

HOUSE BILL NO. 52

INTRODUCED BY L. DEMING

BY REQUEST OF THE SENATE SELECT COMMITTEE ON JUDICIAL OVERSIGHT AND REFORM

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE MONTANA ADMINISTRATIVE PROCEDURE ACT; PROVIDING THAT A REVIEWING COURT MAY NOT GIVE DEFERENCE TO THE AGENCY'S INTERPRETATION OF LAW OR PRIOR INTERPRETATIONS MADE BY THE AGENCY; PROVIDING FOR THE PUBLICATION OF STIPULATIONS OF AGREEMENTS ON THE STATE OF MONTANA WEBSITE; AND AMENDING SECTIONS 2-4-101, 2-4-102, 2-4-303, 2-4-412, 2-4-506, 2-4-603, 2-4-612, AND 2-4-704, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 2-4-101, MCA, is amended to read:

"2-4-101. Short title -- purpose -- exception. (1) This chapter is known and may be cited as the "Montana Administrative Procedure Act".

(2) The purposes of the Montana Administrative Procedure Act are to:

(a) generally give notice to the public of governmental action and to provide for public participation in that action;

(b) establish general uniformity and due process safeguards in agency rulemaking, legislative review of rules, and contested case proceedings;

(c) establish standards for judicial review of agency rules and final agency decisions;

(d) establish standards by which judges are charged with interpreting the law faithfully, impartially, and independently, based on legislative intent, without deference to a state or federal government agency; and

(d)(e) provide the executive and judicial branches of government with statutory directives based on legislative intent.

(3) Effective July 1, 2016, this chapter does not apply to the operations of the state compensation insurance fund provided for in Title 39, chapter 71, part 23. Administrative rules adopted by the state fund board

1 of directors prior to July 1, 2016, apply to new and renewal policies issued by the state fund that are effective
2 prior to July 1, 2016. The state fund is subject to rules adopted by any agency that by law apply to the state
3 fund."

4

5 **Section 2.** Section 2-4-102, MCA, is amended to read:

6 **"2-4-102. Definitions.** For purposes of this chapter, the following definitions apply:

7 (1) "Administrative rule review committee" or "committee" means the appropriate committee
8 assigned subject matter jurisdiction in Title 5, chapter 5, part 2.

9 (2) (a) "Agency" means an agency, as defined in 2-3-102, of state government, except that the
10 provisions of this chapter do not apply to the following:

11 (i) the state board of pardons and parole, which is exempt from the contested case and judicial
12 review of contested cases provisions contained in this chapter. However, the board is subject to the remainder
13 of the provisions of this chapter.

14 (ii) the supervision and administration of a penal institution with regard to the institutional
15 supervision, custody, control, care, or treatment of youth or prisoners;

16 (iii) the board of regents and the Montana university system;

17 (iv) the financing, construction, and maintenance of public works;

18 (v) the public service commission when conducting arbitration proceedings pursuant to 47 U.S.C.
19 252 and 69-3-837.

20 (b) The term does not include a school district, a unit of local government, or any other political
21 subdivision of the state.

22 (3) "ARM" means the Administrative Rules of Montana.

23 (4) "Contested case" means a proceeding before an agency in which a determination of legal
24 rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term
25 includes but is not restricted to ratemaking, price fixing, and licensing.

26 (5) (a) "Interested person" means a person who has expressed to the agency an interest
27 concerning agency actions under this chapter and has requested to be placed on the agency's list of interested
28 persons as to matters of which the person desires to be given notice.

1 (b) The term does not extend to contested cases.

2 (6) "License" includes the whole or part of an agency permit, certificate, approval, registration,
3 charter, or other form of permission required by law but does not include a license required solely for revenue
4 purposes.

5 (7) "Licensing" includes an agency process respecting the grant, denial, renewal, revocation,
6 suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

7 (8) "Party" means a person named or admitted as a party or properly seeking and entitled as of
8 right to be admitted as a party, but this chapter may not be construed to prevent an agency from admitting any
9 person as a party for limited purposes.

10 (9) "Person" means an individual, partnership, corporation, association, governmental subdivision,
11 agency, or public organization of any character.

12 (10) "Register" means the Montana Administrative Register.

13 (11) (a) "Rule" means each agency regulation, standard, or statement of general applicability that
14 implements, ~~interprets, or prescribes law~~ legislative intent or policy or describes the organization, procedures,
15 or practice requirements of an agency. The term includes the amendment or repeal of a prior rule.

