

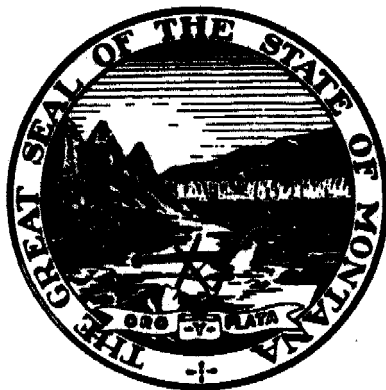
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MONTANA ADMINISTRATIVE REGISTER

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**1985 ISSUE NO. 20
OCTOBER 31, 1985
PAGES 1586-1656**



MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 20

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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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DEPARTMENT OF ADMINISTRATION
BEFORE THE TEACHERS' RETIREMENT BOARD
OF THE STATE OF MONTANA

In the matter of the Adoption	)	NOTICE OF PROPOSED ADOPTION
of a Rule specifying the procedure	)	RULE I
to allow a retired member to	)	CHANGE OF BENEFICIARY
designate a different beneficiary	)	AND/OR CHANGE OF
and select a different retirement	)	RETIREMENT OPTION
option)	

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On December 1, 1985, the Teachers' Retirement Board proposes to adopt a rule specifying the procedure to allow a retired member to designate a different beneficiary and select a different retirement option under Section 19-4-702, MCA.

2. The proposed new rule provides as follows:

RULE I CHANGE OF BENEFICIARY AND/OR CHANGE OF RETIREMENT OPTION (1) The retired member shall submit an application form prescribed by the Teachers' Retirement Board on which shall be designated the name and social security number of the beneficiary.

(2) If the change in beneficiary is due to the death of the beneficiary of record, the retired member shall submit a copy of the death certificate.

(3) If the change in beneficiary is due to dissolution of marriage, the retired member shall submit a copy of the decree of dissolution or marital property settlement, whichever provides documentation that the current beneficiary of record is not entitled to receive all or part of the optional allowance as part of the judicial decree.

3. Consideration was given to the effect on subsequent retirement benefits by a beneficiary failing to survive a retiree and property settlements incident to dissolution of marriage. With this in mind, House Bill 289 was passed in the 1985 legislative session. It provides for redesignation of beneficiary and/or reselection of retirement benefits by a retiree receiving an optional retirement allowance. The rule carries out this process.

4. If the member wishes to retain the same retirement option or change options, the member shall so designate on the application form and also furnish a copy of the beneficiary's birth certificate if the option includes the new beneficiary.

5. The effective date to change a retirement allowance shall be the first of the month, following the month in which the application is received.

6. Interested parties may submit their data, views or arguments concerning the proposed rule in writing to Mr. F. Robert Johnson, Executive Secretary, Teachers' Retirement Division, Department of Administration, 1500 6th Avenue, Helena, Montana, 59601, no later than November 28, 1985.

7. If a person who is directly affected by the proposed rule 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 Mr. F. Robert Johnson at the above address, no later than November 28, 1985.

8. If the agency receives requests for a public hearing on the proposed rule from either 10% or 25, whichever is less of the persons who are directly affected by the proposed rule; the Administrative Code Committee of the Legislature; a governmental subdivision or agency; an association having not less than 25 members who will be directly affected, a notice of hearing will be published in the Montana Administrative Register. Ten per cent of those persons directly affected has been determined to be more than 25.

AUTH: 19-4-201, MCA

IMP: 19-4-702, MCA

TEACHERS' RETIREMENT BOARD
J. WILLIAM KEARNS, JR.
CHAIRMAN

BY *[Signature]*
ADMINISTRATOR, TEACHERS'
RETIREMENT DIVISION

Certified to the Secretary of State October 21, 1985 .

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption)	NOTICE OF PROPOSED ADOPTION OF
of rules requiring a written)	RULE I MINIMUM REFUNDS AND
request for a refund below a)	RULE II
certain amount before refund)	EXCEPTIONS TO MINIMUM REFUND
will be sent out and an)	RULE
exception to this rule.)	

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Parties.

1. On December 1, 1985, the Department of Administration proposes to adopt rules obligating the agencies of the state to refund minimum moneys to which the state or agency is not legally entitled only upon the written request of the party to which the refund is due. Exceptions to this rule are also provided.

2. The proposed rules provide as follows:

RULE I MINIMUM REFUND (1) No refund amounting to less than \$3 shall be paid by a state agency, including units of the university system, except upon the specific request of the person entitled to receive the refund.

(2) A request for a refund must be received in writing. A form used by an agency that addresses refund options and has the signature of the person entitled to receive the refund may serve as the written request.

AUTH: 17-1-102, MCA IMP: 17-8-203, MCA

RULE II EXCEPTIONS TO MINIMUM REFUND RULE (1) Refunds amounting to less than \$3 may be paid where specifically provided by law or where required by federal regulations.

(2) Tax refunds are exempted from the minimum refund rule by 15-1-503, MCA.

(3) Vocational-technical centers may follow their local school boards' refund policies.

AUTH: 17-1-102, MCA IMP: 17-8-203, MCA

3. Research was compiled by the accounting division of the Department of Administration regarding the policies and processing costs of refunds in various state agencies. Interpretation of this data revealed that there was no consistent minimum refund amount and that the average cost of processing a refund often exceeded the amount of the refund.

4. A minimum refund amount of \$3 has been set to establish a consistent, predictable policy throughout the affected agencies upon which the public and administration can rely. The reduction of unsolicited refunds would reduce the expense of processing them and thereby reduce the overall cost of government.

5. Interested parties may submit their data, views, or arguments concerning these proposed rules in writing to Ms. Kathy Fabiano, Administrator, Accounting Division, Department of

Administration, Room 255, Mitchell Building, Helena, Montana 59620, no later than November 28, 1985.


6. If a person who is directly affected by the proposed rules 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 it along with any written comments to Ms. Kathy Fabiano, at the above address, no later than November 28, 1985.

7. If the agency receives requests for a public hearing on the proposed rule from either; 10% or 25, whichever is less of the persons who are directly affected by the proposed rule; the Administrative Code Committee of the Legislature; a governmental subdivision or agency; an association having not less than 25 members who will be directly affected, a public hearing will be noticed in the Montana Administrative Register. Ten per cent of those persons directly affected has been determined to be more than 25.

AUTH: 17-1-102, MCA

IMP: 17-8-203, MCA

DEPARTMENT OF ADMINISTRATION


Ellen Feaver, Director

Certified to the Secretary of State October 21, 1985

20-10/31/85

MAR Notice No. 2-2-146

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PRIVATE SECURITY PATROLMEN AND INVESTIGATORS

In the matter of the proposed) NOTICE OF PUBLIC HEARING
amendment of 8.50.437 concern-) ON THE PROPOSED AMENDMENT
ing the fee schedule) OF 8.50.437 FEE SCHEDULE

TO: All Interested Persons.

The notice of proposed amendment published in the Montana Administrative Register on September 13, 1985, issue number 17, is amended as follows because the required number of persons designated therein have requested a public hearing:

1. On November 20, 1985, at 9:00, a.m., a public hearing will be held in the upstairs conference room of the Department of Commerce, 1424 9th Avenue, Helena, Montana to consider the amendment of the above-stated rule.

2. The amendment is the same as proposed in the original notice.

3. The rule is proposed for amendment 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 Private Security Patrolmen and Investigators, no later than November 28, 1985.

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

6. The authority of the board to make the proposed rule amendment, is based on section 37-1-134 and 37-60-202 (3), MCA, and the rule implements 37-1-134, 37-60-301 and 312, MCA.

BOARD OF PRIVATE SECURITY
PATROLMEN AND INVESTIGATORS
CLAYTON BAIN, CHAIRMAN

BY:

Keith L. Colbo

KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, October 21, 1985

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 10.55.406 Guidance and Counseling: High School, Junior High School, Middle School and 7 and 8 Grades Funded at High School Rates, and Rule 10.55.407 Guidance and Counseling, Elementary) NOTICE OF PUBLIC HEARING ON) PROPOSED AMENDMENT OF RULE) 10.55.406 GUIDANCE AND) COUNSELING: HIGH SCHOOL,) JUNIOR HIGH SCHOOL, MIDDLE) SCHOOL AND 7 AND 8 GRADES) FUNDED AT HIGH SCHOOL RATES,) AND RULE 10.55.407 GUIDANCE) AND COUNSELING, ELEMENTARY
---	---

TO: All Interested Persons.

1. On November 25, 1985 at 11:00 a.m., or as soon thereafter as it may be heard, a public hearing will be held in the Board of Regents Conference Room, 33 South Last Chance Gulch, Helena, Montana 59620 in the matter of the amendment of Rule 10.55.406 Guidance and Counseling: High School, Junior High School, Middle School and 7 and 8 Grades Funded at High School Rates, and Rule 10.55.407 Guidance and Counseling, Elementary. The effective date will be August 1, 1986.

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

10.55.406 GUIDANCE AND COUNSELING: HIGH SCHOOL, JUNIOR HIGH SCHOOL, MIDDLE SCHOOL AND 7 AND 8 GRADES FUNDED AT HIGH SCHOOL RATES

(1)---Each full-time counselor and part-time counselor shall have a valid Montana teaching certificate and have at least 30 quarter hours (20 semester hours) preparation in guidance---(Effective for the 1986-87 school year, a counselor will need an endorsement based on a minimum of a minor and three years experience as a certified classroom teacher.)

(2)---A minimum equivalent of one full-time counselor for each 400 students shall be provided.---All schools must have a counselor assigned for at least one hour a day or five hours per week.

(3)---A separate room specifically designed for guidance and counseling shall be provided.

(a)---Adequate space and facilities for clerical assistance shall be provided.

(b)---A guidance library shall be provided which is available to all students.

(1) Guidance and counseling services are direct pupil services that enhance the personalization of the educational process and seek to develop the full potential of each student.

