information which any appeal request must contain, as specified in ~~RULE-VII(1)~~ ARM 16.32.388(1).

AUTHORITY: Sec. 50-5-103, 50-5-227 MCA
IMPLEMENTING: Sec. 50-5-226 MCA

16.32.387 PERSONAL CARE FACILITIES -- RESIDENT SCREENING (1) A personal care facility may not admit or continue to accept as a resident any individual:

(a) Who is prohibited by section 50-5-226, MCA, from being a resident in a personal care facility;

(b) Whose condition indicates the need for care that is not available in the facility ~~or who requires skilled or intermediate nursing care,~~ unless needed services are provided by a third party other than the personal care facility; or

(c) Who is ambulatory only with mechanical assistance and either the facility cannot physically accommodate the type of mechanical assistance in question in all common living areas or there is no bedroom for the individual on the ground floor of the facility.

(2) - (4) Same as proposed.

(5) Unless appealed pursuant to ~~RULE-VII~~ ARM 16.32.388, the surveyor's decision regarding the appropriateness of the placement will be binding on the facility management and the resident in question.

(6) The information cited in ~~RULE-V(3)~~ ARM 16.32.386(3) must be provided in writing to:

(a) the manager of the personal care facility and to the affected resident or his representative whenever a licensing surveyor makes a screening decision that an individual is inappropriately residing in a personal care facility;

(b) to the resident or his representative if the personal care facility decides that resident is precluded by this rule from continuing to reside in a personal care facility.

AUTHORITY: Sec. 50-5-103, 50-5-227 MCA
IMPLEMENTING: Sec. 50-5-103, 50-5-204, 50-5-226 MCA

16.32.388 PERSONAL CARE FACILITIES -- APPEAL Same as proposed.

AUTHORITY: Sec. 50-5-103, 50-5-227 MCA
IMPLEMENTING: Sec. 50-5-103, 50-5-204, 50-5-226 MCA

3. Jim Spady of Bozeman's Gallatin Adult Residential Day Care Program as well as Rose Skoog, Director of the Montana Health Care Association felt that the definition of "adult day-care center" in 16.32.301 needed clarification regarding what kinds of church or senior citizens program would or would not be considered adult day care. In response, clarifying language was included.

Christine Tremain and Phyllis Taylor of Central Montana Hospital and Nursing Home, Lewistown; Donald Peterson of St. John's Lutheran Home; Margo Hamilton of Hamilton House, Bozeman; and Rose Skoog all requested that rugs be allowed in dining rooms for safety, sanitary, and environmental reasons, primarily. Mr. Peterson also requested carpet be allowed in storage rooms. The department agreed that carpet was less of a problem in those areas than in the other cited areas and deleted them from the prohibition contained in 16.32.309(5).

Mr. Peterson asked if the separation of types of cleaning utensils required by 16.32.310(5) meant separate containers or separate rooms, etc. The rule was generally edited and clarified to indicate that contact was to be prevented, by whatever means the facility chose.

Glenn Mitchell of the Montana Textile Services Association asked if flatwork ironers could be used as well as dryers to dry bed linen. The department amended 16.32.313 to allow that option.

Mr. Peterson felt the requirement in 16.32.313 that staff use clothes covering while working with clean laundry which is separate from the clothes covering used while working with soiled laundry was a waste of time. The department retained the requirement because of the substantial potential for contamination of clean laundry if the precaution was not followed.

Mr. Peterson also felt that the 16.32.356 requirement that an adult day-care home have a separate room for resting was so restrictive that it would hamper the development of such centers and was unnecessary in that residents could rest well enough in the same room where the program was being conducted. The department did not agree that individuals could adequately rest in the same room where activity was occurring, or that even small centers would have difficulty setting aside such a room, so the requirement was retained.

Mr. Spady pointed out that the requirement in 16.32.357 that a person spending over 8 hours in an adult day-care center be served 2 meals would effectively and unnecessarily prevent that person from eating breakfast and supper with his or her family. The department agreed and adopted a 10-hour limit as a more reasonable one, especially in view of the fact that supplemental food also must be offered.

Mr. Peterson felt that the 16.32.380(7) requirement that the person in charge of each personal care facility shift have a key to each facility door was too broad in that it would possibly give that person access to money, valuables, and confidential material. The department retained the provisions because it is a fairly easy matter to lock up such sensitive materials in a cabinet, etc. for which the staff person need have no key and because a fire or other emergency could develop in the room so sequestered.

Doug Blakley, state long-term care ombudsman; Doug Olson, Elderly Legal Services Developer; and Rose Skoog all wished to see an additional requirement that the recreational opportunities offered to personal care home residents be documented. In response, the department added to 16.32.380(9) a requirement that personal care homes post, and retain for one year as documentation, a calendar of those activities.

Mr. Blakley and Ms. Skoog also requested there be added a provision protecting any resident funds which might be handled by a personal care facility. Therefore, 16.32.380(10) now contains a requirement that a facility keep an accounting of any such funds entrusted to it.

Shirley Thennis of the Montana Nurses' Association requested that 16.32.380(12) be made more specific concerning what level of staffing of a personal care facility would be considered "sufficient". The department did not do so because necessary staffing would vary from facility to facility and even within the same facility at different times, depending upon the number and highly variable level of incapacity of its residents and because the building code requirements should ensure that residents needing only personal care be able to evacuate themselves with minimal assistance in case of emergency.

Phyllis McDonald of the state Board of Nursing and Ms. Thennis felt that the amended language in 16.32.382(1) concerning assistance with self-administration of medication resulted in untrained staff performing duties which only a qualified nurse should do. Consequently, subsections (1) and (3) were returned to their original language.

Mr. Peterson objected to the entire rule 16.32.382 concerning supervision of self-medication in personal care homes on grounds that it takes extra staff time, thereby increasing costs, that delivery of medicine at the proper time and the other requirements were too much responsibility for non-professional staff, and that staff supervision of self-medication should only occur when a resident can't or won't take his own medication. The medication rule was retained with the changes noted above because the law relating to personal care homes requires supervision of self-medication, which by its nature necessitates keeping track of when medications must be taken, and the kind of staff responsibility established in the rule does not require nursing expertise.

Mr. Hamilton questioned why 16.32.385(1)(c) required closet shelves to be adjustable. The requirement was eliminated due to the fact that wheel chair patients, for whom the adjustable shelves were intended, likely would need assistance anyway to use them, rendering the adjustability unnecessary.

Kenneth Daniels, representing Hawthorne House in Missoula, objected to references to personal care homes and adult day care centers as "medical facilities"; though that phrase is not used, presumably Mr. Daniels referred to references to those facilities as health care facilities. Both types of facilities are considered health care facilities by definition under the law [50-5-101(18)] even though the residents, by and large, need personal care only, so no change could be or was made.

Mr. Daniels also felt that the electric call system required by 16.32.385(2)(h) was unnecessary, since most patients would be ambulatory and continent. Since residents who are only partially continent, in need of wheelchairs, or simply elderly and somewhat infirm, would be in personal care homes, the call system was deemed necessary for their protection and retained.

