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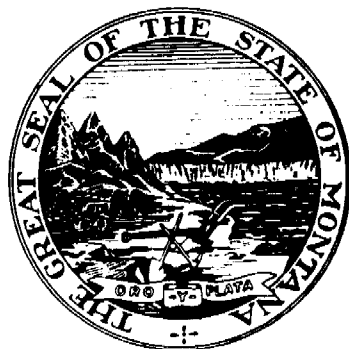
APR 2 1991

OF MONTANA

**MONTANA
ADMINISTRATIVE
REGISTER**

**DOES NOT
CIRCULATE**

1991 ISSUE NO. 6
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APR 2 1991

The Montana Administrative Register (MAR), a bi-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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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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BEFORE THE DEPARTMENT OF AGRICULTURE
STATE OF MONTANA

In the matter of the proposed) NOTICE OF PROPOSED AMENDMENT
amendment of ARM 4.12.3402,) OF ARM 4.12.3402, SEED
SEED LABORATORY INSPECTION -) LABORATORY - REPORTS -
REPORTS - ENFORCEMENT) ENFORCEMENT

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 28, 1991, the Department of Agriculture proposes to amend Rule 4.12.3402 relating to the seed laboratory inspection - reports - enforcement.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

4.12.3402. SEED LABORATORY ANALYSIS FEES INSPECTION-REPORTS---ENFORCEMENT (1) The Montana Seed Laboratory, Montana State University, Bozeman, Montana will test samples of seeds submitted for purity germination and miscellaneous tests. All samples of seed analyzed and tested shall be at the following rates:

KIND OF SEED	PROPOSED FEE SCHEDULE					
		PURITY ONLY		GERMINATION ONLY		PURITY & GERMINATION
Bentgrasses & Redtop	11-00	<u>\$16.50</u>	9-00	<u>\$13.50</u>	19-00	<u>28.50</u>
Bluegrass	10-00	<u>15.00</u>	7-00	<u>10.50</u>	16-00	<u>24.00</u>
Bluestems	16-00	<u>24.00</u>	10-00	<u>15.00</u>	25-00	<u>37.50</u>
Bromegrass	9-00	<u>13.50</u>	7-00	<u>10.50</u>	15-00	<u>22.50</u>
Canarygrass	7-00	<u>10.50</u>	7-00	<u>10.50</u>	13-00	<u>19.50</u>
Cereals-barley*, wheat, rye						
triticale, corn	6-00	<u>9.00</u>	5-00	<u>7.50</u>	10-00	<u>15.00</u>
oats	7-00	<u>10.50</u>	4-00	<u>6.00</u>	10-00	<u>15.00</u>
spelt, emmer	5-00	<u>7.50</u>	7-00	<u>10.50</u>	11-00	<u>16.50</u>
Fescues	9-00	<u>13.50</u>	7-00	<u>10.50</u>	15-00	<u>22.50</u>
Flax	5-00	<u>7.50</u>	5-00	<u>7.50</u>	9-00	<u>13.50</u>
Foxtails-creeping*,						
meadow	16-00	<u>24.00</u>	10-00	<u>15.00</u>	25-00	<u>37.50</u>
Indian ricegrass*	9-00	<u>13.50</u>	8-00	<u>12.00</u>	16-00	<u>24.00</u>
Legumes:						
Alfalfa, cicer milkvetch,						
clovers, sweetclover, birdsfoot						
trefoil, beans, peas, lentils,						
faba, chickpeas	5-00	<u>7.50</u>	5-00	<u>7.50</u>	9-00	<u>13.50</u>
Milletts	7-00	<u>10.50</u>	6-00	<u>9.00</u>	12-00	<u>18.00</u>
Mustards, rapeseed	7-00	<u>10.50</u>	6-00	<u>9.00</u>	12-00	<u>18.00</u>
Needlegrass*	9-00	<u>13.50</u>	8-00	<u>12.00</u>	16-00	<u>24.00</u>
Orchardgrass	9-00	<u>13.50</u>	7-00	<u>10.50</u>	15-00	<u>22.50</u>
Prairie sandreed	9-00	<u>13.50</u>	8-00	<u>12.00</u>	16-00	<u>24.00</u>

KIND OF SEED		PURITY ONLY		GERMINATION ONLY		PURITY & GERMINATION
Reed canarygrass	9-00	\$13.50	7-00	\$10.50	15-00	\$22.50
Ryegrass	8-00	12.00	7-00	10.50	14-00	21.00
Safflower	5-00	7.50	7-00	10.50	11-00	16.50
Sainfoin	8-00	12.00	8-00	12.00	15-00	22.50
Saltbushes-fourwing, nuttall	8-00	12.00	6-00	9.00	13-00	19.50
Sorghums-grain, sudangrass	7-00	10.50	7-00	10.50	13-00	19.50
Sugarbeets	5-00	7.50	6-00	9.00	10-00	15.00
Sunflower	5-00	7.50	7-00	10.50	11-00	16.50
Timothy	8-00	12.00	7-00	10.50	14-00	21.00
Wheatgrasses*	9-00	13.50	7-00	10.50	15-00	22.50
Wildryes	9-00	13.50	7-00	10.50	15-00	22.50
Vegetables	5-00	7.50	5-00	7.50	9-00	13.50

MIXTURES:

2 kinds	9-00	13.50	8-00	12.00	16-00	24.00
3-kinds	11-00		10-00		20-00	
4-or-more-						
-----kinds	13-00		12-00		24-00	

3 or more kinds figured on hourly rate of \$18.00 per hour

BARLEY STRIPE MOSAIC VIRUS TEST (BSMV) \$35-00 \$52.50

Tetrazolium Test (TZ): Cereals	--\$10-00	\$15.00
Small and large seeded legumes	\$-8-00	\$12.00
Grasses	\$15-00	\$22.50

Seed Identification (ID) - \$3-00--\$5-00 \$18.00 per hour (minimum \$5.00)

Indigenous seeds and/or samples of time-consuming nature due to excessive dirt, chaff, weed seeds, etc. will be charged an hourly rate of: \$12-00 \$18.00

Rush Orders - 50 % additional charge (does-not-apply-to-F2-tests)
(48 hour turn around time for those tests that can physically be
performed in 48 hours). Express service or 24 hour turn around
time - \$100 per test.

Flourescence-test---\$5-00

Faxing reports - Actual faxing cost in addition to test fees.

Sprout damage - \$10.00

* May contain dormant seed - dormant seed determination (in addition to germination charges) cereals - \$5-00 \$7.50, grasses- \$10-00 \$15.00, utricle fill determination (in addition to germination charges) - \$5-00 \$7.50.