(2) Each school district shall provide in writing for the planning and implementation of a comprehensive guidance and counseling program for all grades served. Suggested guidelines for program development include:

(a) organizing a district guidance committee,

(b) assessing and prioritizing guidance and counseling needs of the student population,

20-10/31/85

MAR Notice No. 10-3-95

- (c) adopting program goals to meet identified student needs (i.e. personal, social, educational and career/life planning),
- (d) setting objectives (i.e. activities and resources) to achieve program goals, and
- (e) developing a plan for evaluation.
- (3) The program offered may include but is not specifically limited to:
 - (a) personal counseling, individual and group,
 - (b) structured developmental guidance experiences presented systematically through groups and/or classrooms that promote psychological growth and development,
 - (c) consultation with parents, professional staff and other agencies etc.,
 - (d) student appraisal, test interpretation and/or administration,
 - (e) information system for educational vocational planning and decision making,
 - (f) referral services for health, emotional, vocational etc. needs but served by other agencies, and
 - (g) placement, educational and vocational and follow-up activities.
- (4) Each full-time counselor and part-time counselor shall have a valid Montana teaching certificate and have at least 30 quarter hours (20 semester hours) preparation in guidance. (Effective for the 1986-87 school year, a counselor will need an endorsement based on a minimum of a minor and three years experience as a certified classroom teacher.)
- (5) A minimum equivalent of one full-time counselor for each 400 students shall be provided. All schools must have a counselor assigned for at least one hour a day or five hours per week.
- (6) A separate room specifically designed for guidance and counseling shall be provided.
 - (a) Adequate space and facilities for clerical assistance shall be provided.
 - (b) A guidance library shall be provided which is available to all students.

AUTH: Sec. 20-7-101 MCA

IMP: Sec. 20-7-101 MCA

10.55.407 GUIDANCE AND COUNSELING: ELEMENTARY

- (1) Guidance and counseling services shall be provided, and each school district shall provide in writing for the planning and implementation of a comprehensive guidance and counseling program for all grades served. Suggested guidelines for program development include:
 - (a) organizing a district guidance committee,
 - (b) assessing and prioritizing guidance and counseling needs of the student population,
 - (c) adopting program goals to meet identified student needs (i.e. personal, social, educational and career/life planning),
 - (d) setting objectives (i.e. activities and resources) to achieve program goals, and

(e) developing a plan for evaluation.

AUTH: Sec. 20-7-101 MCA

IMP: Sec. 20-7-101 MCA

3. The Board is amending the rules at the request of various members of educational organizations. The purpose of the amendments is to provide for a better formulation of services to students at the district level.

4. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or argument may also be submitted to Ted Hazelbaker, Chairman, Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59620 no later than November 28, 1985.

5. Ted Hazelbaker, Chairman, and Hidde Van Duym, Executive Secretary to the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana have been designated to preside over and conduct the hearing.

Ted Hazelbaker

TED HAZELBAKER, CHAIRMAN
BOARD OF PUBLIC EDUCATION

BY: *Hidde Van Duym*

Certified to the Secretary of State October 21, 1985

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMEND-)	NOTICE OF THE PROPOSED AMEND-
MENT of Rules 42.22.1102 and)	MENT of Rules 42.22.1102 and
42.22.1119 relating to net)	42.22.1119 relating to net
proceeds reclamation costs.)	proceeds reclamation costs.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 27, 1985, the Department of Revenue proposes to amend rules 42.22.1102 and 42.22.1119 relating to net proceeds reclamation costs.

2. The rules proposed to be amended can be found on pages 42-2241 and 42-2248 of the Administrative Rules of Montana.

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

42.22.1102 NET PROCEEDS TAX RETURN (1) Return and statement for the assessment of net proceeds must be on the form prescribed by the department of revenue and must contain the following detailed information:

(a) through (f) remain the same.

(g) deductions taken as listed and explained in ARM 42.22.1111 through 42.22.1117 and 42.22.1119;

(1) (h) through (1) (n) remain the same.

(2) and (3) remain the same.

AUTH: 15-23-108 MCA; IMP: 15-23-502 MCA.

42.22.1119 DEDUCTIONS FOR INSURANCE, WELFARE, RETIREMENT, MINERAL TESTING, SECURITY AND ENGINEERING (1) through (6) remain the same.

(7) The cost of labor, supplies, and equipment used to reclaim the mine site are deductible. If during the process of reclamation, costs are incurred that result in an improvement or betterment in and about the working of the mine, those costs will be amortized over a 10-year period. The deductions provided in this paragraph are allowable beginning in the 1986 production year.

AUTH: 15-23-108 MCA; IMP: 15-23-502 and 15-23-503 MCA.

4. The Department proposes to amend rules 42.22.1102 and 42.22.1119 because Chapter 623, Laws 1985, amending §§ 15-23-502 and 15-23-503, MCA, specifically provided for the cost of reclamation at the site of the mine to be an allowable deduction in computing the net proceeds on miscellaneous mines. These proposed rule changes would bring the rules into conformity with the statutes and provide clarification as to what items are deductible and in what manner.

5. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to:


Dawn Sliva
Department of Revenue
Legal Division
Mitchell Building
Helena, Montana 59620

no later than November 29, 1985.

6. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Dawn Sliva at the above address no later than November 29, 1985.

7. If the agency receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the Legislature; from a governmental subdivision, or agency; or from an association having no 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 25.

8. The authority of the Department to make the proposed amendments is based on § 15-23-108, MCA. The rules implement §§ 15-23-502, and 15-23-503, MCA.


JOHN D. LAFAVER, Director
Department of Revenue

Certified to Secretary of State 10/21/85

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA
BOARD OF HAIL INSURANCE

In the matter of the adoption)	NOTICE OF THE ADOPTION
of emergency amended rules)	OF EMERGENCY AMENDED
pertaining to extending hail)	RULES EXTENDING HAIL
insurance coverages for the)	INSURANCE COVERAGE
1985 crop to October 31, 1985)	

TO: ALL INTERESTED PERSONS.

1. Statement of Reason for Emergency. State Hail Insurance provides coverage for crops with the coverage ending on Oct. 1 of each year. This provision is based upon the assumption that the cut off date reflects the last reasonable date that crops in Montana will be harvested.

The 1985 growing season started with drought conditions, which stunted the growth of many crops or forced replanting. This was followed by a wet August and September that precluded or hampered efforts to harvest the crops. Because of the unique conditions some farmers still have not harvested their crops. The hail board has received reports of hail storms after the date when all claims must be submitted.

It is the desire of the Hail Board to provide hail insurance coverage for the entire season, which due to the unusual weather pattern has made the season run late. The board in order to provide this coverage must by emergency rule extend the period for submitting claims. Because claims must be submitted in an expeditious manner, these rules must be implemented immediately so that the farmers can submit their claims and the necessary claims adjustments may be made in a proper fashion. Any delay may result in a loss of evidence for conducting proper claim adjustments.

2. The text of the rule reads as follows:

4.4.314 CUT OFF DATE (1) Loss claims for year 1985 after ~~October 17~~ October 31, 1985 will not be accepted.

AUTH: 80-2-201, MCA IMP: 80-2-241, MCA

4.4.316 LIABILITY ON ALL CROPS (1) The liability on all 1985 crops insured ~~except-sugar-beets~~ will expire on ~~September 15, October 31, 1985.~~ ~~The insured may apply for an extension of the risk if his crops, except sugar beets, are an extension before that date to the state board of hail insurance at Helena, Montana.~~

AUTH: 80-2-201, MCA IMP: 80-2-203, 80-2-241, MCA

3. The reason for the emergency rules is to extend hail insurance coverage through October 31, 1985. This is being done because extremely unusual weather conditions have forced producers to harvest their crops much later than normal and they need hail insurance coverage to last later into the fall.

4. These rules are authorized under Section 80-2-201, MCA and implemented under Sections 80-2-203, MCA and 80-2-241, MCA.

The emergency action is effective October 9, 1985.

Keith Kelly
Director

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF ATHLETICS

In the matter of the amend-	)	NOTICE OF AMENDMENT OF
ment of 8.8.2803 concerning	)	8.8.2803 PROHIBITIONS and
prohibitions and 8.8.3402 con-	)	8.8.3402 REFEREE
cerning referees.)	

TO: All Interested Persons:

1. On August 30, 1985, the Board of Athletics published a notice of amendment of the above-stated rules at pages 1185 through 1186, 1985 Montana Administrative Register, issue number 16.
2. The board has amended the rules exactly as proposed.
3. No comments or testimony were received.

BOARD OF ATHLETICS
DR. JOHN R. HALSETH, CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR

Certified to the Secretary of State, October 21, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF BARBERS

In the matter of the amendments)	NOTICE OF AMENDMENTS OF
of 8.10.405 concerning fees,)	8.10.405 FEE SCHEDULE, 8.
8.10.407 concerning qualifi-)	10.407 QUALIFICATIONS FOR
cation for examination for)	EXAMINATION FOR OUT-OF-STATE
out-of-state applicants, 8.)	APPLICANTS, 8.10.801 GENERAL
10.801 concerning general)	REQUIREMENTS and REPEAL OF
requirements and repeal of)	SUB-CHAPTER 6, RULES 8.10.
sub-chapter 6, rules 8.10.)	601-603, APPRENTICE BARBERS
601 - 8.10.603, concerning)	
apprentice barbers)	

TO: All Interested Persons:

1. On August 30, 1985, the Board of Barbers published a notice of amendments and repeal of the above-stated rules at pages 1187 through 1189, 1985 Montana Administrative Register, issue number 16.
2. The board has amended and repealed the rules exactly as proposed.
3. No comments or testimony were received.