Mr. Daniels thought the 16.32.385(3)(e) requirement that there be one toilet for every 4 residents was more strict than the equivalent standard for nursing homes and should be loosened. The standard in fact is the same as that required by the present nursing home standards and was retained as reasonable.

Mr. Daniels also asked if 16.32.385(3)(g) meant there had to be 30 square feet per resident in each living room if there were more than one such room. Since adequate space is assured if the total living/dining area allows for 30 square feet per resident, the rule was amended accordingly.

Finally, Mr. Daniels objected to what he saw as a requirement in 16.32.385(3)(h) that screens always exist between beds in multi-bed rooms, even those of married couples. However, since the rule allows a facility to have movable screens to use only upon resident request as an alternative to cubicle curtains, the rule was retained as is.

Mr. Peterson objected to the 16.32.385(3)(f) bathing facility requirement as more stringent than the nursing home equivalent. That is not the case; the requirement is deemed reasonable and was retained.

Margo Hamilton, supported by a large number of individuals from Bozeman as well as the Bozeman Clinic, requested language be added to clarify that a "third-party provider" who may give nursing services in a personal care home could include an owner or operator of the facility who happens to be a nurse. The department added language to 16.32.386(1)(c) indicating that such a person can provide nursing services in the personal care home, so long as it is done under an agreement separate from that with the personal care facility.

Mr. Daniels felt that spot-checks of residents during survey visits should be sufficient, rather than the 16.32.387 (4) requirement that each resident be screened at that time. However, since the purpose of screeing is to ensure that each individual in a personal care home has the level of capacity the statute requires, the provision was retained. A redundant phrase was also deleted from 16.32.387(1)(b) on the department's initiative.

Mr. Daniels also objected to the right to appeal in 16.32.388 on grounds the state shouldn't interfere with the right of a person to choose were they live. Since the right to appeal screening decisions is statutory, the rule was left alone.

Sally Hanley of Maplewood Manor in Missoula objected to the rules in general as too expensive to comply with, but made no specfic request that could be considered.

Mr. Spady felt that it was unnecessary to inspect each day care home, but since each is a separate facility with a separate license, such inspection is necessary.

David King requested that the department take care to see that all rules are necessary in order to hold down costs to facilities. Since the department has already considered that issue, no changes were made.

Ben Johns of the Department of Social and Rehabilitation Services commented that the rules apparently would be difficult for small (5-12 person) facilities to meet. No changes were made because of the lack of any specific suggestion from SRS.

Rose Skoog also expressed general support for the rules as protecting residents while keeping the cost of meeting standards down.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State June 18, 1984

BEFORE THE DIVISION OF WORKERS' COMPENSATION
OF THE STATE OF MONTANA

In the matter of the adoption of new rules and amending and transferring of rule 24.29.3201 concerning employers insurance requirements.	NOTICE OF THE ADOPTION OF NEW RULES AND AMENDING AND TRANSFERRING OF RULE 24.29.3201 CONCERNING EMPLOYERS INSURANCE REQUIREMENTS.

TO: All Interested Persons:

1. On March 19, 1984, the Division of Workers Compensation published notice of public hearing on the proposed adoption of rules and amending and transferring of rule 24.29.3201 concerning employers insurance requirements at page 486 of the 1984 Montana Administrative Register, issue number 6. The hearing was held at 9:30 a.m. on April 18, 1984.

2. The division has adopted rules, effective July 2, 1984, as follows:

Rule I -- 24.29.701 - same as proposed rule, except the implementing section is changed from 2-4-302, MCA, to 39-71-203, MCA. Rule II -- 24.29.702, Rule III -- 24.29.703, Rule IV -- 24.29.704, Rule V -- 24.29.705, same as proposed.

(VI) 24.29.706 ELECTION NOT TO BE BOUND -INDEPENDENT CONTRACTOR (1), (2), (a), same as proposed rule

(i) evidence he pays social security or unemployment taxes on his employees or self-employment tax on himself; ~~or~~

(ii), (iii), (iv), same as proposed rule

(b), (i), same as proposed rule

(ii) ~~affidavits~~ letters from at least three different hiring agents, each of which states that the independent contractor is currently, or was under contract during the independent contractor's most recent tax year and that during the time of the contract he was free from control or direction over the performance of his services, other than control or direction required by government regulation.

(c), (d), (e) same as proposed rule

(3) same as proposed rule

New sections as follow:

(4) Sole proprietors or working members of a partnership who consider themselves or hold themselves out as independent contractors, other than those in section (1) of this rule and who have employees, may elect not to be bound under a compensation plan, without providing the information required by section (2) of this rule, but providing the following information:

(a) number of persons employed by the independent contractor other than himself,

(b) name of workers' compensation insurance carrier providing coverage for his employees, and

(c) policy number of workers' compensation insurance covering his employees.

(5) The exemption provided for under this rule is for workers' compensation purposes only. The fact that an independent contractor neither applies for nor receives an exemption does not imply employee status.

(4), as noticed, has been renumbered (6) and remains the same as proposed.

(VII) 24.29.707 INEFFECTIVE ELECTION TO BE BOUND, RESULTING DIVISION ACTION (1), (2), (3) same as proposed rule.

(4) When an uninsured employer is discovered, the division will conduct a payroll audit to determine total payroll paid during the period of time the uninsured employer was not properly insured. The uninsured period to be audited is limited to the three years prior to the date of discovery. ~~or date of insurance coverage, whichever is the longest uninsured period.~~ The division will assess a penalty of twice the premium which would have been due for the past two years had the uninsured employer been insured under compensation plan No. 3 or $200, whichever is greater.

(5) same as proposed rule

(6) same as proposed rule

(7) Upon failure of an uninsured employer to satisfy any obligations imposed by this rule, the division has a ~~first~~ lien upon property of the employer within the state.

(8), (9) same as proposed rule

(VIII) 24.29.708 POSTING INSURANCE STATUS IN WORKPLACE

(1) through (9) same as proposed rule

(10) Upon failure of an employer to satisfy any obligations imposed by this rule, the division has a ~~first~~ lien upon property of the employer within the state.

(11), (12) same as proposed rule

3. The parts of these rules that recite a statute will be indicated in the final rules submitted to the secretary of state for printing in the ARM.

4. These rules are adopted in response to the 1983 Montana legislative amendment of Section 39-71-401, MCA, which mandates the division to enact rules for the exemption process and the posting of insurance status in the workplace. To place all similar division rules in one subchapter, the corporate officer rule was transferred from 24.29.3201 to 24.29.705. In addition, a summary of plans 1, 2 and 3, and the uninsured employer penalty procedure are included in this subchapter. It was a reasonable necessity that the division adopt the mandated rules and place them in a common subchapter.

5. On April 18, 1984, a public hearing was held by the division of workers' compensation regarding the adoption of the foregoing rules. The division has thoroughly considered all

verbal and written commentary received. The following is a summary of the comments received from the public, and the division's responses:

COMMENT: "Contracting agent" should be used instead of "employer" in paragraphs (3) and (4) of Rule I (24.29.701).