AUTH: 80-5-112, MCA

IMP: 80-5-108, 80-5-110 MCA

3. The reason for the proposed amendment is to raise the fees, (which have not been raised for seven years) to levels commensurate with amounts currently necessary to assist in the funding of operating expenses. Such fees include a component covering the state regulatory tests.

No seed categories have been deleted, although some are relocated under a different heading.

4. Interested persons may present their data, views, or arguments either orally or in writing to Plant Industry, Montana Department of Agriculture, Agriculture/Livestock Building, Capitol Station, Helena, Montana 59620-0201, no later than April 26, 1991.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Plant Industry, Department of Agriculture, Ag/Livestock Building, Capitol Station, Helena, MT 59620, no later than April 26, 1991.

6. If the agency receives requests for a public hearing on the proposed amendment 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 agency or subdivision or from any 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 and mailed to all interested persons.


EVERETT M. SNORTLAND, DIRECTOR
DEPARTMENT OF AGRICULTURE

Certified to the Secretary of State Office March 13, 1991.

In the matter of the proposed	)	NOTICE OF PROPOSED AMENDMENT
amendment of rules pertaining	)	AND REPEAL OF RULES PERTAIN-
to fees, general requirements,	)	ING TO THE PRACTICE OF
sanitation requirements,	)	BARBERING
teaching staff, college)	
requirements, applications,)	
procedure upon completion,)	
identification and sanitation)	
requirements and the proposed)	
repeal of rules pertaining to)	
preparation and publication of)	
posters, notices, orders, new)	
schools and violation)	
)	

TO: All Interested Persons:

1. On April 28, 1991, the Board of Barbers proposes to amend and repeal rules pertaining to the practice of barbering.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

"8.10.403 EXAMINATION (1) will remain the same.

(2) A score of 75% is required on written examinations, and 75% on each section of practical examinations to pass. An applicant who does not pass the examination shall only be required to retake the portions of the examination he failed if he takes the next scheduled examination.

(3) will remain the same.

(4) Applicants licensed in a state other than Montana with less than 2000 hours of training in a barber school shall furnish affidavits from at least 2 persons stating that from their personal knowledge the applicant has practiced as a barber in another state or country for a period of at least one year."

Auth: 37-30-203, MCA: IMP. Sec. 37-30-305, MCA

REASON: These amendments are being proposed to clarify exam scoring and procedure.

"8.10.405 FEE SCHEDULE

(1) and (2) will remain the same.

(3) Reciprocity	150.00	100.00
-----------------	-------------------	--------

(4) through (11) will remain the same."

Auth: Sec. 37-1-134, 37-30-203, MCA; IMP, Sec. 37-30-307, 37-30-309, MCA

REASON: This fee is being reduced to make the fee commensurate with program area costs.

"8.10.801 GENERAL REQUIREMENTS (1) No one can own or operate a barber shop without a Montana barber license. No itinerant or house to house barbering will be licensed or permitted.

(2) Only one shop license shall be issued to each barber, unless the judgement of the board deems otherwise any one licensed barber, except for good cause shown.

(3) No shop license shall be issued to any barber shop in a house trailer or small house on skids. Mobile homes, moveable trailers and structures on skids will not be considered fixed places of business for the purposes of 37-30-401, MCA.

(4) will remain the same.

(5) -- Barber licenses must be on display in the shop."

Auth: Sec. 37-30-203, MCA; IMP, Sec. 37-30-308, 37-30-401, 37-30-411, MCA

REASON: These amendments are being proposed to clarify situations which are not fixed places of business; clarify basis of discretion; and clarify definition of statute.

"8.10.802 SANITATION REQUIREMENTS (1) A copy of the rules governing barber schools, colleges and barber shops on sanitation shall be conspicuously displayed at all times.

(1) through (10) will remain the same but will be renumbered (2) through (11).

(11) (12) All new shops licensed after January 1, 1975, must have adequate, clean toilet rest room facilities available for use by their patrons in a convenient location within the perimeter of the shop or shopping mall in which the shop is located.

(13) Each work station shall have separate sink with hot and cold running water.

(14) Animals, birds and reptiles are prohibited in all barber shops and schools, with the exception of guide and hearing dogs."

Auth: Sec. 37-30-203, MCA; IMP, Sec. 37-30-403, 37-30-422, MCA

REASON: These subsections are being proposed to add provisions for sanitation.

"8.10.1003 CURRICULUM COLLEGE OPERATING REQUIREMENTS

(1) -- Each barber college shall meet requirements for admission and graduation of students as set forth in section 37-30-307 and 404, MCA, and these rules.

---- (2) -- Each barber college shall conduct a course of study and training as set forth in section 37-30-406, MCA. -- No student shall be permitted to spend more than 8 hours in the college in any one day.

(3) (1) Each barber college shall require that no No patron may be released from a chair after being served by a student until all the work performed has been thoroughly

inspected and approved by the instructor.

~~(4) (2) Each barber college shall furnish each student upon enrollment, a copy of Title 37, chapter 30 of the Montana Code Annotated and a copy of the rules governing sanitary conditions of barber shops provided by the board of the board."~~

Auth: Sec. 37-30-203, MCA; IMP, Sec. 37-30-203, 37-30-404, 37-30-406, 37-30-412, MCA

REASON: These amendments are being made to edit out unnecessary statutory language.

~~"8.10.1006 PROCEDURE UPON COMPLETION (1) Upon completion of the prescribed course of study as set forth in section 37-30-406, MCA, t~~The barber college shall certify to the board that each student has performed the required hours of training. Each barber college shall present to each student successfully completing the course, a diploma or certificate of graduation.

(2) The ~~Any~~ student may make application for an examination conducted by the board to determine his or her fitness to practice in the state of Montana, upon completion ~~of the hours of units of practice as prescribed in section 37-30-406, MCA, graduation~~ and, while pending the date of examination, the barber college ~~shall~~ may permit the students to continue to attend the classes and practice.

~~(3) -- Each barber college shall report to the board on or before the 10th day of each month, the number of clock hours of each student in each specific category as set forth in section 37-30-406, MCA."~~

Auth: Sec. 37-30-203, MCA; IMP, Sec. 37-30-406, MCA

REASON: These amendments are being made to edit out unnecessary statutory language.

~~"8.10.1009 SANITATION REQUIREMENTS (1) Each barber college shall post in a conspicuous place on its premises a copy of these rules and a copy of the governing sanitary conditions of barber shops adopted by the board. Each such college shall require strict compliance by its students with the rules governing barber shops."~~

Auth: Sec. 37-30-203, MCA; IMP, Sec. 37-30-422, MCA

REASON: These amendments are being made to edit out unnecessary statutory language.