BOARD OF BARBERS
LAWRENCE SANDRETTO, CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR

Certified to the Secretary of State, October 21, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MORTICIANS

In the matter of the amend-	)	NOTICE OF AMENDMENTS OF
ments of 8.30.402 concern-	)	8.30.402 APPLICATIONS, 8.30.
ing applications, 8.30.405	)	405 INTERNSHIP, 8.30.406
concerning internship, 8.30.	)	EXAMINATIONS, 8.30.408
406 concerning inspections,	)	INSPECTIONS, REPEAL 8.30.
repeal of 8.30.403 concern-	)	403 MORTICIANS QUALIFICA-
ing morticians qualifica-	)	TIONS, and ADOPTION OF A NEW
tions, and adoption of a new	)	RULE UNDER SUB-CHAPTER 5,
rule under sub-chapter 5	)	CONTINUING EDUCATION, CON-
concerning conditional per-	)	DITIONAL PERMISSION TO
mission to practice while on	)	PRACTICE WHILE ON INACTIVE
inactive status	)	STATUS

TO: All Interested Persons:

1. On September 12, 1985, the Board of Morticians published a notice of amendments, repeal and adoption of the above-stated rules at pages 1271 through 1274, 1985 Montana Administrative Register, issue number 17.
2. The board has amended, repealed and adopted the rules exactly as proposed.
3. No comments or testimony were received.

BOARD OF MORTICIANS
DENNIS DOLAN, CHAIRMAN

BY: Keith P. Colbo
KEITH L. COLBO, DIRECTOR

Certified to the Secretary of State, October 21, 1985

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF SPEECH PATHOLOGISTS AND AUDIOLOGISTS

In the matter of the amendments)	NOTICE OF AMENDMENTS OF
of 8.62.413 concerning fees,)	8.62.413 FEES, AND 8.62.
and 8.62.703 concerning con-)	703 CONTINUING EDUCATION RE-
tinuing education.)	QUIRED - WHEN

TO: All Interested Persons:

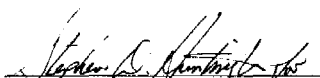
1. On August 30, 1985, the Board of Speech Pathologists and Audiologists published a notice of amendments of the above-stated rules at pages 1190 through 1191, 1985 Montana Administrative Register, issue number 16.

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

3. No comments or testimony were received.

BOARD OF SPEECH PATHOLOGISTS
AND AUDIOLOGISTS
PATI DUBRAY, CHAIRMAN

BY:



KEITH L. COLBO, DIRECTOR

Certified to the Secretary of State, October 21, 1985.

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

In the matter of the amendment	)	NOTICE OF THE AMENDMENT
of rules 16.24.201, 16.24.202	)	OF ARM 16.24.201
16.24.205 16.24.206, 16.24.207,	)	16.24.202,
16.24.209, 16.24.211 and	)	16.24.205 - 16.24.207.
16.24.213 setting requirements	)	16.24.209, 16.24.211, AND
for testing of newborns for	)	16.24.213, AND THE
inborn errors of metabolism,	)	ADOPTION OF RULE 16.24.210
and the adoption of RULE 1,)	
(16.24.210) stating when a)	
newborn needing an exchange)	
transfusion must be tested.	)	(Infant Screening Tests --
	)	Inborn Errors of Metabolism)

TO: All Interested Persons

1. On September 12, 1985, the department published notice of a proposed amendment of rules 16.24.201, 16.24.202, 16.24.205-16.24.207, 16.24.209, 16.24.211, and 16.24.213, and of a proposed adoption of rule 16.24.210, all concerning when blood specimens must be taken from infants by hospitals and other responsible individuals for submission to the department to be tested for inborn errors of metabolism, at page 1300 of the 1985 Montana Administrative Register issue number 17

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

16.24.201 DEFINITION DEFINITIONS (1) A newborn is "Newborn" means an infant under LESS THAN 28 days of life old or less.

(2) "Tests for inborn errors of metabolism" include laboratory tests for phenylketonuria, detection of other aminoacidopathies, and thyroxine level for hypothyroidism.

16.24.202 RESPONSIBILITIES OF REGISTRAR OF BIRTH--
ADMINISTRATOR OF HOSPITAL Same as proposed

16.24.205 PREMATURE INFANTS--IN-HOSPITAL Same as proposed

16.24.206 NON-PREMATURE INFANTS--IN-HOSPITAL Same as proposed

16.24.207 TRANSFER OF NEWBORN INFANT Same as proposed

16.24.209 INFANT BORN OUTSIDE HOSPITAL OR INSTITUTION
Same as proposed

16.24.211 POSITIVE OR SUSPICIOUS TEST (1) If the initial test results on an infant's who has a serum BLOOD specimen are positive or suspicious:

(a) the department will immediately report that fact to the attending physician or midwife, or, if there is none or the physician or midwife is unknown, to the person who registered the infant's birth;

(b) the individual to whom the above report is made must ensure that initial test shall immediately have a second BLOOD specimen is immediately taken and submitted to the department for a second test performed.

(2), (3) Same as proposed.

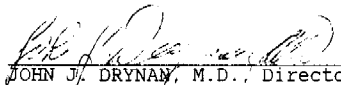
16.24.213 STATE LABORATORY—RESPONSIBILITY FOR TESTS
Same as proposed

RULE 1 (16.24.210) EXCHANGE TRANSFUSION; WHEN SPECIMEN TAKEN
Same as proposed

3. The department corrected two errors in the original language as proposed. First, the definition of "newborn" was revised to conform to the statutory definition. Second, the department corrected the erroneous reference in 16.24.211(1) to the taking of a "serum" specimen for the initial test to reflect the fact that initial tests must be performed on a blood specimen rather than a serum specimen. For clarification purposes, 16.24.211(1)(b) was also amended to indicate that the specimen referred to is a blood specimen.

Complaints were received concerning the commencement, as of July 1, 1985, of billing of hospitals and physicians by the department's laboratory for tests performed by it for inborn errors of metabolism. No change was made because the comments do not address the substance of these proposed amendments, which do not set fees or address billing [the fee for tests for inborn errors of metabolism is set in rule 16.38.303(2)].

Another commenter questioned the decision to have initial testing done by the department's laboratory rather than the Oregon State Laboratory as in times past. Since the rule's designation of the state laboratory as the only approved lab for initial tests reflects the decision of the 1985 legislature in its appropriations bill to have the state lab do such tests, and because safeguards are in place to ensure the quality, equivalent to that of the Oregon Lab, of tests performed by the state, the suggested change was not made.


JOHN J. DRYNAM, M.D., Director

Certified to the Secretary of State October 21, 1985

BEFORE THE DEPARTMENT OF JUSTICE

OF THE STATE OF MONTANA

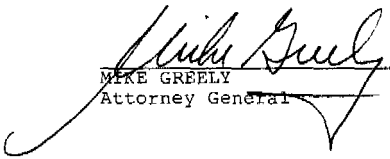
In the matter of the amendment	)	AMENDED NOTICE OF
and repeal of ARM 23.3.901 -	)	TRANSFER AND AMENDMENT,
23.3.941 and the adoption of new	)	REPEAL AND ADOPTION OF
rules I-V pertaining to alcohol	)	NEW RULES PERTAINING
analysis.	)	TO ALCOHOL ANALYSIS.

TO: All Interested Persons

1. On October 17, 1985, the Department of Justice published a notice of the transfer, amendment, and repeal of rules, and adoption of new rules pertaining to alcohol analysis at page 1560 of the Montana Administrative Register, issue number 19.

2. The second paragraph of the notice of transfer and amendment, repeal and adoption of new rules pertaining to alcohol analysis is amended to include the following addition: The Department has repealed rules 23.3.903 through 23.3.906, 23.3.914, 23.3.935, 23.3.937 and 23.3.938 as proposed.

3. The following statutes are added as authority for rule 23.4.125: sections 7-4-2916 and 46-4-103, MCA.



MIKE GREELY
Attorney General

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption	)	NOTICE OF ADOPTION
of rules pertaining to	)	OF ARM 24.9.1301
discrimination in insurance	)	THROUGH 24.9.1305
and retirement plans)	

To: All Interested Persons

1. On August 15, 1985, the Montana Human Rights Commission and the Montana State Auditor and Commissioner of Insurance jointly published notice of proposed adoption of rules implementing §49-2-309, MCA, relating to discrimination in insurance and retirement plans at page 1049-1054 of the 1985 Montana Administrative Register, issue number 15.

2. The Human Rights Commission has adopted the proposed rules with the following changes:

24.9.1301 (RULE I) DEFINITIONS (1) The term "insurer" as used in these rules includes the definition of insurer found in section 33-1-201(6), MCA, the definition of financial institution found in section 49-2-101(10), MCA, and the definitions of person found in sections 33-1-202(3) and 49-2-101(15), MCA; this subchapter means any financial institution or person, as those terms are defined in section 49-2-101, MCA, that issues, operates, sells or otherwise provides any type of insurance policy, plan, or coverage or any pension or retirement plan, program, or coverage to another person or persons, except that an employer or organization which provides to its employees or members a group insurance policy, plan, or coverage or pension or retirement plan, program, or coverage purchased from or provided by an insurer is not an insurer.

(2) The term "renewal" as used in these rules means the act whereby an insurer and insured agree to an extension or continuation of an existing insurance policy, plan or coverage or retirement plan, program or coverage when no consideration was given in the original contract for the right to renew under the same terms. The fact that the contract formed by extension or continuation is identical to the original contract is not material if no consideration for the right to extend or continue the original terms of the contract was given.

24.9.1302 (RULE II) RATES OR AND PREMIUMS; PROPERTY AND CASUALTY INSURANCE (1) Rates or premiums for any property or casualty insurance policy, plan, or coverage on a risk, when the risk is resident, located, or to be performed in the State of Montana shall not be based on sex or marital status.

(2) Moved to new rule 24.9.1303(1).

(3) Factors which an insurer may be taken into account to determine rates or premiums for motor vehicle liability and property coverage include, but are not limited to:

- (a) The age of the driver.
- (b) The length of driving experience.

(c) The number of years licensed to operate a motor vehicle.