RESPONSE: The term "employer" is defined in 39-71-118, MCA, of the Workers' Compensation Act, which includes contractors as employers, and substituting the term "contracting agent" would be confusing.

COMMENT: The rule is inequitable and totally wrong by making employers responsible and liable for independent contractors' employees if the independent contractor has not properly complied with insurance requirements.

RESPONSE: Subsection (3) of Rule I (24.29.701) is a restatement of an employer's liability under Section 39-71-405(1), MCA, and does not create a new liability.

RULE II (24.29.702) - no comments.

RULE III (24.29.703) - no comments.

RULE IV (24.29.704):
COMMENT: "For any length of time" should allow up to 15 calendar days for musicians under casual employment.

RESPONSE: The wording of this rule clarifies the language in 39-71-117, MCA. The rule cannot be used to create an exemption for any particular group.

RULE V (24.29.705) - no comments.

RULE VI (24.29.706):
COMMENT: It would be impossible to administer for any employer with a large number of independent contractors due to the large amount of paper work required.

RESPONSE: The paper work indicated by this rule is not required; it is an option available to a business to reduce the risk of treating an independent contractor as an employee by requiring proof of coverage or exemption from the independent contractor. A business could require all its independent contractors to purchase their own workers' compensation insurance, apply for exemption from coverage, or make no requirement whatsoever. A business, with the concurrence of its insurer, which decides not to require independent contractors to purchase insurance or obtain an exemption might later be required to define their employment status after an accident occurred. Therefore,

whether the paper work is worth undertaking is up to the business, depending on its method or risk management.

COMMENT: Individuals who do not apply or do not receive an exemption would automatically be employees requiring coverage.

RESPONSE: The proposed rule has been modified to make it clear that a person who does not apply for exemption or purchase insurance is not then necessarily an employee. There is no requirement to apply for an exemption from coverage as an independent contractor. A person who holds himself out as an independent contractor also has the alternative of purchasing his own workers' compensation coverage. Furthermore, if a person does not formally hold himself out to be an independent contractor and the hiring agent does not require that he purchase insurance or obtain an exemption, the person may choose to do neither, in which case his status will not be defined until an accident occurs on the job. However, if a person holds himself out as an independent contractor by applying for exemption from insurance coverage and the exemption is denied, the individual under Section 39-71-401, MCA, is determined not to be an independent contractor for workers' compensation purposes only.

COMMENT: This is intimidating to young people and contains very strict requirements with which newspaper carriers cannot comply.

RESPONSE: Newspaper carriers would only have to comply with applying for exemption if they chose not to buy workers' compensation insurance for themselves, and if the newspaper companies with whom they contract enforced a requirement that newspaper carriers do one or the other. This rule is not written to determine who is or is not an employee. Its purpose is to allow authentic independent contractors who elect not to be covered with workers' compensation insurance an exemption from the provisions of the Workers' Compensation Act. The criteria is narrow and strictly construed to provide the division with information to enable it to make a responsible determination of the status of a person who applies for independent contractor exemption.

COMMENT: The paper work in administering this will be overwhelming for both the business community and the division.

RESPONSE: The burden of paper work will be commensurate with the business community's perception of its need to manage risk. Many independent contractors will buy insurance as a sensible and inexpensive method for covering the costs of their accidents. Many businesses will find that the risk of on-the-job accidents with independent contractors not very great and therefore not worth the effort of enforcing coverage or an exemption. For

those who do seek an exemption, the division recognizes it will be faced with an increased responsibility, but has made adjustments to administer the rule. The potential workload has been further reduced by amending the rule to require only proof of workers' compensation insurance coverage for an independent contractor who has employees but wants to exempt himself.

COMMENT: Paragraph (2)(b)(i) should be amended to read: "Other than control or direction required for the performance of his contract or by government regulation."

RESPONSE: The phrase would effectively remove control as a factor in determining independent contractor status and is a legislative, not an administrative, decision.

COMMENT: The term "government regulation" should be all-inclusive.

RESPONSE: The term is not intended to be restrictive.

COMMENT: Who will educate the public on the proposed rule requirements?

RESPONSE: The division will provide information to the public.

COMMENT: An application should not be necessary each time the independent contractor changes hiring agents.

RESPONSE: Applications are not necessary each time a hiring agent changes. The exemption is for a specific type of work or service performed by an independent contractor. An approved exemption would be valid for one year and would be effective provided the work being done was essentially the same work described in the exemption.

COMMENT: The questions in the application cannot be filled out until after the work has begun.

RESPONSE: It may take some period of time to accumulate the necessary information to establish independent contractor status, so a novice independent contractor may not be able to obtain an exemption. The rule is intended to protect against granting exemptions to people who are employees and not independent contractors.

COMMENT: Would an independent contractor who has coverage or an exemption from another state need to apply?

RESPONSE: We do have provisions for extraterritorial coverage and if an independent contractor from another state has workers' compensation coverage, there would be no need for him to apply

for an exemption. No other state has this exemption so there can be no reciprocity.

COMMENT: What consitutes a "large, substantial investment"?

RESPONSE: Each trade, occupation or profession has its own special set of educational requirements or tools of the trade which are essential to its performance. The term "a large, substantial investment" is intended to distinguish an independent contractor who effectively controls the essentials of his business as opposed to an employee who is availed the employer's resources. Each application will have to be reviewed to determine whether or not the applicant's investment indicates his own or another's control.

COMMENT: Amend (2)(a)(i) to read: "Evidence he pays self-employment social security tax on himself (copy of Schedule SE from his most recent tax return) or pays social security or unemployment taxes on his employees."

RESPONSE: This language has been incorporated in the rule.

COMMENT: The requirement of submitting each year the entire tax return is an intrusion on individual privacy which is unnecessary to the requirements of regulation.

RESPONSE: We have modified the rule so that a submission of a tax return each year is not required. However, the submission of a tax return on the initial application if no other evidence is available is required as a reasonable method of providing evidence of business records and relationships that can document that the applicant is in business. This does not violate the right of individual privacy since there are alternatives of purchasing insurance or taking no action whatsoever.

COMMENT: The annual requirement to resubmit all information each year is extremely burdensome and should take place by a statement that none of the conditions have changed and the applicant seeks renewal.

RESPONSE: The proposed rule has been amended to allow an independent contractor to renew the exemption each year by submitting an affidavit or statement that all conditions remain exactly the same as the original application.

COMMENT: A one-year exemption period is too short.

RESPONSE: A one-year exemption and renewal period is necessary to keep the information upon which the exemption is based current. Many changes may occur in a business in the course of a year. It will be difficult for the division to be aware of

those changes without a regular annual renewal process.

COMMENT: Be more specific as to the type of tax statement that will qualify under (2)(a)(iii).