3. ARM 8.10.401, 8.10.402, 8.10.407, 8.10.1002, 8.10.1005, 8.10.1008 and 8.10.1010 are being proposed for repeal. Full text of the rules can be located at pages 8-287 through 8-309, Administrative Rules of Montana. These rules are being repealed because the language is covered in the statutes. ARM 8.10.402 is being repealed because its substance is being consolidated in another rule. The authority for the board to repeal the rules is 37-30-203, MCA and the rules implement 37-30-203, 309, 402, 404 and 422, MCA.

4. Interested persons may present their data, views or


arguments concerning the proposed amendments and repeals in writing to the Board of Barbers, Arcade Building, 111 North Jackson, Helena, Montana 59620-0407, no later than April 25, 1991.

5. If a person who is directly affected by the proposed amendments and repeals wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to the Board of Barbers, Arcade Building, 111 North Jackson, Helena, Montana 59620-0407, no later than April 25, 1991.

6. If the Board receives requests for a public hearing on the proposed amendments and repeals from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendments and repeals, from the Administrative Code committee of the legislature, from a governmental agency or subdivision 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 120 barbers based on the 1200 licensed barbers in the state of Montana.

BOARD OF BARBERS
EUGENE THOMAS, CHAIRMAN

BY:


ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 18, 1991.

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

In the matter of the amendment of) NOTICE OF PUBLIC HEARING
rules 16.8.1423 and 16.8.1424) FOR AMENDMENT OF RULES

(Air Quality Bureau)

To: All Interested Persons

1. On June 21, 1991, at 9:00 A.M., the Board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules.

2. The proposed amendments would incorporate federal regulatory changes occurring since July 1, 1987 to the "Standard of Performance for New Stationary Sources" and the "Emission Standards for Hazardous Air Pollutants".

3. The rules, as proposed to be amended, appear as follows (new material is underlined; material to be deleted is interlined):

16.8.1423 STANDARD OF PERFORMANCE FOR NEW STATIONARY SOURCES (1) For the purpose of this rule, the following definition applies:

(a) Remains the same.

(2) The terms and associated definitions specified in 40 CFR §60.2, July 1, 198790, shall apply to this rule.

(3) The owner and operator of any stationary source or modification, as defined and applied in 40 CFR Part 60, July 1, 198790, shall comply with the standards and provisions of 40 CFR Part 60, July 1, 198790.

(4) For the purpose of this rule, the board hereby adopts and incorporates by reference 40 CFR Part 60, July 1, 198790, which pertains to standards of performance for new stationary sources and modifications. 40 CFR Part 60, July 1, 198790, is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana; at EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460; and at the libraries of each of the ten EPA Regional Offices. Copies are also available as supplies permit from the U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; and copies may be purchased from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.
AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-203, MCA

16.8.1424 EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

(1) For the purpose of this rule, the terms and associated definitions specified in 40 CFR §61.02, July 1, 198790, shall apply.

(2) The owner or operator of any existing or new stationary source, as defined and applied in 40 CFR Part 61, July 1, 1987~~90~~, shall comply with the standards and provisions of 40 CFR Part 61, July 1, 1987~~90~~.

(3) For the purpose of this rule, the board hereby adopts and incorporates by reference 40 CFR Part 61, July 1, 1987~~90~~, which pertains to emission standards for hazardous air pollutants. 40 CFR Part 61, July 1, 1987~~90~~, is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620; at EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460; and at the libraries of each of the ten EPA Regional Offices. Copies are also available as supplies permit from the U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; and copies may be purchased from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.
AUTH: 75-2-111, 75-2-203, MCA; IMP: 75-2-203, MCA

4. The Board is proposing these amendments to the rules in order to enhance Montana's air program and ensure primacy.

5. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Jeff Chaffee, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than June 21, 1991.

DAVID W. SIMPSON, Chairman
BOARD OF HEALTH AND
ENVIRONMENTAL SCIENCES

by 
DENNIS IVERSON, Director

Certified to the Secretary of State March 18, 1991.

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

In the matter of the	)	NOTICE OF PUBLIC HEARING ON
amendment of Rule 46.10.510	)	THE PROPOSED AMENDMENT OF
pertaining to AFDC excluded	)	RULE 46.10.510 PERTAINING
earned income	)	TO AFDC EXCLUDED EARNED
	)	INCOME

TO: All Interested Persons

1. On April 18, 1991, at 9:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of Rule 46.10.510 pertaining to AFDC excluded earned income.

2. The rule as proposed to be amended provides as follows:

46.10.510 EXCLUDED EARNED INCOME (1) In testing gross monthly income, ~~no the following earned~~ income is to be excluded; ~~and/or disregarded from earnings of assistance unit members.~~

~~(a) for six months per calendar year, the earned income of a dependent child who is a full-time student;~~

~~(b) income received by a dependent child under section 503 of the Job Training Partnership Act (JTPA) of 1982, P.L. 97-300, will be excluded for the first 6 months of participation in JTPA training; and~~

~~(c) earned income tax credit (EITC) advance payments and refunds.~~

(2) In testing net monthly income and determining grant amount, the following earned income shall be excluded:

~~(a) earned income of a full-time student who works full-time or part-time for six months per calendar year, the earned income of a dependent child who is a full-time student;~~

~~(b) earned income of a part-time student who works part-time, but his/her earnings are not to be excluded if employment is full-time;~~

~~(c) income received by a dependent child under section 503 of the Job Training Partnership Act (JTPA) of 1982, P.L. 97-300, will be excluded for the first 6 months of participation in JTPA training; and~~

~~(d) income received by a dependent child who is a full-time student for the first six months AFDC is received; and~~

~~(e) earned income tax credit (EITC) advance payments and refunds.~~

AUTH: Sec. 53-4-212 MCA

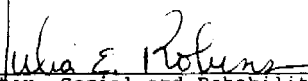
IMP: Sec. 53-4-211, 53-4-231, 53-4-241 and 53-4-242 MCA

3. Federal regulations at 45 CFR 233.20(a)(3)(xix) and (a)(11)(vi) allow the Department the option of excluding earned income of dependent children who are full-time students for up to six months per calendar year and the earned income of dependent children who are JTPA participants for the first six months of their participation in training. Federal regulations do not address part-time students and therefore, their inclusion in the rule should be deleted. Although the Department opted some time ago in its State Plan to exclude earned income of full-time students and JTPA participants, the rule was never amended to conform to the policy expressed. The administrative rule is now being revised to reflect accurately the contents of the State Plan.

