ISSUE NO. 23

The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 Adoption Section contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after print publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end of each Register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Secretary of State's Office, Administrative Rules Services, at (406) 444-2055.

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PROPOSAL NOTICE SECTION

BEFORE THE BOARD OF HOUSING
DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 8.111.602 pertaining to the low income housing tax credit program	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On January 11, 2011, the Board of Housing proposes to amend the above-stated rule.

2. The Board of Housing will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Commerce no later than 5:00 p.m. on December 23, 2010, to advise us of the nature of the accommodation that you need. Please contact Paula Loving, Board of Housing, Department of Commerce, 301 South Park Avenue, P.O. Box 200528, Helena, Montana, 59620-0528; telephone (406) 841-2840; fax (406) 841-2841; TDD (406) 841-2702; or e-mail ploving@mt.gov.

3. The rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

8.111.602 DEFINITIONS

(1) and (2) remain the same.

(3) "QAP" means the "Low Income Housing Qualified Allocation Plan~~ 2010",~~ 2011", as amended ~~December 12, 2009,~~ November 15, 2010, which sets forth the selection criteria used by the board for determining housing priorities and the allocation of tax credits for calendar year ~~2010~~ 2011, copies of which may be obtained by contacting the Board of Housing by mail at P.O. Box 200528, Helena, MT 59620-0528, by telephone at (406) 841-2845 or (406) 841-2838, or at the board's web site www.housing.mt.gov.

(4) remains the same.

AUTH: 90-6-106, MCA
IMP: 90-6-104, MCA

REASON: The Board of Housing is proposing the amendment to the rule to amend the year in which the plans are to be implemented.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Gerald Watne, Board of Housing, Department of Commerce, 301 South Park Avenue, P.O. Box 200528, Helena,

Montana, 59620-0528; telephone (406) 841-2838; fax (406) 841-2841; or e-mail gewatne@mt.gov, and must be received no later than 5:00 p.m., January 6, 2011.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to Gerald Watne at the above address no later than 5:00 p.m., January 6, 2011.

6. If the agency receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 25 persons based on the number of individuals who are interested in low income housing tax credits.

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of State strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

/s/ G. MARTIN TUTTLE
G. MARTIN TUTTLE
Rule Reviewer

/s/ DORE SCHWINDEN
DORE SCHWINDEN
Director
Department of Commerce

Certified to the Secretary of State November 29, 2010.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.10.103, 12.10.106, and 12.10.112 regarding shooting range development grants	))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On January 27, 2011, the Department of Fish, Wildlife and Parks (department) proposes to amend the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, please contact the department no later than December 23, 2010, to advise us of the nature of the accommodation that you need. Please contact Stella Cureton, Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-4594; fax (406) 444-7456; e-mail scureton@mt.gov.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

12.10.103 GRANT APPLICATION PROCEDURE (1) To apply for a shooting range development grant, an applicant must prepare and submit a completed application to the department's Conservation Education ~~Division~~ Bureau in Helena. For questions and assistance contact:

Department of Fish, Wildlife and Parks
Conservation Education ~~Division~~ Bureau
1420 East Sixth Avenue
P.O. Box 200701
Helena, MT 59620
Phone (406) 444-3188

(2) Applications ~~are reviewed throughout the biennium as long as funds are available~~ must be postmarked on or before May 1.

(3) If the applicant is a private club or organization, the applicant must submit a club or organization resolution that approves the application for financial assistance, the project proposal, the commitment to allow public and hunter education program use of the facilities, and certifies the applicant's ability to provide matching funds or in-kind contributions.

(4) Applicants receiving preliminary approval must enter into a shooting range development project agreement with the department before the department gives final approval and disburses grant funds. The agreement shall delineate the terms the applicant must abide by under applicable statutes, administrative rules, and state and department policy. Department final approval of an agreement is contingent upon the EA decision notice.

AUTH: 87-1-201, 87-1-279, MCA
IMP: 87-1-201, 87-1-276, 87-1-277, 87-1-278, 87-1-279, 87-2-105, MCA

12.10.106 INSPECTIONS (1) The department may conduct periodic on-site inspections.

(2) Project sites will be subject to inspection by the department for ten years following receipt of a shooting range development grant.

(3) Upon completion of the work, the applicant must submit ~~photographs~~ proof of the completed project.

AUTH 87-1-201, 87-1-279, MCA
IMP: 87-1-201, 87-1-276, 87-1-277, 87-1-278, 87-1-279, 87-2-105, MCA

12.10.112 GRANT PRIORITY (1) As long as funds are sufficient to allocate grants to all eligible applicants, grants will be ~~allocated~~ awarded ~~on a first come, first served basis~~ beginning ~~with~~ on July 1 of each ~~biennium~~ year.