RESPONSE: The federal income tax form 1040 with Schedule C attached, because the form 1040 requires a signature. In the case of a partnership, form 1065 must be submitted with form 1040.

COMMENT: Employers would be the persons required to enforce this rule.

RESPONSE: The exemption from coverage by independent contractors is one option that an employer of independent contractors can choose to manage risk. Enforcement is a business choice and not an obligation.

COMMENT: The affidavits from three hiring agents in (2)(b)(ii) should be changed to letters from different hiring agents, "or bid on a contract" during the most recent tax year and "was or would have been free from control or direction".

RESPONSE: Since the criminal penalty for falsification of any unsworn statement is the same as for an affidavit, a letter could be used with equal effect, and the rule has been so amended. Bids alone do not provide evidence of obligations assumed by a contractor.

COMMENT: A provision should be made for the employer to be involved in the determination process.

RESPONSE: The exemption is for the independent contractor himself, not to one specific employer or hiring agent. The employer or hiring agent may be contacted for verification of statements submitted by the applicant.

COMMENT: Is a person who does not consider or hold himself out to be an independent contractor outside the requirement of insuring or obtaining an exemption?

RESPONSE: This question requires a consideration of the person's assertion versus the actual facts of the case. If he does not consider or hold himself out to be an independent contractor, he will not apply for or be granted the exemption. However, if an injury occurs which puts his status at issue, the actual facts will be considered at that point to determine whether he is an employee covered by a workers' compensation insurance policy.

COMMENT: Can a volunteer obtain an exemption?

RESPONSE: A volunteer cannot obtain an exemption because under the workers' compensation law they are neither an employee nor an independent contractor, so there is no provision for them to do so.

COMMENT: Once an exemption is issued, there is no provision to change the status if necessary.

RESPONSE: If the conditions in the application change, the exemption would cease to be valid. Once approved, the exemption remains effective for one year while the independent contractor performs services consistent with the conditions under which the Division granted its approval. The applicant can have the exemption voided at any time by informing the division in writing that he desires to cancel the exemption.

COMMENT: The rule should state that the exemption is for workers' compensation purposes only.

RESPONSE: The rule has been amended to include this language.

RULE VII (24.29.707):
COMMENT: What is the maximum period that can be audited to assess a penalty under (4)?

RESPONSE: While Section 39-71-504(1), MCA, is rather unclear, the amended rule provides for an audit period of three years back from the date of discovery, which seems to be the most conservative period of the options provided by the statute.

COMMENT: The lien provision in (7) is unconstitutional.

RESPONSE: The lien is not unconstitutional but has been revised in (7) to delete the word "first". The lien is provided for by Section 39-71-408, MCA.

RULE VIII (24.29.708) - no comments.

GARY L. BLEWETT, Administrator
Division of Workers' Compensation

Certified to the Secretary of State June 18, 1984.

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

In the matter of the amending of Rules 46.6.2510, 46.6.2515, 46.6.2525, 46.6.2535, 46.6.2560 and 46.6.2570 pertaining to the blind vendors program.	)))))	NOTICE OF THE AMENDMENT OF RULES 46.6.2510, 46.6.2515, 46.6.2525, 46.6.2535, 46.6.2560 and 46.6.2570 PERTAINING TO THE BLIND VENDORS PROGRAM

TO: All Interested Persons

1. On April 26, 1984, the Department of Social and Rehabilitation Services published notice of the amendment of Rules 46.6.2510, 46.6.2515, 46.6.2525, 46.6.2535, 46.6.2560 and 46.6.2570 pertaining to the blind vendors program at page 691 of the Montana Administrative Register, issue number 8.

2. The Department has amended Rules 46.6.2510, 46.6.2515, 46.6.2535, 46.6.2560 and 46.6.2570 as proposed.

3. The Department has amended Rule 46.6.2525 as proposed with the following changes:

46.6.2525 VENDOR RESPONSIBILITIES Subsection (1) remains the same.

(2) The duties of the vendor shall be to:

(a) perform faithfully and to the best of his ability the necessary duties in connection with the operation of the facility in accordance with the department's rules and regulations, the terms of the permits, the agreement, and shall perform in the best interests of the blind vendors program as a whole;

(b) cooperate with duly authorized representatives of the department in connection with their official responsibilities under the program;

(c) operate the facility in accord with all applicable health laws and regulations;

(d) furnish such reports as the department may from time to time require;

(i) submit the SRS-VSD-BE-1 by fifteenth of each month;

(ii) ~~participate in annual monthly inventory by fifteenth at beginning of October each month~~ SUBMIT QUARTERLY INVENTORY BY THE FIFTEENTH OF JANUARY, APRIL, JULY AND OCTOBER;

(e) follow generally acceptable accounting practices;

(f) take no action in the derogation of, or inconsistent with, the paramount right, title, and interest of the department to the facility, its equipment and the lease or agreement with the management of the property;

(g) maintain the highest standard of personal appear-

ance, grooming and behavior so as to win and retain the respect of the clientele of the facility;

(h) pay cash for all merchandise or immediate payment upon receipt of billing;

(i) to report to the department in writing, as soon as practicable, the occurrence of any accident at this facility. This requirement is in addition to the vendor's duty to report any accident to the insurance carrier;

(j) to report to the department any claim or suit which may be brought against the vendor as the result of any accident at the facility. This requirement is in addition to the vendor's duty to report such information to the insurance carrier.

Subsections (3) through (6) remain the same.

AUTH: 18-5-414 MCA
IMP: 18-5-415 MCA

4. The Department has thoroughly considered all verbal and written commentary received:

COMMENT: All vendors opposed the amendment to Rule 46.6.2525 which changed an annual inventory requirement to a monthly inventory. The vendors found a monthly inventory unreasonable in that it is too time consuming for the visually impaired and unnecessary considering the small amount of inventory on hand.

RESPONSE: The monthly inventory requirement will be changed to a quarterly inventory. The Department felt a quarterly inventory would be required for proper business practice but not necessarily a monthly inventory.

COMMENT: The vendors recommended that Rule 46.6.2560 be changed to provide for either a flat fee or a percentage of profits in contracts with vending machine companies with a determination being made on an individual basis. Percentage of profits would mean more income per machine during peak periods of use. A flat fee would be easier to administer and over a period of time would be the same or higher than the percentage of profits. Reporting of profits accurately is almost impossible to monitor.

RESPONSE: The Department has determined that the amendment to the rule of a flat fee will remain as proposed for ease of administration with no anticipated loss of income.

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 18, 1984.

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

In the matter of the repeal of Rules 46.11.111 and 46.11.114; the amendment of Rules 46.11.116, 46.11.120 and 46.11.125 and the adoption of Rule 46.11.127 pertaining to the food stamp program	))))))	NOTICE OF THE REPEAL OF RULES 46.11.111 and 46.11.114; THE AMENDMENT OF RULES 46.11.116, 46.11.120 and 46.11.125 AND THE ADOPTION OF RULE 46.11.127 PERTAINING TO THE FOOD STAMP PROGRAM

TO: All Interested Persons

1. On April 26, 1984, the Department of Social and Rehabilitation Services published notice of the proposed repeal of Rules 46.11.111 and 46.11.114; the amendment of Rules 46.11.116, 46.11.120 and 46.11.125 and the adoption of a rule pertaining to the food stamp program at page 687 of the Montana Administrative Register, issue number 8.