The Department's AFDC program currently counts the earned income tax credit (EITC) that a family receives either as payments or refund for purposes of testing gross monthly income of the assistance unit. The Omnibus Budget Reconciliation Act of 1990 (OBRA 90) provides that EITC benefits are to be disregarded as income when AFDC and Medicaid eligibility and benefit levels are determined. Therefore, the Department will amend the rule to state that EITC will no longer be counted in total income of the assistance unit in testing gross monthly income, net monthly income or determining grant amount.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604-4210, no later than April 25, 1991.

5. The Office of Legal Affairs, Department of Social and Rehabilitation Services has been designated to preside over and conduct the hearing.



Director, Social and Rehabilitation Services

Certified to the Secretary of State March 18, 1991.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA


In the matter of the amendment	)	NOTICE OF THE AMENDMENT OF
of ARM 2.21.8011, 2.21.8017,	)	ARM 2.21.8011, 2.21.8017,
and 2.21.8018 relating to	)	AND 2.21.8018 RELATING TO
grievances	)	GRIEVANCES

TO: All Interested Persons.

1. On December 27, 1990, the department of administration published notice of the proposed amendment of ARM 2.21.8011, 2.21.8017, and 2.21.8018 relating to grievances at page 2212 of the Montana Administrative Register, issue number 24.

2. The rules have been amended as proposed.

3. No comments or testimony were received.



Bob Marks, Director
Department of Administration

Certified to the Secretary of State March 18, 1991.

BEFORE THE STATE COMPENSATION MUTUAL INSURANCE FUND
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION) NOTICE OF ADOPTION OF RULES
of Rules I through XI relating) I THROUGH XI RELATING TO STATE
to the organization and board) FUND ORGANIZATION, BOARD
meetings of the State Fund and) MEETINGS AND PREMIUM RATES
the establishment of premium)
rates.)

TO: All Interested Persons:

1. On November 15, 1990, the State Compensation Mutual Insurance Fund published notice of the proposed adoption of 2.55.101 (Rule I) relating to organization of the State Compensation Mutual Insurance Fund and 2.55.201 (Rule II) relating to meetings of the State Fund Board of Directors. Rule 2.55.301 (Rule III), 2.55.302 (Rule IV), 2.55.303 (Rule V), 2.55.304 (Rule VI), 2.55.305 (Rule VII), 2.55.309 (Rule VIII), 2.55.310 (Rule IX), 2.55.315 (Rule X), 2.55.316 (Rule XI) relating to the establishment of premium rates for State Fund policyholders. The notice can be found on pages 1975 through 1981 of the 1990 Montana Administrative Register, Issue No. 21.

2. No comments or testimony concerning the rules were received.

3. The State Compensation Mutual Insurance Fund has adopted the rules as proposed.

4. The authority of the State Compensation Mutual Insurance Fund to adopt the proposed rules is based on sections 2-4-201, 2-3-103, and 39-71-2316, MCA and the rules implement sections 2-4-201, 2-3-103, 39-71-2311, 39-71-2316, MCA.

State Compensation Mutual Insurance Fund

By: 

Patrick J. Sweeney, President

Certified to the Secretary of State March 18, 1991.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment)	NOTICE OF THE AMENDMENT
of rules pertaining to the)	of 4.10.311, 4.10.312
regulatory status and use of)	4.10.313, 4.10.314,
aquatic herbicides)	4.10.315 and 4.10.316

TO: All Interested Persons:

1. On January 31, 1991, the Department of Agriculture proposed to amend the above-stated rules that pertain to the sale and use of aquatic herbicides on page 100, Issue No. 2 of the 1991 Montana Administrative Register.

2. No comments were received.

3. The Department has amended the rules as proposed.

4. The authority for the amendment is 80-8-105, MCA and the rules implement 80-8-105, MCA.


E.M. Snortland, Director
DEPARTMENT OF AGRICULTURE

Certified to the Secretary of States Office March 13, 1991

BEFORE THE BOARD OF HORSE RACING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

matter of the amendment) NOTICE OF AMENDMENT OF
s pertaining to defini-) RULES PERTAINING TO
fees, general provisions) DEFINITIONS, FEES, GENERAL
inition of conduct) PROVISIONS AND DEFINITION
ital to the best) OF CONDUCT DETERIMENTAL TO
s of racing) THE BEST INTERESTS OF
) RACING

: All Interested Persons:

On February 14, 1991, the Board of Horse Racing
ad a notice of public hearing on the proposed amendment
501, 8.22.503, 8.22.701, 8.22.1501 and 8.22.1502, at
2, 1991 Montana Administrative Register, issue number
public hearing was held on March 8, 1991, at 9:00,
the conference room of the Department of Natural
as and Conservation, 1520 East Sixth, Helena, Montana.

The Board has amended ARM 8.22.501, 8.22.1501 and
32 exactly as proposed. The Board has amended ARM
3 and 8.22.701 as proposed but with the following
:

8.22.503 ANNUAL LICENSE FEES

) through (11) will remain the same as proposed.

2) Parimutuel #2

) Parimutuel employees at \$15.00 \$10.00
live race meets and
simulcast races

3) through (15) will remain the same as proposed.

6) Occupational #2

) through (y) will remain the same as proposed.

)-Parimutuel employees-at \$15.00
simulcast-facility

a) through (af) will remain the same as proposed but
renumbered (z) through (ae).

7) Not requiring licenses \$15.00 \$10.00
but requiring identification.

[Wives, children over 6 years
of age and under 16 years of age,
duplicate (lost i.d. cards)]"

th: Sec. 37-1-134, 23-4-104, 23-4-201, MCA; IMP, Sec.
4, 23-4-201, MCA

8.22.701 GENERAL PROVISIONS (1) through (11) will
the same as proposed.

2) In the event of the loss of a license card, the
ay in its discretion issue a duplicate, the fee for
all be \$15.00 \$10.00 and all minor and spouses
ication cards shall be issued for \$15.00 \$10.00.

3) and (14) will remain the same as proposed."

th: Sec. 23-4-202, MCA; IMP, Sec. 23-4-104, MCA

3. The Board has thoroughly considered all oral and written comments received. Those comments and the Board's responses thereto are as follows:

COMMENT: Robert McTaggart asked the Board not to approve the proposed amendment of ARM 8.22.503, which would raise fees for licenses across the Board by \$10.00. He argued that the proposed fee increases are arbitrary and capricious with no relationship to any fiscal study.

RESPONSE: The Board's position is that an increase in fees is necessary to finance the operations of the Board of Horse Racing. Furthermore, the rationale behind the proposed fees increase was reported to the Administrative Code Committee via a memorandum.