(2) When the department receives more eligible applications for grants than funds are available, the department may include, but is not limited to, the following criteria to disperse funds and approve grants:

(a) needs of the community determined by distance to ~~existing~~ applicant shooting range~~s or~~ and annual club membership/range use;

(b) population of the county compared with numbers of shooting ranges allowing public use within the county;

(c) disabled accessibility ~~improved~~ to existing shooting range improved as a result of the proposed project;

(d) types of firearms and archery equipment that can be used at the proposed project;

(e) range safety improved as a result of the proposed project; and

(f) impacts to the human environment.

AUTH: 87-1-279, MCA
IMP: 87-1-277, 87-1-278, 87-1-279, MCA

REASONABLE NECESSITY: The department is proposing the rules regarding the shooting range grant applications to comply with the practices of the department. The department is proposing an annual submission date and award process instead of the biennial process. Applications will need to be postmarked on or before May 1 and distribution of awarded grant money will begin on July 1.

The department is proposing amendments to ARM 12.10.103 to reflect the changes to the department's organization adopted on June 30, 2009. The department is proposing amending ARM 12.10.106 to expand proof of completed work beyond just photographs.

4. Concerned persons may submit their data, views, or arguments concerning the proposed actions in writing to: Kurt Cunningham, Department of Fish,

Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; fax (406) 444-4952; or e-mail kcunningham@mt.gov, and must be received no later than January 8, 2011.

5. If persons who are directly affected by the proposed actions wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Jessica Fitzpatrick at the above address. A written request for a hearing must be received no later than January 8, 2011.

6. If the department receives requests for a public hearing on the proposed actions from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be greater than 25 people based on the number of people who utilize shooting ranges.

7. The Department of Fish, Wildlife and Parks maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the commission or department. Persons who wish to have their name added to the list shall make written request, which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the commission or department.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

/s/ Arthur Noonan	/s/ William A. Schenk
Arthur Noonan, Deputy Director	William A. Schenk
Department of Fish, Wildlife and Parks	Rule Reviewer

Certified to the Secretary of State November 29, 2010.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 32.3.220 and 32.3.401 pertaining to semen shipped into Montana and brucellosis definitions, and the adoption of new rules I through V pertaining to designated surveillance area and penalties	)))))))	AMENDED NOTICE OF PUBLIC HEARING AND EXTENSION OF COMMENT PERIOD ON PROPOSED AMENDMENT AND ADOPTION

1. On October 28, 2010 the Department of Livestock published MAR Notice No. 32-10-214 pertaining to the public hearing on the proposed amendment and adoption of the above-stated rules at page 2485 of the 2010 Montana Administrative Register, Issue Number 20.

2. The reason for the amended notice of public hearing and extension of comment period is the cancellation of the published public meeting (Twin Bridges November 23, 2010 at 3:00 p.m.) due to inclement weather and to allow more time for public comment following the new public hearing. On January 4, 2011 at 3:00 p.m., the Department of Livestock (department) will hold a public hearing at the fairgrounds in Twin Bridges, Montana, to consider the amendment and adoption of the above-stated rules. The new deadline for written comments is January 10, 2011.

3. The Department of Livestock will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Livestock no later than 5:00 p.m. on December 29, 2010 to advise us of the nature of the accommodation that you need. Please contact Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001; telephone: (406) 444-9321; TTD number: 1 (800) 253-4091; fax: (406) 444-4316; e-mail: cmackay@mt.gov.

4. Concerned persons 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: Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001, by faxing to (406) 444-1929, or by e-mailing to cmackay@mt.gov to be received no later than 5:00 p.m., January 10, 2011.

5. An electronic copy of this proposal notice is available through the department's web site at www.liv.mt.gov.

DEPARTMENT OF LIVESTOCK

BY: /s/ Christian Mackay
Christian Mackay
Executive Officer
Board of Livestock
Department of Livestock

BY: /s/ George H. Harris
George H. Harris
Rule Reviewer

Certified to the Secretary of State November 29, 2010.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of ARM 37.89.103, 37.89.114, 37.89.115, 37.89.125, 37.89.131, pertaining to provider reimbursement under the Mental Health Services Plan	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On December 29, 2010, at 1:30 p.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on December 22, 2010, to advise us of the nature of the accommodation that you need. Please contact Gwen Knight, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-9503; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

37.89.103 MENTAL HEALTH SERVICES PLAN, DEFINITIONS As used in this subchapter, unless expressly provided otherwise, the following definitions apply:

(1) "Adult" means an individual ~~that is not a youth as defined in this rule~~ 18 years of age or older.