(d) A determination of which driver, among several insured individuals, is the primary driver of a covered vehicle, based upon the proportionate use of each vehicle insured under the policy by individual drivers insured or to be insured under the policy.

(e) Average number of miles driven over a period of time.

(f) Type of use, such as business, farm, or pleasure use.

(g) Vehicle characteristics, features, and options such as engine displacement, ability of vehicle and its equipment to protect passengers from injury, vehicle make and model, and design characteristics related to damagability of the vehicle.

(h) Commuting mileage over a period of time.

(i) The number of cars insured or number of licensed operators in the household, without regard to the sex or marital status of the licensed operators. An insurer may not utilize a policy of establishing insurance rates for an individual based upon the driving record of a spouse who is a licensed operator but not a primary driver of the vehicle to be insured unless the policy is applied in the same manner to households of individuals not married to each other.

(j) The amount of insurance.

~~(k) The income of the insured.~~

~~++ (k) The anticipated cost of vehicle repairs or replacement, which may be measured by age, price, cost, or value of the insured automobile, and other related factors.~~

~~++ (l) Geographic location.~~

~~++ (m) The accident record of the insured, including accidents for which the insured, although not cited, was substantially at fault.~~

~~++ (n) The driving record of the insured, including citations.~~

(4) Moved to new rule 24.9.1303(2).

~~(5) No rates or premiums established to comply with these rules shall be excessive or unreasonably high or shall result in undue enrichment to an insurer. No insurer may attempt to comply with §49-2-309, MCA, or these rules, by merely raising rates for women to the same level previously charged to men or by merely raising rates for men to the same level previously charged to women, unless these rates are based on reasonable grounds.~~

~~--- (6) Every insurer shall file for record purposes its rates or premiums for any insurance policy, plan or coverage or retirement plan, program or coverage to be offered on or after October 1, 1995 with the Office of Insurance Commissioner in a format acceptable by that office. The rates and premiums to be filed for record purposes are those which the insurer proposes to use in compliance with Section 49-2-309, MCA, and these rules. The filings will serve to meet the applicable requirements of Title 33 of Montana Code Annotated and will be reviewed by the Insurance Commissioner if specific statutory authority permits. Copies of the filings will be made~~

~~available to the Human Rights Commission by the Insurance Commissioner or by the insurer upon request.~~

24.9.1303 RATES AND PREMIUMS, LIFE, DISABILITY, AND HEALTH INSURANCE, ANNUITIES, AND PENSION AND RETIREMENT PLANS, PROGRAMS, AND COVERAGES ~~49-2 (1)~~ Rates or premiums for life, disability, and health insurance policies, plans, and coverages, including annuities and any pension or and retirement plans, programs, or and coverages, which is issued, delivered, or issued for delivery where the participant resides in the State of Montana shall not be based on sex or marital status.

~~44 (2) Rates or premiums charged by any insurer as a provider of a life or disability insurance policy, plan, program, or coverage may be based on factors such as~~ Factors which an insurer may take into account to determine rates or premiums for a life, disability, or health insurance policy, plan, program, or coverage, include but are not limited to age, weight, general health, personal habits such as smoking or other use of tobacco, consumption of alcoholic beverages, and the hazardous nature of work or recreation engaged in by the insured.

24.9.1304 (RULE III) PAYMENTS OR BENEFITS (1) No payments or benefits of any insurance policy, plan or coverage or pension or retirement plan, program, or coverage shall be based on sex or marital status.

~~(2) No payments or benefits of any insurance policy, plan, or coverage or retirement plan, program, or coverage shall result in undue enrichment to an insurer. No insurer may attempt to comply with §49-2-309, MCA, or these rules by merely lowering payments or benefits to the same level previously paid to men or by merely lowering the payments and benefits to the same level previously paid to women unless these payments and benefits are based on reasonable grounds.~~

24.9.1305 (RULES IV AND V) JURISDICTION AND APPLICABILITY DATE (1) Section 49-2-309, MCA, and this sub-chapter are applicable to all insurance policies, plans, and coverages and pension or retirement plans, programs or coverages subject to the laws of Montana and issued or entered into on or after October 1, 1985. shall not discriminate in issuance on the basis of sex or marital status and any payments or benefits provided by such policies, plans, programs or coverages shall be provided without discrimination on the basis of sex or marital status.

(2) Any term, payment, or benefit of an insurance policy, plan, or coverage or pension or retirement plan, program or coverage in effect prior to October 1, 1985, may be exercised in accordance with the terms of that policy, plan, program, or coverage. Options to increase or decrease coverage, annual rate adjustments ~~as opposed to annual renewal,~~ and

settlement options in life insurance policies are examples of terms which if included in a policy, plan, program or coverage in effect prior to October 1, 1985, may be exercised without regard to §49-2-309, MCA or these rules.

(3) ~~Section 49-2-309, MCA, and these rules, are applicable to any renewal of any insurance policy, plan, or coverage or retirement plan, program or coverage on or after October 1, 1985.~~ In determining if a policy, plan, program, or coverage was in effect prior to October 1, 1985, the primary consideration will be whether a new contract is formed on or after October 1, 1985, or whether a pre-October 1 contract is continued after that date.

(4) Section 49-2-309, MCA, and these rules, are applicable to any ~~new certificate issued under any group insurance policy, plan or coverage or group retirement plan, program or coverage on or after October 1, 1985.~~ agreement whereby an insurer and an insured agree to an extension or continuation of a pre-October 1, 1985 insurance policy, plan, or coverage or pension or retirement plan, program, or coverage when no consideration was given in the pre-October 1, contract for the right to extend or continue upon the same terms. The fact that the contract formed by extension or continuation is identical to the pre-October 1, 1985 contract is not material if no consideration for the right to extend or continue the pre-October 1 terms was given.

+++ (5) Section 49-2-309, MCA, and these rules do not apply to any insurance policy, plan, or coverage or pension or retirement plan, program or coverage issued to or provided to a person who resided in a state other than Montana at the time the policy, plan, program or coverage became effective. ~~Section 49-2-309, MCA, and these rules apply to any insurance policy, plan or coverage or retirement plan, program or coverage renewed by a person who resides in Montana, regardless of the place of issuance.~~

(2) ~~Section 49-2-309, MCA, and these rules, apply to any insurance policy, plan, or coverage or retirement plan, program or coverage issued or provided to a person who resides in Montana, regardless of the place of issuance.~~ An insurer shall be on notice that a person resides in Montana if the address for the person on the application or policy is a Montana address.

-----(3) ~~Section 49-2-309, MCA, and these rules, apply to any group insurance policy, plan, or coverage or group retirement plan, program or coverage when individuals residing in Montana are solicited to purchase or join the group insurance policy, plan, or coverage or group retirement plan, program or coverage.~~

-----(4) ~~Section 49-2-309, MCA, and these rules, apply to any benefit or payment contract issued or to be performed in Montana regardless of the place of the original policy issuance.~~

Rule VI not adopted.

3. The Commission received written comments and testimony at the hearing both in support of the proposed rule and in opposition to the proposed rule. The comments, and the Commission's responses to them, are summarized as follows:

(a) Several commenters objected to the definition of "renewal" contained in proposed rule I and its use in the rules, contending that the definition was confusing and inconsistent with the manner in which the term is used in the insurance industry. The Commission agreed with these comments and deleted the definition of renewal and its use in the rules as adopted.

(b) Several commenters objected to the use of the term "risk" with respect to accident and health insurance because that term is not customarily used for those types of insurance and could cause confusion. The Commission agreed with these comments and amended the rules as adopted to reflect the change.

(c) The Women's Lobbyist Fund objected to the inclusion of the income of the insured as a permissible factor in establishing insurance rates and premiums on the ground that income can act as a surrogate for gender. The Commission has deleted this factor from the rules as adopted, reasoning that because the list of factors is permissive, an insurer would not be prohibited from utilizing income. A person who believes the use of income to be discriminatory on the basis of sex in the setting of his or her insurance premiums may file a complaint and the issue can be resolved in a contested case proceeding.

(d) Glen Drake, representing the American Insurance Association recommended adding the language "where the car is garaged" to the portion of the rule which permits the use of geographic location as a factor in establishing rates for motor vehicle liability and property coverage. The Commission rejects this suggestion. The present language does not preclude the use of the location where the car is garaged and affords more flexibility by permitting the use of other locations as well.

(e) The National Organization for Women (NOW) and its Montana Chapter recommended the adoption of a prohibition on flat-rate pricing for automobile insurance that ignores mileage currently in use by the automobile insurance industry. NOW contends that actual mileage is the best predictor of risk of accident and that facially neutral flat rates are discriminatory against women as a class because women tend to be low mileage drivers. The Commission rejects this recommendation on the ground that the statute does not give the Commission authority to prohibit flat-rate price unless it can be determined to be discriminatory. The determination of whether a facially neutral pricing scheme is discriminatory should be left to a contested proceeding.

(f) Robert S. Seiler, representing Allstate Life Insurance objected to proposed rule II(4) as an effort to limit the factors upon which an insurer may establish rates for life and disability insurance. The Commission did not intend to

limit insurers to the use of the factors contained in the proposed rule and the rule as adopted has been rewritten to clarify this.

(g) The Montana Chapter of NOW recommended that the practice of offering "no-smoker" discounts to pipe and cigar smokers should be prohibited as sex discriminatory. The Commission rejects this proposal on the ground that the determination of whether a facially neutral pricing scheme is discriminatory should be left to a contested proceeding.

(h) Several organizations recommended the inclusion of a rule clarifying that pregnancy discrimination constitutes sex discrimination. The Commission declines to include such a rule at this time. The Commission staff believes the weight of authority supports a conclusion that pregnancy discrimination may constitute sex discrimination but does not believe the Commission need set forth this interpretation expressly in its rules. The Commission is hesitant to make such an interpretation the basis of a rule when it was not included in the proposed rules so that opponents would have an opportunity to comment.