COMMENT: Douglas C. Allen stated in written testimony that he believed the proposed amendment to 8.22.503 should contain a category for a designation of owner/lessor. He said this would eliminate any confusion concerning whether a person who runs horses both as an owner and as a lessor would need to be licensed both as an owner and as a lessor under 8.22.501.

RESPONSE: The Board's position is that it is fairly clear that only the one license is needed and therefore the Board took no action to adopt to Mr. Allen's suggestions.

COMMENT: By written testimony, Bob Cartwright, the Secretary/Manager of the Northwest Montana Fair stated that it was an inopportune time to raise all license fees. He urged the Board to look at cutting expenses and leave licensing fees at the 1990 rate until the racing situation looks better.

RESPONSE: The Board noted that it had to take some action to provide revenues for racing during the year 1991. It noted that cut-backs had been made in Board operating costs and that this was the only avenue left to the Board to generate funds to run the Board for the coming racing year.

COMMENT: Written notices were received from Jay Belden, Track Manager at Montana State Fair in Great Falls, Montana, and Gary Koepplin, Manager of the Ravalli County Fair in Hamilton, Montana, who objected to an increase from \$5.00 to \$15.00 for the licenses of parimutuel employees. They noted that this represented a 300% percent increase in this particular license fee. They requested that the Board reconsider and re-evaluate the need for tripling the license fee for parimutuel employees.

RESPONSE: The Board concurred and has amended the fee from \$15.00 to \$10.00 as shown above.

COMMENT: The concerns of Jay Clark, Manager of the Marias Fair in Shelby, Montana, were relayed concerning a duplicity between the \$15.00 fee charged for parimutuel employees under

subsection (12)(a) and the \$15.00 fee charged for simulcast parimutuel employees under subsection (16)(z) of proposed rule 8.22.503.

RESPONSE: The Board took note of the duplicity apparent here and has amended 8.22.503 by striking subsection (16)(z) and by renumbering subsections (aa) through (af) to (z) through (ae).

COMMENT: Robert McTaggart opposed the tripling of fees for lost cards from \$5.00 to \$15.00 as required in subsection (17) of 8.22.503. This section was proposed to triple the fee from \$5.00 to \$15.00 for those not requiring licenses but requiring identification. He claimed that the tripling of this fee was punitive in nature.

RESPONSE: Upon the recommendation of Sam Murfitt, Executive Secretary of the Board, the Board has amended the rule to bring the proposed fee down from \$15.00 to \$10.00 as shown above.


COMMENT: In regard to 8.22.701, Robert McTaggart again asserted that the proposed fee of \$15.00 was too high and was punitive in nature in tripling it from \$5.00 to \$15.00.

RESPONSE: The Board concurred and has amended the proposed fee increase from \$15.00 to \$10.00 as shown above.

4. No other comments or testimony were received.

BOARD OF HORSE RACING
STEVE CHRISTIAN, CHAIRMAN

BY: _____


ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 18, 1991.

BEFORE THE LOCAL GOVERNMENT ASSISTANCE DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption)	NOTICE OF ADOPTION OF
of a new rule for the adminis-)	8.94.3707 INCORPORATION BY
tration of the 1991 federal)	REFERENCE OF RULES FOR THE
community development block)	ADMINISTRATION OF THE 1991
grant program)	FEDERAL COMMUNITY DEVELOP-
)	MENT BLOCK GRANT (CDBG)
)	PROGRAM

TO: All Interested Persons:

1. On January 31, 1991, the Department of Commerce published notice of a public hearing on the proposed adoption by reference of the above-stated rule at page 105, 1991 Montana Administrative Register, issue number 2.

2. The hearing was held on February 20, 1991, at 1:30 p.m., in Room C-209 of the Cogswell Building in Helena, Montana.

3. The Department has adopted rule 8.94.3707 exactly as proposed.

4. No members of the public attended the hearing, but the Department did receive two written comments from local government units during the public comment period provided for by the Administrative Procedure Act. A summary of these comments and the Department's responses to them follow:

COMMENT: The proposed guidelines should be modified to allow a county to apply for a CDBG grant on behalf of one of its political subdivisions, such as a county sewer or water district, even though work on an earlier CDBG grant obtained by the county on behalf of another political subdivision is incomplete or behind schedule. Although a county may encompass a number of independent water and sewer districts, the current guidelines' restrictions on multiple grants prohibit a county from applying for a grant on behalf of a second district until the project activities for the district originally funded by the earlier grant are substantially completed.

RESPONSE: Since 1982 Montana's CDBG guidelines have incorporated minimum standards of performance which must be met in order for a previous grant recipient to reapply for CDBG funds. As proposed in the 1991 guidelines, the reapplication standard would require a recipient of a previous grant to meet the following requirements in order to apply for new grants:

- a. The local government must have drawn down 75% of the non-administrative CDBG funds from the previous grant;
- b. The local government unit must be in compliance with the project implementation schedule for the previous grant; and
- c. There must be no unresolved audit or monitoring findings for the previous grant.

Under the federal Housing and Community Development Act the Department of Commerce is responsible for assuring that CDBG recipients complete their projects in a timely manner. The United States Department of Housing and Urban Development, which administers the Act, is placing increasingly heavy emphasis on the need for CDBG recipients to promptly complete projects. The Department of Commerce's proposed reapplication requirements will provide a strong incentive to do so. In view of the heightened federal emphasis, the Department has concluded that it should not adopt the change recommended by this comment.

COMMENT: The second comment generally endorsed the Department of Commerce's rule as proposed.

5. No other testimony or comments were received.
6. The reasons for and against adopting the rules are embodied in the comments and response contained in item 4, above.

DEPARTMENT OF COMMERCE
LOCAL GOVERNMENT ASSISTANCE
DIVISION

BY: 

ANDY POOLE, DEPUTY DIRECTOR

Certified to the Secretary of State, March 18, 1991.

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

In the Matter of Amendment of)	NOTICE OF ADOPTION OF AN
an Existing Rule Pertaining)	AMENDMENT TO RULE
to Motor Carrier Insurance.)	38.3.706

TO: All Interested Persons

1. On January 17, 1991 the Department of Public Service Regulation published notice of the proposal identified in the above titles at page 45, issue number 1 of the 1991 Montana Administrative Register.

2. The Department of Public Service Regulation has adopted the amended rule as proposed.

3. No comments to the proposal were received.

4. The authority and implementing statutes are set forth in the notice of proposed action identified in paragraph 1.


HOWARD L. ELLIS, Chairman

CERTIFIED TO THE SECRETARY OF STATE MARCH 18, 1991.