16 (b) The term does not include:

17 (i) statements concerning only the internal management of an agency or state government and
18 not affecting private rights or procedures available to the public, including rules implementing the state
19 personnel classification plan, the state wage and salary plan, or the statewide accounting, budgeting, and
20 human resource system;

21 (ii) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;

22 (iii) rules relating to the use of public works, facilities, streets, and highways when the substance of
23 the rules is indicated to the public by means of signs or signals;

24 (iv) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when
25 there is a statutory requirement for the publication of the rules and rules adopted annually or biennially relating
26 to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of
27 the rules is indicated to the public by means of signs or signals;

28 (v) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in

1 accordance with 2-4-306 and must be published in the ARM;

2 (vi) game parameters approved by the state lottery and sports wagering commission relating to a
3 specific lottery game. This subsection (11)(b)(vi) does not exempt generally applicable policies governing the
4 state lottery that are otherwise subject to the Montana Administrative Procedure Act.

5 (vii) policies relating to sports wagering sales agents' commissions prescribed by the state lottery
6 and sports wagering commission; or

7 (viii) annual plan documents governed by and published as provided in Title 2, chapter 12, part 1.

8 (12) (a) "Significant interest to the public" means agency actions under this chapter regarding
9 matters that the agency knows to be of widespread citizen interest. These matters include issues involving a
10 substantial fiscal impact to or controversy involving a particular class or group of individuals.

11 (b) The term does not extend to contested cases.

12 (13) "Small business" means a business entity, including its affiliates, that is independently owned
13 and operated and that employs fewer than 50 full-time employees.

14 (14) "Substantive rules" are either:

15 (a) legislative rules, which if adopted in accordance with this chapter and under expressly
16 delegated authority to promulgate rules to implement a statute have the force of law and when not so adopted
17 are invalid; or

18 (b) adjective or interpretive rules, which may be adopted in accordance with this chapter and under
19 express or implied authority to codify an interpretation of a statute. The interpretation lacks the force of law.

20 (15) "Supplemental notice" means a notice that amends the proposed rules or changes the timeline
21 for public participation."

22

23 **Section 3.** Section 2-4-303, MCA, is amended to read:

24 **"2-4-303. Emergency or temporary rules.** (1) (a) If an agency finds that an imminent peril to the
25 public health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing
26 its reasons for that finding, it may proceed upon special notice filed with the committee, without prior notice or
27 hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The
28 rule may be effective for a period not longer than 120 days, after which a new emergency rule with the same or

1 substantially the same text may not be adopted, but the adoption of an identical rule under 2-4-302 is not
2 precluded. Because the exercise of emergency rulemaking power precludes the people's constitutional right to
3 prior notice and participation in the operations of their government, it constitutes the exercise of extraordinary
4 power requiring extraordinary safeguards against abuse. An emergency rule may be adopted only in
5 circumstances that truly and clearly constitute an existing imminent peril to the public health, safety, or welfare
6 that cannot be averted or remedied by any other administrative act. The sufficiency of the reasons for a finding
7 of imminent peril to the public health, safety, or welfare is subject to ~~judicial review upon petition by any person~~
8 legislative intent consistent with 2-4-303. The matter must be set for hearing at the earliest possible time and
9 takes precedence over all other matters except older matters of the same character. The sufficiency of the
10 reasons justifying a finding of imminent peril and the necessity for emergency rulemaking must be compelling,
11 without deference to state or federal agencies, and, as written in the rule adoption notice, must stand on their
12 own merits for purposes of judicial review. The dissemination of emergency rules required by 2-4-306 must be
13 strictly observed and liberally accomplished.

14 (b) An emergency rule may not be used to implement an administrative budget reduction.

15 (c) (i) For the purposes of this subsection (1), "special notice" means written notice to each
16 member of the committee and each member of the committee staff using expedient means, such as electronic
17 mail. The special notice must include:

18 (A) the agency's reasons for its findings of imminent peril to the public health, safety, or welfare;

19 (B) the text of the proposed emergency rule or an overview of the rule's substantive changes; and

20 (C) the estimated date of adoption.

21 (ii) Prior to adoption of an emergency rule, the agency shall make a good faith effort to provide
22 special notice to each committee member and each member of the committee staff. The adoption notice of the
23 emergency rule must state the date on which and the manner in which written contact was made or attempted
24 with each person required under this subsection (1). If the adoption notice fails to state the date on which and
25 the manner in which written contact was made or attempted for each person required under this subsection (1),
26 the adoption of the emergency rule is ineffective for the purposes of this part.