(2) remains the same.

(3) "Correctional or detention facility" means:

(a) the Montana ~~s~~State ~~p~~Prison, including the Warm Springs correctional facilities;

(b) the Montana ~~w~~ Women's Prison ~~correctional center~~;

(c) through (7) remain the same.

(8) "Medically necessary service" is defined as provided in ARM 37.82.102.

(9) through (11) remain the same.

(12) "Mental ~~h~~Health ~~s~~Services ~~p~~Plan, (MHSP)" or "plan" means the Mental Health Services Program established in this subchapter.

(13) through (18) remain the same.

AUTH: 41-3-1103, 52-1-103, 53-2-201, 53-6-113, 53-6-131, 53-6-701, 53-21-703, MCA
IMP: 41-3-1103, 52-1-103, 53-1-601, 53-1-602, 53-1-603, 53-2-201, 53-6-101, 53-6-113, 53-6-116, 53-6-117, 53-6-131, 53-6-701, 53-6-705, 53-21-139, 53-21-201, 53-21-202, 53-21-701, 53-21-702, MCA

37.89.114 MENTAL HEALTH SERVICES PLAN, COVERED SERVICES

(1) Authorized medically necessary mental health services for a covered diagnosis are covered under the plan for members, except as provided in this subchapter, include:

(a) remains the same.

(b) ~~primary care providers, as defined in ARM 37.86.5001~~ physician services as defined in ARM 37.86.101 and mid-level practitioner services as defined in ARM 37.86.202, for screening and identifying psychiatric conditions and for medication management;

(c) a psychotropic drug formulary, as specified in ~~(5)~~ (4);

(d) remains the same.

(e) mental health center services provided by a licensed mental health center contracted with the department for services to adults enrolled in the plan.

~~(2) This subchapter is not intended to and does not establish an entitlement for any individual to be determined eligible for or to receive any services under the plan. The category of services, the particular provider of services, the duration of services and other specifications regarding the services to be covered for a particular member may be determined and may be restricted by the department or its designee based upon and consistent with the services medically necessary for the member, the availability of appropriate alternative services, the relative cost of services, the member's treatment plan objectives, the availability of funding, the degree of financial need, the degree of medical need and other relevant factors.~~

~~(a) If the department determines with respect to the plan that it is necessary to reduce, limit, suspend or terminate eligibility or benefits, reduce provider reimbursement rates, reduce or eliminate service coverage or otherwise limit services, benefits or provider participation, in a manner other than provided in this subchapter, the department may implement such changes by providing ten days advance notice published in Montana major daily newspapers with statewide circulation, and by providing:~~

~~(i) ten days advance written notice of any individual eligibility and coverage changes to affected members; and~~

~~(ii) ten days advance written notice of coverage, rate, and provider participation changes to affected providers.~~

(3) through (5) remain the same but are renumbered (2) through (4).

~~(6)~~ (5) Except as provided in ~~(6)(a)~~ (5)(a), the plan covers medically necessary mental health services for covered diagnoses for members who are residents of nursing facilities, regardless of whether the services are provided in the nursing facility.

(a) remains the same.

(7) through (8)(c) remain the same but are renumbered (6) through (7)(c).

~~(9)~~ (8) A member who is an inmate in or incarcerated in a correctional or detention facility is not entitled to services under the plan, except as specifically provided in these rules.

(a) The plan covers discharge planning services in relation to a covered diagnosis prior to release from a correctional or detention facility for a member who is:

(i) and (ii) remain the same.

(iii) a forensic patient~~, as specified in (6)(a),~~ admitted to the Montana state hospital.

(b) and (c) remain the same.

~~(10)~~ (9) This subchapter is not intended to and does not establish an entitlement for any individual to be determined eligible for or to receive services under the plan. ~~The department may limit services, rates, eligibility or the number of persons determined eligible under the plan based upon such factors as availability of funding, the degree of financial need, the degree of medical need or other factors.~~ The category of services, the particular provider of services, the duration of services, and other specifications regarding the services to be covered for a particular member may be determined and may be restricted by the department or its designee based upon and consistent with the services medically necessary for the member, the availability of appropriate alternative services, the relative cost of services, the member's treatment plan objectives, the availability of funding, the degree of financial need, and the degree of medical need.

(a) through (a)(ii) remain the same.