VOLUME NO. 44

OPINION NO. 8

CITIES AND TOWNS - Effect of requirements of section 7-33-4107 on section 7-33-4106;

FIRE DEPARTMENTS - Meaning of "original appointment" as used in section 7-33-4107;

RETIREMENT SYSTEMS - Appointment as firefighter made in violation of section 7-33-4107 and eligibility for membership in Firefighters' Unified Retirement System;

MONTANA CODE ANNOTATED - Sections 7-33-4106, 7-33-4107, 19-13-104, 19-13-202, 19-13-301, 49-1-102, 49-2-303, 49-3-103;

MONTANA LAWS OF 1981 - Chapter 566;
UNITED STATES CODE - 29 U.S.C. § 623.

- HELD: 1. An individual, over the age of 34 when first hired as a firefighter by a Firefighters' Unified Retirement System employer, is in compliance with section 7-33-4107, MCA, if the individual's first appointment as a firefighter, irrespective of place of employment, occurred when the individual was not over 34 years of age.
2. A firefighter who is over the age of 34 at the time of his original appointment is not eligible for membership in the Firefighters' Unified Retirement System.

March 4, 1991

Paul A. Smietanka, Counsel
Public Employees' Retirement Board
Department of Administration
Mitchell Building
Helena MT 59620

Dear Mr. Smietanka:

You have requested my opinion concerning the qualifications necessary for membership in the Firefighters' Unified Retirement System (FURS). In order to address the issues inherent in your request I have phrased your request as two separate questions:

1. Is an individual, over the age of 34 when first hired as a firefighter by a Firefighters' Unified Retirement System employer, appointed in violation of section 7-33-4107, MCA?
2. Is an individual appointed as a firefighter in violation of section 7-33-4107, MCA, qualified to participate in the Firefighters' Unified Retirement System?

Title 7, chapter 33, part 41, MCA, addresses the establishment of municipal fire departments in the cities and towns of Montana. The mayor or manager of a municipality is charged with the appointment of the "chief of the fire department, the assistant chief or chiefs of the fire department, and all firefighters." § 7-33-4106, MCA. The statutorily-required qualifications for those individuals seeking appointment are set out in section 7-33-4107, MCA, as follows:

The state of Montana determines that age is a valid, bona fide occupational qualification for the position of firefighter because of the rigorous physical demands of the firefighting profession and the expectation of many years of emergency service. The qualifications of firefighters shall be that they:

- (1) shall not be more than 34 years of age at the time of original appointment;
- (2) shall have passed a physical examination by a practicing physician duly authorized to practice in this state; and
- (3) at the option of said city or town, shall be qualified voters of the city or town.

The term "original appointment," as used in subsection (1), is not defined in the statute nor has its meaning been addressed by the Montana Supreme Court. Therefore, the ordinary principles of statutory construction must be applied to determine the proper interpretation of section 7-33-4107, MCA. The fundamental rule of statutory construction is that the intention of the Legislature controls, and that requires initial reference to the plain language of the statute. Missoula County v. American Asphalt, Inc., 216 Mont. 423, 426, 701 P.2d 990, 992 (1985); W.D. Construction, Inc. v. Gallatin County Board of Commissioners, 218 Mont. 348, 351, 707 P.2d 1111, 1113 (1985). Words must be construed in the context used and provisions relating to the same subject matter must be harmonized to the extent possible. Title Insurance and Trust Co. v. County of Riverside, 767 P.2d 1148, 1152 (Cal. 1989); State v. Henderson, 664 P.2d 1291, 1292 (Wash. Ct. App. 1983).

The phrase "original appointment" is used here in the context of a statute which recognizes a maximum hiring age of 34 for firefighters as a bona fide occupational qualification (BFOQ). Montana's statutes governing age discrimination in employment provide for an exemption based on a BFOQ. This opinion does not address the appropriateness of a maximum hiring age for firefighters in the state of Montana. However, in order to determine the meaning of the phrase "original appointment" as used in the context of a statute determining a BFOQ, it is necessary to look at the Montana statutes governing age

discrimination in employment and case law applicable to the designation of a BFOQ.

In Montana the right to be free from discrimination based on age is declared to be a civil right. § 49-1-102, MCA. It is unlawful for "an employer to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his ... age ... when the reasonable demands of the position do not require an age ... distinction." § 49-2-303 (1)(a), MCA. Nothing in this law, however, "prohibit[s] any public or private employer from enforcing a differentiation based on ... age ... when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age." § 49-3-103, MCA.

The Montana Supreme Court has not specifically addressed the appropriateness of a BFOQ based on age; however, it has addressed the appropriateness of a BFOQ based on sex. In analyzing this BFOQ, the Court relied on case law interpreting federal law prohibiting sex discrimination. Stone v. Belgrade School Dist. No. 44, 217 Mont. 309, 703 P.2d 136 (1984). The Montana Supreme Court has held that reference to federal case law is useful and appropriate in considering questions arising under the Montana Human Rights Act. Snell v. Montana-Dakota Utilities, 198 Mont. 56, 62, 643 P.2d 841, 845 (1982). Federal case law interpreting the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 to 634, is also helpful to understand the context of section 7-33-4107, MCA.

The ADEA has provisions similar to Montana's statutes governing age discrimination in employment. Section 623 of the ADEA makes it "unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). However, a classification based on age is lawful "where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business." 29 U.S.C. § 623(f)(1).

The United States Supreme Court set out the test an employer must meet in order to establish a BFOQ in Western Air Lines v. Criswell, 472 U.S. 400, 413-15 (1985). The Court of Appeals for the Fifth Circuit summarized this test as follows:

To qualify under the BFOQ exception to the ADEA, an employer must show: (1) The job qualifications invoked to justify the age discrimination must be reasonably necessary to the normal operation of the particular business, and (2) age is a necessary proxy for those job qualifications, either because (a) there is a factual basis for believing that all or

substantially all people over a certain age would be unable to satisfy those job qualifications, or (b) there is proof that individual testing for those job qualifications is impossible or highly impractical. Western Air Lines v. Criswell, 472 U.S. 400, 413-15 (1985).

E.E.O.C. v. Mississippi State Tax Comm'n, 873 F.2d 97, 98 (5th Cir. 1989). The United States Supreme Court in Criswell went on to find that the relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by safety interests are whether the job qualification is "reasonably necessary" to the overriding interest in public safety, and whether the employer is compelled to rely on age as a proxy for the safety-related job qualification validated in the first inquiry. The BFOQ exemption was meant to be an extremely narrow exemption to the general prohibition against age discrimination and any problems involving age discrimination were to be decided on a case-by-case basis. Criswell at 412, 422.