(i) Don LaBar on behalf of Blue Cross of Montana argued that the proposed rules go beyond the scope and intent of the statute in that they ignore the term "solely". The Commission rejects this contention. If "solely" is interpreted as Mr. LaBar contends it should be, no meaning whatsoever can be attributed to the statute, as it is unlikely that any insurance company uses sex or marital status as the "sole" basis for insurance or operation of its policies, plans, programs, or coverages.

(j) The rules as proposed required that all insurers file their rates with the Insurance Commissioner's office. A number of life and health insurers objected to this requirement. While the Insurance Commissioner's office has authority to require filing of property and casualty rates, it has conceded that its authority to require life and health rate filings is questionable and does not intend to require such filings. The Women's Lobbyist Fund, on the other hand contended that filing was essential to insure that the law is properly implemented and that language be added to insure that the filings are available to the public. The Commission declines to include a requirement that rates be filed with the Commission because of inadequate space and staff to handle a filing requirement of this magnitude. The Commission has adequate authority to obtain needed rate information when a complaint is filed.

(k) Several commenters argued that proposed rule IV(4) resulted in extra-territorial application of the statute and application of the statute to policies in effect prior to October 1, 1985. These commenters contended that neither of these effects were intended by the legislature. The Commission has responded to these comments by deleting proposed rule IV(4) from the rules as adopted.

(l) Several commenters objected to what they characterized as an effort to give extra-territorial

application to the statute contained in proposed rule V. The Commission has deleted all of that proposed rule, except for the first sentence of rule V(1), in response to this comment. The Commission intends to study this issue further in the future.

(m) A number of commenters objected to proposed rules II(5) and III(2) on the grounds that they were vague and unenforceable, exceed statutory authority, are excessively burdensome, and are in conflict with other state laws. The Commission acknowledges problems exist in the proposed rules as drafted and has deleted them from the rules as adopted. The Commission intends to attempt additional rulemaking on the issues of rates and benefits in the future after it has obtained clarification of the statutory conflicts.

(n) Edward Zimmerman of the American Council of Life Insurance recommended that language be added to the rules to indicate that an insurer may consider the make-up of a group in establishing funding requirements for a policy issued for that group. The Commission rejects this recommendation on the ground it is not convinced such an interpretation was intended by the legislature. The Commission will consider this recommendation in the future when it undertakes additional rulemaking on the rates and premium issues.

(o) Don LaBar on behalf of Blue Cross objected to the use of the term "insurer" since it is not included in the statute. The Commission rejects this argument. The term "insurer" was included as a defined term so it could be used in the rules for purposes of simplification. The Commission has redrafted the definition of insurer for purposes of clarification, however.

4. The authority for the rules is section 49-2-204, MCA, and the rules implement 649-2-309 MCA.

COMMISSIONER OF THE MONTANA
HUMAN RIGHTS DIVISION

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

Certified to the Secretary of State October 21, 1985

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

In the matter of the adoption)	
of ARM 26.2.401 setting a)	NOTICE OF AMENDMENT
schedule of fees for state)	OF ARM 26.2.401 REGARDING
land use authorizations and)	ADMINISTRATIVE FEES
sale documents.)	

TO: All Interested Persons:

1. On August 29, 1985, the Board of Land Commissioners and Department of State Lands published notice of a proposed amendment to ARM 26.2.401 concerning fees for state land use authorizations and sale documents at page 1208 of the 1985 Montana Administrative Register, issue number 16.

2. The agency has amended the rule with minor editorial change but substantially as proposed.

3. The agency received only one comment. In the comment, the Montana Mining Association advised that it has no objection to the amendment.

4. The authority for the rule is 2-4-201, MCA, and the rule implements 77-1-302, MCA.


DENNIS HEMMER, COMMISSIONER

Certified to the Secretary of State, October 15, 1985.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION)	NOTICE OF THE ADOPTION)
of Rules I through VI.)	Rules I through VI)
(42.7.101 through 42.7.107);)	(42.7.101 through 42.7.107);)
Rules VIII through XIV;)	Rules VII through XIV.)
(42.7.121 through 42.7.127);)	(42.7.121 through 42.7.127);)
Rules XV through XIX)	Rules XV through XIX)
(42.7.201 through 42.7.205);)	(42.7.201 through 42.7.205);)
and Rules XX through XXXIII)	and Rules XX through XXXIII)
(42.7.216 through 42.7.229))	(42.7.216 through 42.7.229))
to implement the Video Draw)	to implement the Video Draw)
Poker Machine Control Law of)	Poker Machine Control Law of)
1985.)	1985.)

TO: All Interested Persons:

1. On August 15, 1985, the Department published notice of the proposed adoption of Rules I through XXXIII (42.7.101 through 42.7.229) to implement the Video Draw Poker Machine Control Law of 1985 at pages 1100 through 1115 of the 1985 Montana Administrative Register, issue no. 15.

2. The Department has adopted rules I, II, IV, V, VI, VII, VIII, X, XII, XIII, XIV, XVII, XVIII, XX, XXI, XXII, XXIII, XXIV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, and XXXIII as proposed, and rules III, IX, XI, XV, XVI, XIX, and XXV with the following changes:

(RULE III)

42.7.103 APPLICATION FOR LICENSE, LICENSE FEE, AND LICENSING REQUIREMENT (1) An application to license an electronic video draw poker machine must be submitted to the video draw poker program of the department of revenue upon forms prescribed by the department. The application is not complete unless it is dated and signed by the applicant, and contains all information and statements required by the department.

(2) through (5) remain the same.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 8, and 10, Ch. 720, L. 1985.

(RULE IX)

42.7.122 LICENSE NOT TRANSFERABLE (1) Remains the same.

(2) A license is further restricted to the particular machine approved by the department and identified on the license application. When a licensed machine remains on the same premises after a transfer of ownership of an on-premises consumption alcoholic beverages license, no additional license fee will be charged to an applicant seeking to license the same machine at the same premises for the remainder of the license year.

(3) through (5) remain the same.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 8, 10, Ch. 720, L. 1985.

(RULE XI)

42.7.124 LICENSEE BUSINESS RELATIONSHIPS (1) The department may deny an application, ~~or revoke, suspend restrict, or limit or revoke~~ a license or ~~revoke~~ approval of a machine when it finds that a business relationship between a licensee and another person or business entity is unsuitable or endangers the health, safety, or welfare of the citizens of this state. In determining the suitability of other persons or business entities in a business relationship, the department may consider the person or business entity's:

- (a) through (d) remain the same.
- (2) remains the same.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 11, Ch. 720, L. 1985.

(RULE XV)

42.7.201 GENERAL SPECIFICATIONS OF VIDEO DRAW POKER MACHINE

Detailed specifications for video draw poker machines are required by the department in addition to those specifications provided by chapter 720, L. 1985. Such specifications are required to ensure the legal operation and integrity of each machine and provide the department with methods to monitor the machines.

- (1) remains the same.

(2) The department may ~~revoke, suspend restrict, or limit or~~ revoke a license or ~~revoke~~ approval of a machine at any time when it finds that any machine or machine component does not comply with statutes and rules governing electronic video draw poker machines. The department may also ~~revoke, suspend restrict, or limit or revoke~~ the licenses or ~~revoke~~ approval of other similar model machines or machine components in use in the state.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Sec. 3, Ch. 720, L. 1985.

(RULE XVI)

42.7.202 HARDWARE SPECIFICATIONS A video draw poker machine must include the following hardware specifications:

- (1) through (7) remain the same.

(8) The ticket printing mechanism provided in section 3, subsection (4)(j), chapter 720, L. 1985, must be located in the locked logic area to ensure the safekeeping of the audit copy provided by section 3, subsection (4)(k), chapter 720, L. 1985. The printing mechanism must produce a printed original and duplicate that will remain legible throughout the retention period required by these rules. Upon cash out by a player, the ticket printing mechanism must record the full value of the credits due the player in dollars and cents, as well as all information required by section 3, subsection (4)(j), chapter 720, L. 1985.

- (9) and (10) remain the same.

(11) The logic board must have a unique serial number that may be used to identify the board for approval and inspection purposes. The serial number shall be in 10 symbol configuration. The first 4 symbols shall identify the manufacturer and the last 6 symbols shall identify the board a configuration of not more than 10 symbols. The manufacturer must be identified within the first 4 symbols. The logic board must be identified within the remaining 6 symbols of the 10 symbol configuration.

(12) through (16) remain the same.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 3, 4, Ch. 720, L. 1985.

(RULE XIX)

42.7.205 RESTRICTIONS ON OPTIONAL GAME FORMAT OR FEATURES

(1) A machine shall only offer the game of draw poker as provided by the act and these rules and shall not offer any other game or variant which will award free games, ~~or credits that may be redeemed by a player~~ or any other inducement for a player's performance. This restriction applies to bonus, progressive, or any other means of awarding games, ~~or credits, or inducements which deviates~~ deviate from the award of games or credits for a winning hand of draw poker.

(2) remains the same.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 3, 4, Ch. 720, L. 1985.

(RULE XXV)

42.7.221 REPAIRING MACHINES - APPROVAL (1) remains the same.

(2) Any repair or replacement of a machine's logic board which may cause a loss of memory or change in the meter reading must be reported to the video poker program of the department of revenue on forms prescribed by the department at the time of the repair. The report requires the disclosure of the following information:

(a) final electronic and mechanical meter readings before repair;

(b) initial electronic and mechanical meter readings after repair; and

(c) the nature of the problem encountered which necessitated the repair.

~~42~~ (3) Any repair made to a machine's logic board which requires the breaking of a department seal must be reported to video poker program of the department before the seal is removed or broken. At that time, readings of the machine's electronic meters and mechanical meters must be provided to the department. After repair, the logic board must be reapproved by the department and initial electronic and mechanical meter readings provided to the department before the machine is again placed in operation on the licensee's premises. After repair, the logic board must be reapproved by the video poker program before being reused in a machine.