2. The agency has repealed Rules 46.11.111 and 46.11.114 as proposed.

3. The agency has adopted Rule 46.11.127 (Rule I), FOOD STAMPS, CERTIFICATION PERIODS, as proposed.

4. The agency has amended Rules 46.11.116 and 46.11.120 as proposed.

5. The agency has amended Rule 46.11.125 as proposed with the following changes:

46.11.125 FOOD STAMPS, DETERMINING BENEFITS (1) Except as provided in subsection (2) below, household benefits shall be determined retrospectively on the basis of the household's circumstances reported in their monthly report.

(2) Household benefits shall be determined prospectively in the following situations:

(a) in cases which involve migrant farmworkers who are pursuing migrant farmwork outside of their home area;

(b) in the first two months of eligibility following an initial application;

(c) in the first two months of eligibility when a participating household moves ~~to a new county~~ INTO MONTANA FROM ANOTHER STATE;

~~(c)~~ (d) when a new member who is not already certified to receive food stamps in another household begins to live with a household which is currently on retrospective budgeting, the income and resources of the new member shall be treated prospectively in the first two months of the new members eligibility~~;~~.

(e) when an individual moves from one participating household into another participating household, he cannct receive benefits twice in the same month. However, that individual can receive benefits in his new household when, before benefits are issued to his former household, the former household agrees in writing to have their benefits reduced by the portion allotted to the departing individual and waives their right to an advance notice of adverse action.

(3) Income received in the first two months of eligibility ~~which is no longer available~~ shall not be included in retrospectively budgeted income in the third and fourth months' of eligibility: when:

(a) the income is from a source which no longer provides income to the household; and

(b) the income was included in the household's prospective budget in the first two month's of eligibility.

(4) Lease, royalty, and rental income which is received periodically but not on a monthly basis and which is expected to continue shall be determined for the prior ~~period, July 1 to June 30, and prorated over the current period, September 1 to August 31.~~ 12 MONTH PERIOD BEGINNING FROM THE MONTH OF APPLICATION AND PRORATED OVER THE CURRENT 12 MONTH PERIOD. ONCE A CYCLE OF INCOME PRORATION IS ESTABLISHED, IT SHALL REMAIN IN EFFECT FOR ONE YEAR. However, if any portion of the prior period's income is expected to stop in the current period, then this portion shall not be considered as income in the current period.

6. The following are comments received by the Department. No oral testimony was presented at the public hearing:

COMMENT: On May 21, 1984, the Department received a letter from the U.S. Food and Nutrition Service which denied the Department's request for a waiver to exempt households from retrospective budgeting in the first two months of eligibility after they move from one county in Montana to another Montana county.

RESPONSE: The Department operates the Food Stamp Program under federal regulations and only the federal level can waive rules. The Department is, therefore, revising the rule so that only households who move into Montana from another state are exempt from retrospective budgeting in the first two months of eligibility.

COMMENT: A county administering the Food Stamp Program on two Indian reservations finds that under retrospective budgeting it is better to use lease payments in the month they are received. This county has few clients who have to be closed because of the entire lease income received.

RESPONSE: The proposal to average and prorate lease, royalty, and rental income will apply to all households, both Indian and non-Indian. The averaging of the annual income from these sources will save clients from reporting and the agency from working with this income at the time it is received during a year. The county offices have reported that lease income can be received at up to eight different times during a year. The Department also believes that establishing a uniform procedure for the averaging of this type of income will reduce certification errors which occur when the receipt of income in a month is not reported timely.

COMMENT: It has been our experience as a county with an Indian reservation that prorating lease income in the current last twelve months from a household's application for benefits is better than prorating all cases from a certain date such as July 1st. Prorating all cases from a fixed date will cause too much casework to be concentrated in a short period of time.

RESPONSE: The Department agrees with this comment and has revised the rule so that the month of application will be the date from which income will be prorated. The Department has also added language to the rule which keeps the proration of income cycle in effect for one year after it is established. This will prevent the agency from having to verify the income received in a new twelve month period when a household drops off the program and applies for benefits later in the same twelve month cycle.

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 18, 1984.

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

In the matter of the adoption of Rules 46.12.510, 46.12.511, 46.12.512 and 46.12.513 pertaining to the participation of rural hospitals in the medicaid program as swing-bed facilities.	)))))	NOTICE OF THE ADOPTION OF RULES 46.12.510, 46.12.511, 46.12.512 and 46.12.513 PERTAINING TO THE PARTICIPATION OF RURAL HOSPITALS IN THE MEDICAID PROGRAM AS SWING-BED FACILITIES

TO: All Interested Persons

1. On May 17, 1984 the Department of Social and Rehabilitation Services published notice of the proposed adoption of rules pertaining to the participation of rural hospitals in the medicaid program as swing-bed facilities at page 798 of the Montana Administrative Register, issue number 9.

2. The department has adopted Rules 46.12.512, SWING-BED HOSPITALS, PROCEDURES and 46.12.513, SWING-BED HOSPITALS, REIMBURSEMENT, as proposed.

3. The department has adopted Rules 46.12.510 and 46.12.511 as proposed with the following changes:

46.12.510 SWING-BED HOSPITALS, DEFINITION (1) A swing-bed hospital is a hospital which has been certified to use medicaid patient beds interchangeably as either hospital beds or skilled or intermediate nursing care beds and which meets the requirements of ~~Rule II~~ ARM 46.12.511.

46.12.511 SWING-BED HOSPITALS, REQUIREMENTS Subsections (1) through (1)(g) remain the same as proposed.

(h) The hospital shall be in substantial compliance with the requirements for skilled nursing facilities with respect to patient's rights, specialized rehabilitation services, dental services, social services, patient activities and discharge planning as required in 42 CFR 405, subpart K, which federal regulation has been incorporated herein by reference at ~~Rule II~~ ARM 46.12.511 (1)(d).

4. The department has thoroughly considered all verbal and written commentary received:

COMMENT: Nursing home residents must not be forced to move 100 miles away from homes and families. I suggest a 50 mile radius.

RESPONSE: Payment for patients requiring less than acute care service is not considered to be medically necessary when an

appropriate skilled or intermediate care bed is available within 100 miles. We have adopted this distance from the Montana Foundation for Medical Care and feel it is appropriate. Clients residing further away than they wish may move to a closer bed as soon as one becomes available.

COMMENT: Patients requiring special rehabilitation services should not be admitted in swing-beds when those services are not available.

RESPONSE: We feel that these concerns are addressed in utilization control procedures. In addition, such procedures would have to be prescribed by the attending physician. It is doubtful the physician would allow placement in a facility where the needed services were not available.

COMMENT: A recommendation was made that swing-bed stays should not exceed 60 days.