It became apparent that those professions requiring a high degree of physical stamina and agility in which public safety was an issue required special consideration under the ADEA. Congress, in recognition of the importance of the safety considerations involved in the firefighting and law enforcement professions and the problems of dealing with these professions on a case-by-case basis, amended the ADEA in 1986 by adding the following exemption:

It shall not be unlawful for an employer ... to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken --

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983[.]

29 U.S.C. § 623(i)(1). The amendment will terminate effective December 31, 1993, allowing these professions time to study the feasibility of developing physical and mental fitness tests which will adequately measure the ability of police officers and firefighters to do their jobs. 132 Cong. Rec. S16854-54 (daily ed. Oct. 16, 1986).

Although firefighters are not exempted from the Montana statutes addressing age discrimination in employment, section 7-33-4107, MCA, does state that a maximum hiring age is a bona fide occupational qualification for the position of firefighter "because of the rigorous physical demands of the firefighting

profession and the expectation of many years of emergency service."

Prior to the 1986 amendments to the ADEA, numerous courts addressed the criteria necessary to establish a maximum hiring age as a BFOQ. In relation to law enforcement personnel, the Court of Appeals for the Eighth Circuit upheld a maximum hiring age for highway patrol officers because the maximum entry age ensures that the Patrol can take advantage of the physical skills and abilities of younger persons and also provide those persons with enough experience while they are relatively young to compensate for the inevitable reduction in their physical skills and abilities that comes with aging. E.E.O.C. v. Missouri State Highway Patrol, 748 F.2d 447, 456 (8th Cir. 1984), cert. denied, 474 U.S. 828 (1985); see also Civil Service Board of City of Portland v. Bureau of Labor and Industry, 692 P.2d 569 (Or. 1984).

In 1981, the Montana Legislature amended section 7-33-4107, MCA, by increasing the maximum hiring age for firefighters from age 31 to age 34. 1981 Mont. Laws, ch. 82, § 1 (Senate Bill 204). The legislative history of SB 204 indicates that there was some concern over the impact an increase in the maximum hiring would have on the firefighters' retirement plan. See Hearing on Senate Bill 204, Minutes of House Committee on Local Government, February 3, 1981, at 5; Hearing on Senate Bill 204, Minutes of Senate Committee on State Administration, March 9, 1981, at 4. It is clear, however, from case law that a claim of an adverse impact upon pension and disability plans that would be encountered by hiring "older" firefighters cannot justify hiring only those applicants under a particular age. Civil Service Board, 692 P.2d at 574. Economic considerations cannot be the basis for a BFOQ as it was precisely those considerations which were the target of the ADEA. E.E.O.C. v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983).

In E.E.O.C. v. County of Los Angeles, the Ninth Circuit recognized that there was an inherent contradiction in the county's argument which justified a maximum hiring age of 35 on grounds that the experience gained by deputies hired at a young age makes up for the gradual decline in physical fitness that often accompanies the aging process, while at the same time making no provision for hiring persons over the age of 35 who had extensive similar experience in other governmental agencies. E.E.O.C. v. County of Los Angeles, 706 F.2d at 1043.

The word "original" is defined as "relating to, or constituting an origin or beginning ... not secondary, derivative, or imitative." Webster's Ninth New Collegiate Dictionary 832 (1983). The plain meaning of this term would suggest an interpretation of "original appointment" as that appointment which is the individual's first appointment as a firefighter irrespective of the individual's employer. Such an interpretation allows an employer to consider the individual's

prior experience as a firefighter in making a determination as to that person's qualifications and is consistent with the intent of state and federal law governing the criteria necessary to establish a BFOQ. To require that the "original appointment" must be appointment by an employer who is a member of FURS would discount that individual's prior experience and training as a firefighter and would be in direct opposition to the purpose of the laws governing age discrimination.

I conclude that an individual, over the age of 34 when seeking appointment as a firefighter with any employer in the state of Montana, must first prove that he or she was 34 or younger when originally appointed as a firefighter in order to be in compliance with section 7-33-4107, MCA. It is not necessary that the original appointment be within the state of Montana or with a FURS employer. The employer is then free to look at the experience, qualifications, and physical examination results of the individual applicant in order to make a hiring determination.

Your second question asks whether an individual who has in fact been appointed in violation of section 7-33-4107, MCA, is eligible for membership in FURS. The Firefighters' Unified Retirement System was established by statute in 1981. 1981 Mont. Laws, ch. 566. Although the Public Employees' Retirement Board (the Board) has the duty to determine the conditions under which persons may become members of and receive benefits under FURS, § 19-13-202, MCA, the basic requirements for membership are set out by statute.

Pursuant to section 19-13-301, MCA, a "full-paid firefighter" becomes an active member under the plan on the first day of his employment by a FURS employer. Upon becoming eligible for membership the firefighter must complete the appropriate forms and furnish any proof required by the board. A full-paid firefighter is defined as "a person appointed as a firefighter under 7-33-4106." § 19-13-104(8), MCA. An employer is defined as "any city that is of the first or second class or that elects to join this plan under 19-13-108." § 19-13-104(5), MCA. Therefore, in order for a firefighter to be a member of FURS, he or she must be appointed in compliance with section 7-33-4106, MCA, and the city or town by which the firefighter is appointed must be a FURS member.

Section 7-33-4106, MCA, requires that the mayor or manager of the city or town shall "nominate and, with the consent of the council or commission, appoint ... all firefighters." However, in order to be a firefighter in the state of Montana, an individual must meet particular statutory requirements. Section 7-33-4107, MCA, requires that the firefighter "shall not be more than 34 years of age at the time of original appointment." (Emphasis added.) Even a city with self-government powers may not establish standards or requirements which are lower or less stringent than those imposed by state law. § 7-1-113(2), MCA;

see also Billings Firefighters Local 521 v. City of Billings, 214 Mont. 481, 694 P.2d 1335 (1985). Therefore, any individual who does not meet at least the minimum statutory requirements of section 7-33-4107, MCA, cannot be legally appointed pursuant to section 7-33-4106, MCA. Thus, a firefighter who is over the age of 34 at the time of his original appointment, as defined above, cannot be legally appointed pursuant to section 7-33-4106, MCA, and therefore is not eligible for membership in FURS.

THEREFORE, IT IS MY OPINION:

1. An individual, over the age of 34 when first hired as a firefighter by a Firefighters' Unified Retirement System employer, is in compliance with section 7-33-4107, MCA, if the individual's first appointment as a firefighter, irrespective of place of employment, occurred when the individual was not over 34 years of age.
2. A firefighter who is over the age of 34 at the time of his original appointment is not eligible for membership in the Firefighters' Unified Retirement System.