~~43~~ (4) Any repair or replacement made to a machine's meters must be reported to the department video poker program before a seal is removed or broken and the readings of the machine's electronic and mechanical meters must be provided to the department video poker program. After repair, the initial readings of the electronic and mechanical meters must be provided before the machine is again placed in operation. The department must subsequently be given access to the machine to reseal the meters and verify their proper operation.

~~44~~ (5) To assure the integrity, security, and monitoring of machines in service, a licensed machine may not be substituted or

replaced until the replacement machine has been licensed by the department video poker program.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 3, 7, Ch. 720, L. 1985.

3. A public hearing was held on September 6, 1985, to consider the proposed adoption of these rules. Written comments were received from Bill Auger, Belgrade Lounge, Belgrade, Montana, and Raymond D. Pike, Vice-President and General Counsel, representing International Game Technology (IGT), Reno, Nevada. The following individuals testified at the hearing: Representative Bob Pavlovich, House District No. 70, Butte, Montana, sponsor of House Bill No. 236, the Video Draw Poker Machine Control Act; Phillip Strobe, Montana Tavern Association (MTA) attorney, Helena, Montana; Charles Jovick, Montana Bar, Great Falls, Montana, also representing the Cascade County Tavern Association; Clarence Stoick, Big Sky Amusement, Billings, Montana; Phil Benson, Montana Music Rentals, Missoula, Montana, also President of the Montana Coin Machines Operators' Association; Donald W. Larson, MTA Board Chairman, Helena, Montana; and Bob Durkee, MTA lobbyist, Helena, Montana. The Department was represented by Jon Meredith, Administrator, Legal and Enforcement Division; Michael Garrity, Tax Counsel, Legal Bureau; David Schlosser, Video Poker Program; and Mike Zahn, Software Specialist.

Donald W. Larson reiterated that MTA's objections to the proposed permanent rules are the same objections that MTA made against the emergency rules at earlier meetings. A copy of MTA's June 13, 1985 written objections to the emergency rules was provided at this hearing, and have been addressed below.

Several substantive changes were made to the emergency rules as a result of May and June meetings. The most significant changes were: (1) requirement that a written contract exist between a machine owner/operator and the licensed establishment was removed; (2) credit for license fees paid would be allowed for licensing of a replacement machine in the event that machine is destroyed; and (3) the requirement to "hard wire" the machine into the establishment's circuit was removed. Other objections were viewed by the Department as groundless or as being contrary to proper and necessary control of machines; e.g., uncontrolled substitution of machines.

Philip Strobe, MTA attorney, questioned the Department's authority to proceed with permanent rulemaking in view of the pending lawsuits and injunction concerning the Department's interpretation of the Video Draw Poker Machine Control Law of 1985. The Hearing Examiner deemed that any interested party who wanted to question whether the Department should have conducted a rulemaking hearing should have raised the question after receiving public notice of the rulemaking hearing, but before the hearing began. The Department's legal counsel explained at the beginning of the rulemaking hearing that the Department had determined the hearing was legally appropriate. Further, counsel for the Department explained that should any court decision indicate that any of the rules eventually adopted were improper,

the Department would take appropriate action to revise or repeal the rules or propose new rules.

Clarence Stoick, Big Sky Amusement, was concerned that the rules use the discretionary term "may" which could result in the Department exercising favoritism among licensees. As an administrative agency, the Department of Revenue by definition is authorized to exercise discretion in implementing its statutory duties. If a licensee believes the Department has not treated him fairly under the rules, he may seek appropriate redress.

Charles Jovick testified that the Cascade County Tavern Association opposed the proposed permanent rules because they only apply to the licensees of the video draw poker machines rather than to both the licensees and the machine vendors. The Video Draw Poker Machine Control Law of 1985 provides in § 3, ch. 720, L. 1985, that a person must own an alcoholic beverages license prior to being eligible for a poker machine license. Applying the same department rules to vendors would require a legislative amendment to the Act.

Representative Pavlovich also pointed out that machines currently in use in Montana do not comply with § 3, ch. 720, L. 1985, which requires machines to print out a ticket voucher containing, among other items, the value of the prize in numbers and words. The machines do not comply because they can only pay out in round dollars, i.e., a \$25 prize can be paid out, but on a \$25.75 prize, the .75 cannot be paid out. The Department has issued a notice to the manufacturer and has received modified programs providing for total payout in all cases. Section 3(4)(j) of House Bill N 236 is plain and clear in requiring total payout and rule XVI has been amended accordingly.

Referring to its comments to the emergency rules, MTA expressed concern over the definition of the term "machine". The Department's proposed permanent rules reference the Video Draw Poker Machine Control Law of 1985 definition of "machine". The Hearing Examiner deemed and the Department concurred that such reference to the 1985 Act sufficiently addresses the Association's concerns, and clarifies the definition of "machine".

Referring to its comments to the emergency rules, MTA stated that Rule V should be modified to allow for a refund of the license fee when machines are found to be defective or are destroyed and need to be replaced. The proposed permanent Rule V explicitly provides that no license fee will be refunded, in whole or in part, after the license is issued. The Hearing Examiner deemed that Rule IX "License Not Transferable" addresses in part MTA's concern. Subsection (5) of Rule IX provides that "if a machine is destroyed and then replaced by a newly licensed machine, the unused portion of the [license] fee paid on the destroyed machine will be applied as a credit to the [license] fee due on the replacement machine. The Department may require proof of destruction before credit is applied".

The Hearing Examiner deemed that Rule V reflects the Department's determination that the necessary administrative burden and cost outweigh the benefit to the licensee of receiving a refund. If a machine is defective, the licensee should have recourse

against the manufacturer and/or vendor. Similarly, if a machine is destroyed, the licensee would have recourse against the insurer. In both instances, the loss of the use of the machine is one of many business risks with which the licensee must contend.

Based on the Department's best knowledge, "defective" machines are generally repaired in a matter of hours. In the rare or extreme cases, repair may take a few days. In no case to date has the Department been notified that a defective machine was not repairable within a few days. The risk of substitution is obvious. Two working machines could be on the premises operating under a confused licensing situation. The replacement of "defective" machines can frustrate and interrupt the Department's necessary and effective monitoring of the machines. Continuity of necessary audit trails would be interrupted. In researching this issue, the Department has determined that "spare" or "replacement" machines simply do not exist in most locales. The whole "replacement" issue as it relates to defective machines is baseless in reality. Therefore, the Department's decision is that a destroyed machine may be replaced, but not a defective one. The unused portion of the license fee paid on the destroyed machine will be applied as credit towards the license fee on the replacement machine in accordance with Rule V. No refunds will be given in any case.

Charles Jovick, Cascade County Tavern Association, opposed adoption of Rule IX which provides that a machine license is valid only for the licensee and premises where the machine is located. Under the rule, when a liquor establishment is sold, the machine licenses do not transfer to the new owner. In reality, when a liquor establishment is sold, the machines are sold as a part of the establishment, and their licenses should therefore transfer.

Clarence Stoick, Big Sky Amusement, also testified against Rule IX. His concern was that once a machine is licensed, the fee has been paid. If a machine is moved, the license should go with the machine rather than requiring relicensing and reinspection which result in a period of time when the machine is not in operation. Phil Benson, Montana Music Rentals, reiterated the concern that the machine license should be tied to the bar license. Bill Auger, Belgrade Lounge owner, submitted written comments suggesting that a poker machine license should be tied to the liquor license. Such modification should eliminate any complications resulting from the sale of a liquor establishment. Rule IX provides that a machine license is a privilege, and is "only valid for the licensee and the premises identified on the license application". Once the establishment is sold, the machines may not be operated until the new owner is issued new machine licenses. If the seller removes the machines from the premises, then he must relicense the machines before they can again be operated because they have been moved to different premises.

It is the Hearing Examiner's recommendation that Rule IX should be modified to address the machine license problem that occurs when the video draw poker machines are sold as part of a

liquor establishment. Where the machines remain on the same premises but the license changes because the liquor establishment has been sold, it is reasonable for the Department to consider allowing the machine license to transfer to the new owner of the liquor establishment. The Department should consider the transfer of a machine license in conjunction with the transfer and sale of the liquor establishment license. Furthermore, the Hearing Examiner suggested the Department rules should provide for a temporary operating license for the new liquor establishment. Such temporary authority would allow the new owner to operate the machines pending issuance of the machine license in the new owner's name, assuming that an individual to whom a liquor license can be transferred should be able to meet the criteria for issuance of video draw poker machines. Should the individual not qualify for a machine license, the temporary operating authority would cease and provision be made for the removal of the machines from the premises.

It must be noted, however, that a machine license is considered a privilege and not personal property under these rules. Temporary management of machines is provided for in Rule VIII and appears to satisfy the Hearing Examiner's suggestions. The Department rejects the Hearing Examiner's suggestion to make provisions for the transfer of a machine license. The Department has determined that no statutory authority exists for transferring poker machine licenses. However, the Department has determined that no additional license fee should be charged to an applicant seeking to license a licensed machine for the same premises for the remainder of the license year.

Representative Pavlovich testified that he felt the Rule XIII requirement, that quarterly reports must be filed with the Department, was unnecessary harassment. Rule XIII references, § 4, ch. 720, L. 1985, which requires that the Department verify the winning percentages of the machines. The Department's decision to require quarterly reports from its licensees in order to comply with the statutory verification requirement is a reasonable exercise of administrative discretion. It is the recommendation of the Hearing Examiner that Rule XIII be adopted as proposed.

Bob Durkee, MTA, objected to the subsection (3) requirement of Rule XVI that video machines be equipped with a surge protector. Durkee testified that a surge protector is expensive, and only works for a limited time after a power outage. If a power outage occurred after the 2:00 a.m. bar closing, the surge protector could not retain the information it is to protect because its battery would likely lose its power before the 8:00 a.m. opening time. It is the Hearing Examiner's recommendation that the Department should accept estimated meter readings from machines in the event of power outages, and that requiring each machine to be equipped with a surge protector is unnecessary. If it becomes apparent to the Department that a licensee is providing unacceptable estimated meter readings in such situations, then the Department can use its penalty powers against the particular licensee. Therefore, it is the presiding officer's recommendation that Rule XVI(3) be eliminated.