RESPONSE: The department feels that if a swing-bed placement meets the requirements of this rule, it would not be appropriate to limit the stay to 60 days. Given the restrictions placed on the swing-bed, it would be difficult to rationalize its use being less on the sixty-first day of the stay than it was on the first day of admittance.

COMMENT: How will use and misuse of swing-beds be monitored?

RESPONSE: Compliance with the regulations will be monitored through auditing procedures with potential retrospective denial.

COMMENT: Most comments received were in support of these regulations.

RESPONSE: None.

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 18, 1984.

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

In the matter of the adoption of Rules 46.25.701 and 46.25.710 and the amendment of Rules 46.25.712, 46.25.720, 46.25.721, 46.25.723, 46.25.732, 46.25.738 and 46.25.739 pertaining to state general relief assistance.	)))))))	NOTICE OF THE ADOPTION OF RULES 46.25.701 AND 46.25.710 AND THE AMENDMENT OF RULES 46.25.712, 46.25.720, 46.25.721, 46.25.723, 46.25.732, 46.25.738 AND 46.25.739 PERTAINING TO STATE GENERAL RELIEF ASSISTANCE

TO: All Interested Persons

1. On May 17, 1984, the Department of Social and Rehabilitation Services published notice of the proposed adoption of Rules 46.25.701 and 46.25.710 and the amendment of of Rules 46.25.712, 46.25.720, 46.25.721, 46.25.723, 46.25.732, 46.25.738 and 46.25.739 pertaining to state general relief assistance.

2. The department has adopted Rules 46.25.701 (Rule I), GENERAL RELIEF, PURPOSE and 46.25.710 (Rule II), GRANDFATHER PROVISION, as proposed.

3. The department has amended Rules 46.25.721 and 46.25.738 as proposed.

4. The department has amended Rules 46.25.712, 46.25.720, 46.25.723, 46.25.732 an 46.25.739 as proposed with the following changes:

46.25.712 STANDARDS OF ASSISTANCE Subsections (1) through (1)(b)(iii) remain as proposed.

(iv) ~~(vi)~~ Assistance for telephone expenses will be granted up to an eight dollar ($8) maximum standard only for these recipients for which a phone is essential for an indicated medical necessity OR ~~and~~ a member of the assistance unit's continued employment requires them to be on call.

Subsections (1)(c) through (1)(f) remain as proposed.

(g) A household may be eligible for an additional $10 per month to contribute to the costs of NECESSARY transportation needs if the need is documented. Transportation is a need only for the physically disabled OR ~~and~~ those that live more than three miles, taking the shortest practical route, from the workfare worksite, local office of human services or medical facility. Costs of conducting other business and personal matters is considered to be included in the personal need standard. Transportation contribution will be $.175 ~~$.06~~ per mile or the recognized local cost for public transportation for prior approved necessary travel.

Subsection (2) remains as proposed.

AUTH: Sec. 53-2-803, MCA
IMP: Sec. 53-2-602 and 53-2-803, MCA

46.25.720 APPLICATION FOR GENERAL RELIEF Subsections (1) through (4) remain the same.

(5) When an applicant or recipient of general relief has made application for supplemental security income (SSI) UNDER TITLE XVI OF THE SOCIAL SECURITY ACT, the applicant or recipient shall sign an interim assistance agreement wherein general relief will be paid subject to recoupment when a supplemental security income retroactive eligibility determination is made.

AUTH: Sec. 53-2-803, MCA
IMP: Sec. 53-2-201, 53-3-301 and 53-2-803, MCA

46.25.723 DETERMINATION OF INCOME Subsections (1) and (1)(a) remain as proposed.

~~(a)~~ (b) "Potentially available" includes income reasonably anticipated based on an assessment of the individual's actual employment history, ~~and~~ future earning potential, AND ASSURED RECEIPT OF UNEARNED INCOME. ~~;~~Income that would have been available had the applicant or recipient not been fired without good cause, quit his job, or refused a bona fide offer of employment within the prior two (2) months SHALL BE CONSIDERED INCOME. ~~and as well as assured receipt of unearned income.~~

Subsections (1)(c) through (4) remain as proposed.

AUTH: Sec. 53-2-803, MCA
IMP: Sec. 53-3-102, 53-3-204 and 53-2-803, MCA

46.25.732 WORK PROGRAM Subsections (1) through (2)(f) remain the same.

(3) Work program participants are required to register for employment with the local job service and explore job possibilities at least weekly with the local job service.

(4) Work program participants may also be required to participate in general relief job search.

(a) While a recipient is participating in general relief job search, they MAY ~~will~~ be required to submit up to two applications for employment per day ~~on days~~, excluding weekends, ~~the recipient is not in workfare status~~. Verification of job applications must be submitted weekly, BI-WEEKLY OR MONTHLY AS DETERMINED BY THE DEPARTMENT.

~~(3)~~ (5) Any recipient who refuses to participate in the work program or general relief job search will ~~lose eligibility for general relief for one (1) week~~ have their monthly general relief benefit amount decreased by one-fourth for each refusal.

AUTH: Sec. 53-2-803, MCA
IMP: Sec. 53-3-305, 53-3-504 and 53-2-822, MCA

46.25.739 ELIGIBILITY DETERMINATION FOR STATE MEDICAL ASSISTANCE Subsections (1) through (2) remain the same. Subsections (2)(a) through (2)(c) remain as proposed.

~~(c)~~ (d) Payment under the medical program will be made only for those services recognized by the Montana medicaid program. ~~and will not exceed the medicaid reimbursement rate~~ IN ADDITION, ONLY THOSE SERVICES which are medically necessary to relieve pain and suffering or to alleviate life threatening situations.

Subsections (2)(e) through (3) remain as proposed.

AUTH: Sec. 53-2-803, MCA
IMP: Sec. 53-3-103 and 53-2-803, MCA

5. The department has thoroughly considered all verbal and written commentary received:

COMMENT: The benefit standard should be paid at the maximum level (AFDC) through January 1985, at which time the Legislature would be in session and a supplemental appropriation requested.

RESPONSE: There is a constitutional mandate (Article VIII, Sec. 14, Mt. Const.) that each state agency must not exceed their legislative appropriation. (17-8-103, 104, MCA). To allow the appropriation to become exhausted would be in opposition to constitutional mandate and legislative intent.

COMMENT: When and how was the need study completed for the shelter standards? An independent need study should be completed to determine the cost of basic needs.

RESPONSE: This Department compiled a needs study to determine the shelter standard by evaluation of the 1980 Census data and actual documented rental needs in each state administered county for March 1984.

A need study has been completed within the Department for all standards. This need study is considerate of both the actual needs of the indigent and budget limitations.

COMMENT: There should not be a ceiling on the shelter standard. The shelter standard should be raised. A provision should be put into rule to assist with rental deposits. The shelter standard only provides for the indigent to reside in substandard housing.