Sincerely,



MARC RACICOT
Attorney General

VOLUME NO. 44

OPINION NO. 9

CEMETERY DISTRICTS - Authority of cemetery board of trustees to establish rules for the purpose of clearing title to burial lots;

MONTANA CODE ANNOTATED - Sections 7-35-2109, 7-35-2110;

OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 31 (1989), 27 Op. Att'y Gen. No. 31 (1957).

HELD: The board of trustees of a cemetery district has the authority to establish rules for the purpose of clearing title to burial lots.

March 6, 1991

John C. McKeon
Phillips County Attorney
P.O. Box 1279
Malta MT 59538

Dear Mr. McKeon:

You have requested my opinion on the following question:

Does the board of trustees of a cemetery district have the authority to establish rules for the purpose of clearing title to burial lots?

Prior to the formation of the Malta Cemetery District in 1957, the cemetery at Malta was operated by a cemetery association and by the City of Malta. The records of the cemetery district and its predecessors have not been adequately maintained over the years, resulting in discrepancies between the record ownership and the actual ownership of some of the burial lots. The problem came to light when the heirs of a family interred in one of the lots wanted to make some improvements to the lot and discovered that the cemetery records showed ownership of the lot in another person's name. Although the cemetery district did not have any record of the transfer of ownership of this burial lot, the local funeral home had a notation in its records that such a transfer had taken place more than 40 years ago.

The bylaws of the Malta Cemetery District provide that any transfer or conveyance of a vacant cemetery lot is not effective until written evidence of the transaction has been filed with the secretary of the district. The bylaws also provide that a cemetery lot in which there has been a lawful interment is thereafter inalienable. However, the bylaws were not enacted until June 1, 1987.

Your question concerns the authority of the cemetery district to implement rules to resolve title discrepancies arising from the district's inadequate records. If such rulemaking authority does not exist, a legal proceeding in the nature of a quiet title action may need to be commenced to establish title to the burial lots.

The powers of the board of trustees of a cemetery district are set forth in section 7-35-2109, MCA. The trustees may maintain a cemetery or cemeteries within the district, hold title to property by grant, gift, devise, lease, or any other method, and perform all acts necessary or proper for the carrying out of the purposes of sections 7-35-2101 to 2125, MCA, including the selling or leasing of burial lots.

Specific rulemaking authority is provided to the trustees by section 7-35-2110, MCA, which states that the trustees "shall make proper rules for the management of the cemeteries."

In a recent Attorney General's Opinion which held that cemetery district trustees have authority to sell headstones and grave markers for use in the cemetery, I noted that the powers of local government units such as cemetery districts are to be liberally construed and include powers expressly or impliedly granted by statute. 43 Op. Att'y Gen. No. 31 (1989). The issue here is whether the authority to conform cemetery district records to reflect actual ownership of burial lots may be fairly implied from the powers granted to the trustees by statute. I conclude that the board of trustees has such authority.

It is well established that the purchaser of a cemetery lot does not acquire a fee simple interest; rather, he obtains a qualified property right or estate that is more in the nature of an easement, license, or privilege for the exclusive use of the lot for burial purposes, subject to the regulations of the owner of the cemetery grounds. See Evergreen-Washelli Memorial Park Co. v. Dept. of Revenue, 574 P.2d 735 (Wash. 1978), citing Mansker v. Astoria, 198 P. 199 (Or. 1921); Hammerstein v. Woodlawn Cemetery, 194 N.Y.S.2d 385 (N.Y. Sup. Ct. 1960); Schaefer v. West Lawn Memorial Cemetery, 352 P.2d 744 (Or. 1960); 14 Am. Jur. 2d Cemeteries § 25 (1964); 14 C.J.S. Cemeteries § 25 (1939). See also §§ 70-17-101, 70-17-102, MCA (right of burial is land burden or servitude upon land). The ordinary incidents of ownership of real property do not attach to ownership of a cemetery lot, and the rules of real estate conveyancing and devolution do not afford a safe guide for the transfer of rights in a cemetery lot. See Hammerstein, supra. As you have noted in your letter of inquiry, transfers of interests in cemetery lots are not normally recorded at the local clerk and recorder's office; such transfers, however, may be indicated in other documents, such as funeral home records.

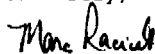
Although the district's power to maintain and revise records of cemetery lot ownership is not expressly provided by statute, I

find that such a power must be implied to give effect to the statutory authority of the district to manage and maintain the cemetery and perform all acts necessary to carry out the purposes of the cemetery. See 27 Op. Att'y Gen. No. 31 at 68 (1957). The district may adopt rules which set forth a procedure for resolving discrepancies between the cemetery's records and the actual ownership of cemetery lots. The rules may take into account other documents which indicate transfers of interests in the lots or otherwise establish ownership of the lots. The rules may also take into account statutory provisions which may have applied to the predecessor cemetery association, such as section 35-20-216, MCA (if a cemetery lot belonging to an association has been transferred to an individual proprietor and there has been an interment in the lot, that lot from the time of interment is forever inalienable), as well as general principles of the common law pertaining to adverse possession of cemetery lots (see 3 Am. Jur. 2d Adverse Possession § 265 (1986), 2 C.J.S. Adverse Possession § 11 (1972), indicating that a cemetery lot may be acquired by adverse possession or prescription). Of course, the cemetery district may still have to initiate or participate in a legal proceeding to establish ownership of a particular lot where two or more bona fide claimants seek to exercise or confirm their rights to the exclusive use of the lot. See Gallaher v. Trustees of Cherry Hill Methodist Episcopal Church of Cherry Hill, 399 A.2d 936 (Md. Ct. Spec. App. 1979).

THEREFORE, IT IS MY OPINION:

The board of trustees of a cemetery district has the authority to establish rules for the purpose of clearing title to burial lots.

Sincerely,



MARC RACICOT
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules, amendment or repeal of existing rules filed with the Secretary of State, except rules proposed by the Department of Revenue. Proposals of the Department of Revenue are reviewed by the Revenue Oversight Committee.

The Administrative Code 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 | 1. Consult ARM topical index. |
| Subject | Update the rule by checking the accumulative |
| Matter | table and the table of contents in the last |
| | Montana Administrative Register issued. |
| Statute | 2. Go to cross reference table at end of each |
| Number and | title which lists MCA section numbers and |
| Department | corresponding ARM rule numbers. |

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1990. This table includes those rules adopted during the period January 1, 1991 through March 31, 1991 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 December 31, 1990, this table and the table of contents of this issue of the MAR.

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