It is obvious that the Hearing Examiner did not have sufficient information regarding the purpose and need for surge protection and somehow got it confused with battery backup. The surge protector is a \$10 item that protects the computer in a machine from damage caused by power fluctuations. It also protects machine memory from corruption. Surge protection is very necessary to protect the investment, reduce fire or shock hazards, and protect the integrity of the program and meter information in the machine. The battery backup, a \$15 item with charger is necessary to protect the electronic memory during power interrupts. Without the backup, the memory would fail every time the machine was switched off or unplugged. Without battery backup, the entire purpose of the electronic metering required under section 3 of House Bill No. 236 would be defeated with a mere flip of a switch.

Both surge protection and battery backup are standard in the industry. Only the cheapest devices and those deliberately designed for illegal operation do not have surge protection and battery backup. The additional \$25 that they add to the eventual machine price is insignificant. The Department's decision is that subsection (3) shall remain in Rule XVI.

Bob Durkee, MTA, also requested that subsection (5)(a) be deleted because it would require remodeling of the old machines in order to be able to read the meters externally. MTA's concern was that a customer could read the meter if it were located in the front of the machine and predict when a payoff was likely to occur. The Hearing Examiner deemed that subsection (5)(a) provides for "either the locating of meters so they can be viewed and read externally from the front of the machine or the keys to the cash area must be immediately available at the licensed premises". Based on the language of the rule, it is apparent that a machine licensee has the option of whether or not to relocate the machine's meter. If the machine licensee chooses to simply keep the keys to the cash area available on the licensed premises, remodeling of the old machines would be unnecessary.

IGT submitted written comments requesting that subsection (11) be modified to read: "The serial number shall be in a maximum ten symbol configuration. Up to the first four symbols shall identify the manufacturer, and the remaining symbols up to the tenth symbol shall identify the board". The modification would enable clear identification of both the manufacturer and the board.

It is the Hearing Examiner's conclusion that IGT's proposed modification should be adopted. The IGT language retains the Department's requirement that the logic board have a unique serial number, that identifies both the manufacturer and the board, while allowing the manufacturer some leeway in determining how to configure the identification. The Department concurs.

Bob Durkee, MTA, stated that both rules XV and XI contain language allowing the Department to "revoke, suspend, restrict or limit" a license or approval of a machine. MTA requested that the rules be clarified to explain what the terms "restrict" and "limit" mean, i.e., what sanctions may be imposed by the Department.

The Hearing Examiner determined a license may only be revoked or suspended, and the phrase "restrict or limit" as used in the rule must refer only to "approval of a Machine". However, as MTA has pointed out, the rules do not explain when or why approval would be restricted or limited, or what sanctions could be rendered by the Department pursuant to these terms. Both Rules XV and XI should be modified to clarify the meaning of the phrase "restrict or limit," and to specify what sanctions could be rendered under those terms. The Department's decision was to remove the terms "restrict" and "limit" and use only suspend or revoke.

Referring to its emergency rules comments, MTA stated that it believed that Rule X(3), and Rule XII were unconstitutional because a licensee would not have a fair hearing before the license was revoked.

In accordance with § 2-4-631, MCA, a license may be revoked without prior notice and opportunity unless so required by law. In Chapter 720, L. 1985, there is no statutory requirement that an opportunity for notice and hearing be provided prior to revocation of a license.

IGT's written comments suggested that Rule XIX(1) be amended to read: "A machine shall only offer the game of draw poker as provided by the Act and Rules and shall not offer any other game or variant which will award free games or credits for successfully accomplishing a particular game objective". IGT's rationale for the proposed change was to allow licensees to offer promotional or advertising incentives to encourage more machine use.

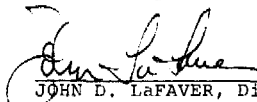
Machines appear to be in active use in Montana, and no testimony was presented, other than IGT's, that incentives to encourage use are needed. However, the presiding officer recommends that the Department consider whether the rules should provide for promotional or advertising incentives if found to be needed. The Department rejects IGT's suggestion and has modified Rule XIX to limit the machines to the game of draw poker.

The change made in Rule III is a correction of the name of the video poker program only.

The Department modified Rule XXV to clarify the conditions under which reporting to the Video Poker Program of the Department is required and to dispel any difficulties in interpreting the rule. In the case of board repair or replacement, reporting is necessary only when memory loss or meter reading changes are likely to occur.

No other comments were made.

4. The authority of the Department to adopt these rules is found in § 7, Chapter 720, L. 1985. The rules implement Chapter 720, L. 1985.


JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 10/21/85

20-10/31/85

Montana Administrative Register

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT)
of Rule 42.12.143 to allow)
temporary ownership of a)
second all-beverages license,)
and Rule 42.12.323 relating to)
the permissible and prohibited)
activities of a special or)
catering permit holder.)

NOTICE OF THE AMENDMENT of
Rule 42.12.143 to allow tempo-
rary ownership of a second
all-beverages license, and
Rule 42.12.323 relating to
the permissible and prohibi-
ted activities of a special
or catering permit holder.

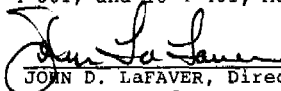
TO: All Interested Persons:

1. On August 29, 1985, the Department of Revenue published notice of the proposed amendment of rule 42.12.143 to allow temporary ownership of a second all-beverages license, and rule 42.12.323 relating to the permissible and prohibited activities of a special or catering permit holder at pages 1211 through 1214 of the 1985 Montana Administrative Register, issue no. 16.

2. The Department has amended these rules as proposed.

3. No comments or testimony were received.

4. The authority for the rules is 16-1-303, MCA, § 2, chapter 82, L. 1985, and § 2, chapter 229, L. 1985, and the rules implement 16-3-241, 16-4-205, 16-4-301, and 16-4-401, MCA.


JOHN D. LAFAVER, Director
Department of Revenue

Certified to Secretary of State October 21, 1985.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION)	NOTICE OF THE ADOPTION of
of Rule I (42.15.308) relating)	Rule I (42.15.308) relating
to Montana adjusted gross in-)	to Montana adjusted gross in-
come and Rule II (42.15.307))	come and Rule II (42.15.307)
relating to Subchapter "S")	relating to Subchapter "S"
shareholder's income.)	shareholder's income.

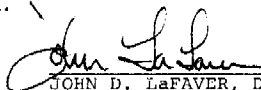
TO: All Interested Persons:

1. On September 12, 1985, the Department published notice of the proposed adoption of Rule I (42.15.308) relating to Montana adjusted gross income and Rule II (42.15.307) relating to Subchapter "S" shareholder's income at pages 1320 and 1321 of the 1985 Montana Administrative Register, issue no. 17.

2. The Department has adopted these rules as proposed.

3. A public hearing was held on October 2, 1985, to consider the proposed adoption of these rules. No persons appeared to oppose the proposed adoptions. Bob Turner of the Income Tax Division appeared on behalf of the Department. No other comments or testimony were received. Therefore, the Hearing Examiner deemed the rule changes submitted as drafted.

4. The authority for the rules is 15-30-305, MCA, and the rules implement 15-30-111, MCA.


JOHN D. LaFAVER, Director
Department of Revenue

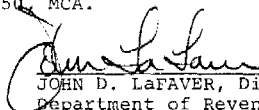
Certified to Secretary of State 10/21/85

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE REPEAL)	NOTICE OF THE REPEAL of Rule
of Rule 42.15.323 relating)	42.15.323 relating to nongame
to nongame wildlife checkoff)	wildlife checkoff and Rule
and Rule 42.15.424 relating)	42.15.424 relating to house-
to household and dependent)	hold and dependent care
care expenses.)	expenses.

TO: All Interested Persons:

1. On August 29, 1985, the Department published notice of the proposed repeal of rule 42.15.323 relating to nongame wildlife checkoff and rule 42.15.424 relating to household and dependent care expenses at pages 1217 and 1218 of the 1985 Montana Administrative Register, issue no. 16.
2. The Department has repealed these rules as proposed.
3. No comments or testimony were received.
4. The authority for the rules is 15-30-305, MCA, and implement 15-30-121 and 15-30-150, MCA.


JOHN D. LAFAVER, Director
Department of Revenue

Certified to Secretary of State 10/21/85

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT)	NOTICE OF THE AMENDMENT of
of Rules 42.15.511 and)	Rules 42.15.511 and 52.15.512
42.15.512 relating to expand-)	relating to expanding and ex-
ing and extending alternate)	tending alternate energy
energy credit.)	credit.

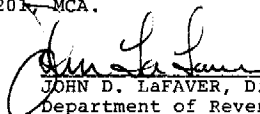
TO: All Interested Persons:

1. On August 29, 1985, the Department of Revenue published notice of the proposed amendment of rules 42.15.511 and 42.15.512 relating to expanding alternate energy credit on pages 1219 through 1221 of the 1985 Montana Administrative Register, issue no. 16.

2. The Department has amended these rules as proposed.

3. No comments or testimony were received.

4. The authority for the rules is 15-32-203, MCA, and implement 15-32-102 and 15-32-201, MCA.



JOHN D. LAFAVER, Director
Department of Revenue

Certified to Secretary of State October 21, 1985.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION)
of Rule I (42.28.303) relating)
to special fuel user's regis-)
tration card and Rule II)
(42.28.501) relating to com-)
pressed natural gas provisions)
and the Amendment of rule)
42.28.105 relating to what)
constitutes special fuels.)

NOTICE OF THE ADOPTION of
Rule I (42.28.303) relating
to special fuel user's regis-
tration card and Rule II
(42.28.501) relating to com-
pressed natural gas provi-
sions and the Amendment of
rule 42.28.105 relating to
what constitutes special
fuels.