RESPONSE: As the shelter standard is based on documented needs, as demonstrated by the state administered counties survey, the standard is realistic to provide for the shelter needs of the indigent. The Department has provided a standard for each county to reflect it's individual economic situation.

The provision of rental deposits within the General Relief Program constitutes payment for future damages or rents and assumes responsibility for an individual's personal negligence. As the General Relief Program is intended to provide for current and emergent needs, provision of rental deposits would seem beyond the intent of the program.

There are other state statutes and local codes that provide protection of citizens against substandard housing. The Department of SRS has no authority or expertise in such matters. Substandard housing regulations and their enforcement are the responsibility of local building inspectors. To increase the shelter standard would not ensure the upgrading of housing, but rather it would be an inducement for a rental increase.

COMMENT: The Low Income Energy Assistance Program does not meet the realistic heating needs of the indigent.

RESPONSE: The department's research indicates that the Low Income Energy Assistance Program covers on the average 100% of all heating needs for the months of October through April. The proposed rules allow for heating costs in the months of May through September.

COMMENT: The proposed rule to have medical coverage for relief of pain and suffering and for the alleviation of life threatening situations is too restrictive and should be expanded.

RESPONSE: The General Relief Program intends to provide for emergent needs of the indigent. Provision of medical care only in the case of pain and suffering and to alleviate life threatening situations is compatible with that intent.

COMMENT: The three mile limit on provision of additional transportation assistance is unreasonable because it does not consider the inclemency of the weather or the irregularity of the terrain in various localities.

RESPONSE: The three mile limit on transportation was based on the statues for school bus transportation (Section 20-10-101 (2)(c), MCA) which states that an eligible transportee will be one who resides three miles or more from the nearest elementary school. The Department requires of the indigent no more than is required of the state's school age children.

COMMENT: The personal needs standard does not provide for actual need.

RESPONSE: The personal needs standard may not cover the situational needs of every individual. Some situational needs are not emergent. In most cases the personal needs standard is sufficient to provide for the basic personal needs of the household.

COMMENT: The Aid to Families with Dependent Children (AFDC) benefit level is below the poverty index. The General Relief payment amount is less than the AFDC benefit level. How can it be said that the General Relief Program is providing for the basic needs of the indigent if it is paying less than AFDC and AFDC is below the poverty index?

RESPONSE: Aid to Families with Dependent Children is an income maintenance program and General Relief is a temporary emergent needs program. When benefits from other programs (LIEAP, Food Stamps and Medical Assistance) are considered, the General Relief program provides for the needs of the indigent. The Montana Legislature has not mandated that benefits in the General Relief program be at the poverty index level.

COMMENT: It has been stated that General Relief benefits would not be decreased, but there is evidence that these benefits are decreasing in some cases.

RESPONSE: The proposed rule provides for a grandfathering provision (Rule 46.25.710) to protect benefits from being decreased by the imposition of this rule. The Department has been restrained from implementing this rule on an emergency basis. The Department must therefore utilize existing rules that allow only for documented need.

COMMENT: The transportation allowance of $.06 per mile found in ARM 46.12.712(1)(g) is unreasonable.

RESPONSE: The department is modifying this section to provide $.175 per mile which is the allowable mileage rate for Montana state employees.

COMMENT: State law requires that vehicles be licensed and insured. The General Relief Program does not recognize these expenses.

RESPONSE: Transportation has been provided both in the personal needs standard (Rule 46.25.712(3)(d)) and in the additional transportation category (Rule 46.25.712(3)(h)). While these standards may not provide for the operation of a motor vehicle, they do provide for a means of transportation for basic necessities.

COMMENT: The Thrifty Food Plan does not provide for the nutritional needs of the indicent.

RESPONSE: The Thrifty Food Plan does provide for nutritious diets. It has been designed to provide the Recommended Dietary Allowances (R.D.A.) set in 1974 by the National Academy of Sciences-National Research Council for the essential vitamins, nutrients and minerals (Family Economics Review, Fall 1981, U.S. Department of Agriculture).

COMMENT: How can eligibility technicians determine medical necessity?

RESPONSE: Eligibility Technicians do not determine medical necessity. They are directed to authorize an appointment with a physician for an examination and any other procedures necessary for diagnosis and treatment. The Montana Foundation for Medical Care reviews services as to their medical necessity.

COMMENT: Hearings should be held in various areas throughout the state so that all interested people could give testimony.

RESPONSE: This Department is not required by law to hold local hearings. The Department will in some circumstances, on other issues, hold local hearings, if time and staff are available. This rule requires immediate attention to resolve emergent budget problems. All those who wish to be heard in any administrative rule hearing and are not available for public testimony may submit their concerns in writing to the Department.

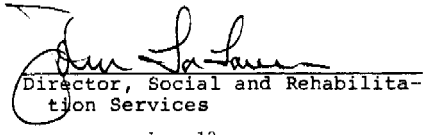
COMMENT: The indigent should not be punished because the Department of SRS did not request enough money from the legislature.

RESPONSE: The appropriation requested from the Legislature and granted in H.B. 798 was based on the historical costs of the county general relief programs for the counties considered to be likely candidates for assumption by the state.

COMMENT: Those on the work program receive less payment than the amount they have earned.

RESPONSE: General Relief recipients who feel they are paid for less than the amount of time they work should seek verification of their wage and hours worked from the Office of Human Services. If there is some remaining question regarding

the wage, hours worked or benefit provided, the Fair Hearing process may be pursued by the recipient.



Director, Social and Rehabilitation Services

Certified to the Secretary of State June 18, 1984.

VOLUME NO. 40 OPINION NO. 54

PROPERTY, REAL - Licensing of brokers and salespersons;
PROPERTY, REAL - Timeshare arrangements;
MONTANA CODE ANNOTATED - Sections 37-51-102, 37-51-202, 70-23-102.

HELD: The Montana statutes concerning the licensing of real estate brokers and salesmen apply to property transactions involving rental leasing, condominiums, the providing of lists of real property by rental agencies for a fee, and those timesharing arrangements where the purchaser becomes an owner of the timeshare unit.

7 June 1984

F. Lon Mitchell
Board of Realty Regulation
Department of Commerce
1424 Ninth Avenue
Helena MT 59620

Dear Mr. Mitchell:

You have requested my opinion on the following question.

> Whether the Montana statutes concerning the licensing of real estate brokers and salesmen apply to property transactions involving rental leasing, condominiums, the providing of lists of real property by rental agencies for a fee, and timesharing arrangements.

The Board of Realty Regulation licenses real estate brokers and salesmen under the authority granted it in section 37-51-202, MCA. The relevant definitions found in section 37-51-102, MCA, are:

(2) "Broker" includes an individual who for another or for a fee, commission, or other valuable consideration or who with the intent or expectation of receiving the same negotiates or attempts to negotiate the listing, sale, purchase, rental, exchange, or lease of real estate or of the improvements thereon or collects rents or attempts to collect rents or advertises or holds himself out as engaged in any of the foregoing activities. The term "broker" also includes an individual employed by or on behalf of the owner or lessor of real estate to conduct the sale, leasing, subleasing, or other disposition thereof at a salary or for a fee, commission, or any other consideration. The term "broker" also includes an individual who engages in the business of charging an advance fee or contracting for collection of a fee in connection with a contract by which he undertakes primarily to promote the sale, lease, or other disposition of real estate in this state through its listing in a publication issued primarily for this purpose or for referral of information concerning real estate to brokers, or both, and any person who aids, attempts, or offers to aid, for a fee, any person in locating or obtaining any real estate for purchase or lease.