27 (2) A statute enacted or amended to be effective prior to October 1 of the year of enactment or
28 amendment may be implemented by a temporary administrative rule, adopted before October 1 of that year,

1 upon any abbreviated notice or hearing that the agency finds practicable, but the rule may not be filed with the
2 secretary of state until at least 30 days have passed since publication of the notice of proposal to adopt the
3 rule. The temporary rule is effective until October 1 of the year of adoption. The adoption of an identical rule
4 under 2-4-302 is not precluded during the period that the temporary rule is effective."
5

6

6 **Section 4.** Section 2-4-412, MCA, is amended to read:

7 **"2-4-412. Legislative review of rules -- effect of failure to object.** (1) (a) The legislature may, by
8 bill, repeal any rule in the ARM. If a rule is repealed, the legislature shall in the bill state its objections to the
9 repealed rule. If an agency adopts a new rule to replace the repealed rule, the agency shall adopt the new rule
10 in accordance with the objections stated by the legislature in the bill. If the legislature does not repeal a rule
11 filed with it before the adjournment of that regular session, the rule remains valid.

12 (b) The legislature may, by joint resolution, repeal a rule or amendment to a rule in the ARM that
13 was adopted after final adjournment of the most recent regular legislative session. If an agency adopts a new
14 rule to replace the repealed rule, the agency shall adopt the new rule in accordance with the objections stated
15 by the legislature in the joint resolution. In order to be effective, the joint resolution must be passed during the
16 regular session and not during a special session. After the regular session adjourns, the rule or the amendment
17 to the rule that was adopted during the period between the two regular legislative sessions remains valid and
18 may not be repealed using a joint resolution.

19 (2) The legislature may also by joint resolution request or advise or by bill direct the adoption,
20 amendment, or repeal of any rule. If a change in a rule or the adoption of an additional rule is advised,
21 requested, or directed to be made, the legislature shall in the joint resolution or bill state the nature of the
22 change or the additional rule to be made and its reasons for the change or addition. The agency shall, in the
23 manner provided in the Montana Administrative Procedure Act, adopt a new rule in accordance with the
24 legislative intent and direction in a bill.

25 (3) Rules and changes in rules made by agencies under subsection (2) must conform and be
26 pursuant to statutory authority.

27 (4) Failure of the legislature or the appropriate administrative rule review committee to object in
28 any manner to the adoption, amendment, or repeal of a rule is inadmissible in the courts of this state to prove

1 the validity of any rule."

2

3 **Section 5.** Section 2-4-506, MCA, is amended to read:

4 **"2-4-506. Declaratory judgments on validity or application of rules.** (1) A rule may be declared
5 invalid or inapplicable in an action for declaratory judgment if it is found that the rule or its threatened
6 application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the
7 plaintiff and subsection (2) of this section.

8 (2) A rule may also be declared invalid in the action on the grounds that the rule was adopted with
9 an arbitrary or capricious disregard for the purpose of the authorizing statute as evidenced by documented
10 legislative intent.

11 (3) A declaratory judgment may be rendered whether or not the plaintiff has requested the agency
12 to pass upon the validity or applicability of the rule in question.

13 (4) The action ~~may~~must be brought in the district court for the county in which the plaintiff resides
14 or has a principal place of business ~~or in which the agency maintains its principal office.~~ The agency must be
15 made a party to the action."

16

17 **Section 6.** Section 2-4-603, MCA, is amended to read:

18 **"2-4-603. Informal disposition and hearings -- waiver of administrative proceedings --**

19 **recording and use of settlement proceeds.** (1) (a) Unless precluded by law, informal disposition may be
20 made of any contested case by stipulation, agreed settlement, consent order, or default. A stipulation, agreed
21 settlement, consent order, or default that disposes of a contested case must be in writing and subject to public
22 inspection as provided in 2-4-623(6).

23 (b) Unless otherwise provided by law, if a stipulation, agreed settlement, consent order, or default
24 results in a monetary settlement involving an agency or the state, settlement proceeds must be deposited in the
25 account or fund in which the penalty, fine, or other payment would be deposited if the contested case had
26 proceeded to final decision. If there is no account or fund designated for the fine, penalty, or payment in the
27 type of action, then the settlement must be deposited in the general fund. Any stipulations or agreed
28 settlements are public record under 2-4-623(6) and must be prominently documented on the state of Montana

1 website in a searchable format.