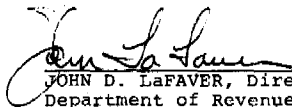
TO: All Interested Persons:

1. On August 29, 1985, the Department published notice of the proposed adoption of Rule I (42.28.303) relating to special fuel user's registration card and Rule II (42.28.501) relating to compressed natural gas provisions, and the amendment of rule 42.28.105 relating to what constitutes special fuels at pages 1215 and 1216 of the 1985 Montana Administrative Register, issue no. 16.

2. The Department has adopted rule I (42.28.303) and rule II (42.28.501), and amended rule 42.28.105 as proposed.

3. No comments or testimony were received.

4. The authority for the rules is 15-70-104, MCA, and the rules implement 15-70-301, 15-70-302, 15-70-322, and 15-71-101, MCA.


JOHN D. LAFAYER, Director
Department of Revenue

Certified to Secretary of State 10/21/85

VOLUME 41

OPINION NO. 30

CONTRACTS - Employment contract between school district and superintendent;
EDUCATION - Authority of board of trustees and superintendent regarding employment contract;
SCHOOL BOARDS - Authority of board of trustees and superintendent regarding employment contract;
SCHOOL DISTRICTS - Authority of board of trustees and superintendent regarding employment contract;
MONTANA CODE ANNOTATED - Sections 20-4-401, 20-4-401(1), 20-4-401(3), 20-4-401(5), 20-4-402, 28-2-1701, 28-2-1702, 28-2-1711;
OPINIONS OF THE ATTORNEY GENERAL - 26 Op. Att'y Gen. No. 15 (1955).

- HELD: 1. A board of trustees and a district superintendent may mutually terminate a three-year employment contract prior to the expiration of its term and enter into another three-year contract identical to the first except for date of expiration, without violating section 20-4-401, MCA.
2. Section 20-4-401, MCA, does not authorize a board of trustees and a district superintendent to enter into a rolling three-year employment contract.

21 October 1985

Patrick L. Paul
Cascade County Attorney
Cascade County Courthouse
Great Falls MT 59401

Dear Mr. Paul:

Your predecessor, J. Fred Bourdeau, requested my opinion on two questions concerning section 20-4-401, MCA, and its three-year limitation on the term of the employment contract between a school district board of trustees and a district superintendent.

In March 1984, the board of trustees (referred to as DISTRICT) and the district superintendent (referred to as SUPERINTENDENT) entered into an initial employment contract which contained the following provisions:

1. TERM

DISTRICT, in consideration of the promises herein contained of SUPERINTENDENT, hereby employs, and SUPERINTENDENT hereby accepts employment as Superintendent of Schools for a term commencing July 1, 1984, and ending June 30, 1987.

DISTRICT may by specific action and with the consent of the SUPERINTENDENT extend the termination date of the existing contract to the full extent permitted by state law.

....

12. RENEWAL OF EMPLOYMENT CONTRACT

If DISTRICT does not notify SUPERINTENDENT in writing before each January 1 that this Employment Contract will not be renewed, it shall be deemed that DISTRICT has renewed this Employment Contract for one (1) year extending from the termination date set forth in paragraph 1, above. SUPERINTENDENT shall, by certified mail to each member, remind the Board of the existence of this automatic renewal clause. Such notice shall be sent one month prior to the board meeting where renewal or nonrenewal is to be considered.

13. TERMINATION OF EMPLOYMENT CONTRACT

This employment contract may be terminated by:

A. Mutual agreement of the parties.

....

On February 11, 1985, the board and the superintendent terminated the contract by mutual agreement, effective June 30, 1985, and entered into a new contract for a term commencing July 1, 1985, and ending June 30, 1988,

but otherwise containing the same provisions as the initial contract.

Mr. Bourdeau sought my opinion on the following questions:

1. Does the mutual termination of the initial contract at the end of the first year of a three-year term and execution of a second three-year contract, identical in all but date of expiration, violate the three-year limitation in section 20-4-401, MCA?
2. Does the "automatic" renewal for one year provided in paragraph 12 of the initial contract violate the three-year limitation in section 20-4-401, MCA?

Section 20-4-401(3), MCA, provides:

The written contract of employment of a district superintendent or a county high school principal shall be authorized by the proper resolution of the trustees of the district or the joint board of trustees and executed in duplicate by the chairman of the trustees or joint board of trustees and the clerks of the districts in the name of the districts and by the district superintendent or the county high school principal. Such contract shall be for a term of not more than 3 years, and after the second successive contract, the contract shall be deemed to be renewed for a further term of 1 year from year to year thereafter unless the trustees shall, by resolution passed by a majority vote of its membership, resolve to terminate the services of the district superintendent or the county high school principal at the expiration of his existing contract. The trustees shall take such termination action and notify the district superintendent or the county high school principal in writing of their intent to terminate his services at the expiration of his current contract not later than February 1 of the last year of such contract.

Regarding the first question, mutual termination of the contract is neither authorized nor forbidden by the express provisions of section 20-4-401(3), MCA; initially, then, it must be determined whether the parties to the contract have the implied authority to terminate the contract prior to the expiration of its term.

Section 20-4-401(1), MCA, requires the board to "employ and appoint" the superintendent. Section 20-4-402, MCA, provides that the superintendent is the "executive officer of the trustees" and performs his duties "subject to the direction and control of the trustees." The board is also vested with the power of removal and discharge of the superintendent. See § 20-4-401(5), MCA; State ex rel. Howard v. Ireland, 114 Mont. 488, 138 P.2d 569 (1943). The Legislature has given the board extensive authority over employment decisions concerning the superintendent. The three-year term restriction appears to be the only limitation on the contracting power of the board. See 26 Op. Att'y Gen. No. 15 (1955).

The general rules regulating the construction and operation of contracts ordinarily apply to contracts of employment of superintendents. See 78 C.J.S. Schools and School Districts § 192 (1952). Montana law allows executory contracts to be extinguished by rescission or cancellation upon consent of all the parties to the contract. See §§ 28-2-1701 to 1702, 28-2-1711, MCA. In the absence of any restriction to the contrary, the board and the superintendent have the authority to effect a mutual termination of their employment contract prior to its expiration.

It follows that the board and the superintendent may then enter into another contract of employment, provided that its term is not more than three years. To hold otherwise would mean that the board could not reemploy a faithful and efficient superintendent on the same contractual basis used in hiring a new administrator. Such a procedure does not violate the three-year limitation imposed by section 20-4-401(3), MCA. See Hardison v. Beard, 430 S.W.2d 53 (Tex. App. 1968). This holding is consistent with the previous opinion of this office concerning subsection (3)'s predecessor statute [§ 75-4140, R.C.M. 1947] in which it was stated that "[t]he trustees, if they see fit, may grant a three-year

contract to any district superintendent regardless of the number of previous terms he has served in the district." 26 Op. Att'y Gen. No. 15.

Regarding the second question, the "automatic" renewal provisions of paragraph 12 must be read together with the provisions of paragraph 1. If one assumes that the parties intended by paragraph 12 to extend the contract's termination date one additional year from June 30, 1987, if notice of nonrenewal was not given by January 1, 1985, the parties have entered into a rolling three-year agreement, the termination of which will not occur until three and one-half years after the notification deadline. The same pattern will be repeated in subsequent years if notice of nonrenewal is not given by January 1. See, e.g., Colman v. School Committee of Swansea, 378 N.E.2d 1016 (Mass. App. 1978).

School authorities may make employment contracts for such a term as may be permitted under the statutes, but they may not fix the term of employment in excess of the statutory limits of the term. See 78 C.J.S. Schools and School Districts § 185(b); Jay v. School District No. 1 of Cascade County, 24 Mont. 219, 61 P. 250 (1900). The question presented here is whether, by reason of paragraph 12, the contract's term of employment is "more than three years." I have concluded that it is.

Section 20-4-401(3), MCA, requires the written contract of employment of a district superintendent to be authorized by the proper resolution of the trustees and further provides that such contract shall be for a term of not more than three years. Paragraph 12 creates, in effect, a "term" in excess of three years by allowing the same contract to continue beyond three years.

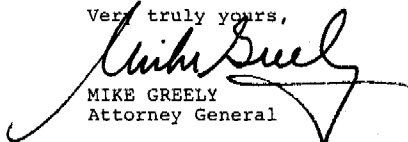
The board of trustees may exercise only those powers conferred upon them by statute and such as are necessarily implied in the exercise of those expressly conferred; the statute granting the power must be regarded as both a grant and a limitation upon the powers of the board. McNair v. School District No. 1, 87 Mont. 423, 288 P. 188 (1930). Section 20-4-401, MCA, clearly requires the board to authorize, by resolution, a fixed-term contract of not more than three years' duration. The board may not bind itself, and future boards, to a contract with a term in excess of three years. With respect to the contract's term, the

Legislature has limited the authority and defined the rights of the parties in such a complete way as to preclude any variation from the express provisions of the statute. Although the superintendent is granted, by this statute, the protection of a one-year continuing contract after completing his second successive contract without notice of nonrenewal, the board is not authorized to grant a rolling three-year employment contract which effectively extends the term of the contract beyond three years.

THEREFORE, IT IS MY OPINION:

1. A board of trustees and a district superintendent may mutually terminate a three-year employment contract prior to the expiration of its term and enter into another three-year contract identical to the first except for date of expiration, without violating section 20-4-401, MCA.
2. Section 20-4-401, MCA, does not authorize a board of trustees and a district superintendent to enter into a rolling three-year employment contract.

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 the 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 statutes 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.
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Statute Number and Department	2. Go to cross reference table at end of each title which list MCA section numbers and corresponding ARM rule numbers.
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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 June 30, 1985. This table includes those rules adopted during the period July 1, 1985 through September 30, 1985, 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 June 30, 1985, this table and the table of contents of this issue of the MAR.

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