....

(8) "Real estate" includes leaseholds as well as any other interest or estate in land, whether corporeal, incorporeal, freehold, or nonfreehold and whether the real estate is situated in this state or elsewhere.

(9) "Salesman" includes an individual who for a salary, commission, or compensation of any kind is associated, either directly, indirectly, regularly, or occasionally, with a real estate broker to sell, purchase, or negotiate for the sale, purchase, exchange, or renting of real estate.

The scope of coverage of Title 37, chapter 51, MCA, is broad, as evidenced by the inclusion of the phrase "any interest in land" in the definition of "real estate," and by specific mention of a broad range of activities that include the listing, sale, purchase, rental, exchange, lease, collection of rent, and advertising of real estate in the definition of "broker." These definitions clearly apply to individuals engaged in the business of rental leasing or providing lists of real property.

The licensing provisions of Title 37, chapter 51, MCA, would also pertain to any of the specified broker activities involving condominiums. A "condominium," as defined in Montana's Unit Condominium Act, involves ownership of a part of the land, buildings, and improvements, described as a "unit." § 70-23-102(5), (13), and (15), MCA. Consequently, a "condominium" represents an interest in real estate for purposes of Title 37, chapter 51, MCA.

Your question as it applies to timesharing arrangements is a more difficult one to answer, since the concept of timesharing may take one of several forms, not all of which resemble traditional interests in land. Some background is in order.

Generally, the purchaser of a timeshare interest obtains an exclusive and repetitive right to occupy housing at a resort for a specified period of time. Where the purchaser actually owns the timeshare unit for his annual period of time, i.e., where he receives a transferable title to the unit (often referred to as a timeshare ownership), the interest in the property is clearly encompassed by the phrase "any interest in land," contained in Montana's real estate licensing statutes. § 37-51-102(8), MCA.

Where, however, the ownership interest is retained by the developer, and the purchaser receives merely a right to use a unit in the timeshare development, the interest more closely resembles a membership license or contractual right. This arrangement is often referred to as a vacation license or vacation lease, the former being a right to occupy an undesignated unit at a certain resort during a specified time each year for a specified number of years, and the latter being a right to occupy a specific accommodation for a specified time

over a specified number of years. Reiser, Real Estate Time-Sharing, Am. Jur. 2d, New Topic Service; Gunnar, Regulation of Resort Time-Sharing, 57 Or. L. Rev. 31, 33-34 (1977). The states vary according to whether they regulate vacation licenses and vacation leases by way of their real estate laws, their subdivision laws, or their securities laws. Gunnar, supra at 40.

Most states, including Montana, do not have specific statutes dealing with timesharing as a property concept. Although there is a growing body of case law on the subject of timesharing, the concept has not, to my knowledge, been tested in the Montana courts. The application of common law property concepts has served to legitimize timesharing ownership interests in some states. See Note, Timesharing: A Unique Property Concept Creates the Need for Comprehensive Legislation, 25 St. Louis U.L.J. 629, 634 (1981), discussing Home Association v. Big Canoe Corp., No. C-65248 (Ga. Super. Ct. Oct. 24, 1980); Bauer, Representing a Purchaser of a Time Share, 11 Colo. Law. 1543, 1544 (1982). Where fee ownership timesharing is not involved, the law is even more unsettled. In Colorado, nonfee timesharing arrangements are unregulated. Martin, Timesharing in Colorado, 11 Colo. Law. 2804, 2806 (1982). In California, a court has determined that under a right-to-use timeshare arrangement, the sale of membership interests in an adventure club entitling members to the use of an undesignated resort condominium unit for one week or more each year constituted a sale or lease of an interest in subdivided lands, and, as such, was within the jurisdiction of the state Department of Real Estate. Cal-Am Corporation v. Department of Real Estate, 104 Cal. App. 3d 453, 163 Cal. Rptr. 729 (Cal. Ct. App., 2d Dist. 1980). The conclusion reached by the California court is the opposite of that arrived at by the Nevada Supreme Court in State of Nevada v. Carriage House Associates, 585 P.2d 1337 (Nev. 1978). California subdivision law, however, specifically covers membership rights in condominiums and makes those interests subject to the regulations of the state's Department of Real Estate. Cal. Ann. Bus. & Prof. Code § 11004.5(g)(1) (West 1984). Montana does not have a similar statute.

The Montana Legislature and the courts have not yet had an opportunity to address the legitimacy of timesharing as a method of transferring property, let alone to determine whether an interest in real property is involved in the variety of timesharing arrangements. While uniform laws have been proposed to deal with timesharing, none has been adopted in Montana. Eastman, Time Share Ownership, 57 N.D.L. Rev. 151, 152 (1981). Moreover, it is uncertain whether any timesharing arrangements are in current use in Montana, other than the fee ownership timesharing arrangement, which, as I have noted, comes under the jurisdiction of the existing real estate licensing statute. Consequently, it would be inappropriate for me to issue an opinion on that part of your request which deals with the nonfee, right-to-use timeshare interest. This subject is more properly one for the Legislature.

THEREFORE, IT IS MY OPINION:

> The Montana statutes concerning the licensing of real estate brokers and salesmen apply to property transactions involving rental leasing, condominiums, the providing of lists of real property by rental agencies for a fee, and those timesharing arrangements where the purchaser becomes an owner of the timeshare unit.

Very truly yours,

MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules or amendment or repeal of existing rules filed with the Secretary of State. Proposals of the Department of Revenue are reviewed only in regard to the procedural requirements of the Montana Administrative Procedure Act. The Committee has the authority to make recommendations to an agency regarding the adoption, amendment or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statute and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

1. Consult ARM topical index, volume 16. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute Number and Department

2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 1984. This table includes those rules adopted during the period April 1, 1984 through June 30, 1984, and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 1984, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1983 and 1984 Montana Administrative Registers.

ADMINISTRATION, Department of, Title 2

I	State Plan of Operation for Distribution of Federal Surplus Property, p. 746
I-IV	and other rules - Moving and Relocation Expenses, p. 735
I-VII	Discipline Handling Policy, p. 740
I-XIX	Veteran's and Handicapped Person's Employment Preference, p. 93, 425
I-XXII	Purchasing Rules, p. 1564, 1918
2.21.6402	and other rules - Minimum Standards for Performance Appraisal, p. 905
2.23.101	and other rules - Operation of a Merit System, p. 858
2.31.101	ANSI Standards for Aerial Passenger Tramways, p. 350, 409, 811
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