2 (c) If a stipulation, agreed settlement, consent order, or default results in a nonmonetary
3 settlement involving an agency or the state, settlement proceeds, whether received by the state or a third party,
4 must be recorded in a nonstate, nonfederal state special revenue account established pursuant to 17-2-
5 102(1)(b)(i) for the purpose of recording nonmonetary settlements. Any stipulations or agreed settlements are
6 public record under 2-4-623(6) and must be prominently documented on the state of Montana website in a
7 searchable format.

8 (2) Except as otherwise provided, parties to a contested case may jointly waive in writing a formal
9 proceeding under this part. The parties may then use informal proceedings under 2-4-604. Parties to contested
10 case proceedings held under Title 37 or under any other provision relating to licensure to pursue a profession
11 or occupation may not waive formal proceedings. All proceedings of a contested case are public record under
12 2-4-623(6) and must be prominently documented on the state of Montana website in a searchable format.

13 (3) If a contested case does not involve a disputed issue of material fact, parties may jointly
14 stipulate in writing to waive contested case proceedings and may directly petition the district court for judicial
15 review pursuant to 2-4-702. The petition must contain an agreed statement of facts and a statement of the legal
16 issues or contentions of the parties upon which the court, together with the additions it may consider necessary
17 to fully present the issues, may make its decision. All proceedings of a contested case are public record under
18 2-4-623(6) and must be prominently documented on the state of Montana website in a searchable format."

19

20 **Section 7.** Section 2-4-612, MCA, is amended to read:

21 **"2-4-612. Hearing -- rules of evidence, cross-examination, judicial notice.** (1) Opportunity shall
22 must be afforded all parties to respond and present evidence and argument on all issues involved.

23 (2) Except as otherwise provided by statute relating directly to an agency, agencies shall must be
24 bound by common law and statutory rules of evidence. Objections to evidentiary offers may be made and shall
25 must be noted in the record. When a hearing will be expedited and the interests of the parties will not be
26 prejudiced substantially, any part of the evidence may be received in written form.

27 (3) Documentary evidence may be received in the form of copies or excerpts if the original is not
28 readily available. Upon request, parties shall must be given an opportunity to compare the copy with the

1 original.

2 (4) All testimony ~~shall~~must be given under oath or affirmation.

3 (5) A party ~~shall~~must have the right to conduct cross-examinations required for a full and true
4 disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of
5 or for the use of the agency and offered in evidence.

6 (6) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally
7 recognized technical or scientific facts within the agency's specialized knowledge. Parties ~~shall~~must be notified
8 either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed,
9 including any staff memoranda or data. They ~~shall~~must be afforded an opportunity to contest the material so
10 noticed.

11 (7) The agency's experience, technical competence, and specialized knowledge may be utilized in
12 the evaluation of evidence.

13 (8) Nothing in this section provides an agency more deference in the interpretation of applicable
14 state or federal statutory or administrative law."

15

16 **Section 8.** Section 2-4-704, MCA, is amended to read:

17 **"2-4-704. Standards of review.** (1) The review must be conducted by the court without a jury and
18 must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in
19 the record, proof of the irregularities may be taken in the court. The court, upon request, shall hear oral
20 argument and receive written briefs.

21 (2) The court may not substitute its judgment for that of the agency as to the weight of the
22 evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further
23 proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been
24 prejudiced because:

25 (a) the administrative findings, inferences, conclusions, or decisions are:

26 (i) in violation of constitutional or statutory provisions;

27 (ii) in excess of the statutory authority of the agency;

28 (iii) made upon unlawful procedure;

1 (iv) affected by other error of law;

2 (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole
3 record;

4 (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise
5 of discretion; or

6 (b) findings of fact, upon issues essential to the decision, were not made although requested.

7 (3) The court shall decide all questions of law, including any interpretation of a federal or state
8 constitutional provision, statute, or agency rule, without deference to any previous interpretation by the agency.
9 When interpreting the provisions of this chapter or any rule, the court may not defer to an agency's
10 interpretation of the provisions of this chapter or the rule and shall interpret the meaning and effect de novo. In
11 an action brought by or against an agency, after applying all customary tools of interpretation, the court shall
12 exercise any remaining doubt in favor of a reasonable interpretation that limits agency power and maximizes
13 individual liberty.

14 (3)(4) If a petition for review is filed challenging a licensing or permitting decision made pursuant to
15 Title 75 or Title 82 on the grounds of unconstitutionality, as provided in subsection (2)(a)(i), the petitioner shall
16 first establish the unconstitutionality of the underlying statute."

17 - END -