AUTH: 41-3-1103, 52-1-103, 52-2-603, 53-2-201, 53-6-113, 53-6-131, 53-6-706, 53-21-703, MCA
IMP: 41-3-1103, 52-1-103, 52-2-603, 53-1-405, 53-1-601, 53-1-602, 53-1-603, 53-2-201, 53-6-101, 53-6-113, 53-6-116, 53-6-701, 53-6-705, 53-6-706, 53-21-139, 53-21-202, 53-21-701, 53-21-702, MCA

37.89.115 MENTAL HEALTH SERVICES PLAN, PROVIDER PARTICIPATION (1) through (1)(b) remain the same.

(2) Providers in the following categories may request enrollment in the plan:

(a) and (b) remain the same.

(c) ~~primary care providers, as defined in ARM 37.86.5001(25)~~ physicians;

(d) mid-level practitioners as defined in ARM 37.86.202);

(d) through (i) remain the same but are renumbered (e) through (j).

(3) through (3)(c) remain the same.

(4) The provisions of ARM Title 37, chapter 85, subchapter 4 and other Medicaid program laws, rules, and regulations regarding particular categories of service apply to participating providers and the services provided under the plan, except as specifically provided in this subchapter or the provider agreement.

(a) through (b) remain the same.

(c) The department may collect from a provider any overpayment under the plan as provided with respect to Medicaid overpayments in ARM 37.85.406(9) through (10)(b). The department may recover overpayments by withholding or offset as provided in ARM 37.85.513~~(1)~~.

(i) through (d)(iii) remain the same.

(5) An enrolled provider has no right to an administrative review or fair hearing as provided in ARM ~~37.5.304, et seq.~~ Title 37, chapter 5, 37.85.411 or any other department rule for:

(a) through (7) remain the same.

AUTH: 2-4-201, 41-3-1103, 53-2-201, 53-6-113, 53-21-703, MCA
IMP: 2-4-201, 41-3-1103, 53-1-601, 53-1-602, 53-1-603, 53-2-201, 53-6-113, 53-6-116, 53-6-701, 53-6-705, 53-21-202, 53-21-701, 53-21-702, MCA

37.89.125 MENTAL HEALTH SERVICES PLAN, PROVIDER REIMBURSEMENT (1) through (1)(a)(i) remain the same.

(2) Provider claims for mental health services provided by the following provider types to members under the plan must be submitted to the department's Medicaid Management Information System (MMIS) contractor according to requirements set forth in ARM 37.85.406. Payments will be made to the provider through the department's Medicaid MMIS contractor~~.~~:

(a) psychiatrists;

(b) physicians;

(c) mid-level practitioners;

(d) outpatient pharmacies;

(e) labs; and

(f) rural health clinics and federally qualified health clinics.

(3) Licensed mental health centers contracted with the department for mental health center services to adults enrolled in the plan will be reimbursed according to the provisions of their contract.

(3) through (4) remain the same but are renumbered (4) through (5).

AUTH: 53-2-201, 53-6-113, 53-21-703, MCA
IMP: 53-1-601, 53-2-201, 53-6-101, 53-6-116, 53-6-701, 53-6-705, 53-21-202, 53-21-702, MCA

37.89.131 MENTAL HEALTH SERVICES PLAN, MEMBER NOTICE, GRIEVANCE AND RECONSIDERATION AND RIGHTS (1) through (2) remain the same.

(3) A member has the right to any applicable grievance processes provided by the department's review designee referred to in ARM 37.89.118 and, following exhaustion of such grievance processes, an informal reconsideration as provided in ARM ~~37.5.318(5)(a)~~ 37.5.311 regarding a denial or termination of plan eligibility, a denial of authorization or coverage of services, or a determination that a member is liable to the department as provided in ARM ~~37.89.106~~ 37.82.207 based upon a misrepresentation or failure to provide notification of changes in income or family.

(4) through (10) remain the same.

AUTH: 2-4-201, 53-2-201, 53-6-113, 53-6-706, 53-21-703, MCA
IMP: 2-4-201, 53-1-601, 53-2-201, 53-6-101, 53-6-113, 53-6-116, 53-6-706, 53-21-202, 53-21-701, 53-21-703, MCA

4. The Department of Public Health and Human Services (the department) is proposing amendments to ARM 37.89.103, 37.89.114, 37.89.115, 37.89.125, and 37.89.131 pertaining to provider reimbursement under the Mental Health Services Plan. The proposed amendments are for the purpose of altering the reimbursement methodology for the Mental Health Services Plan (MHSP). If adopted, the amendments will allow the department to establish a fixed amount contract with licensed mental health centers that provide services to adults with severe disabling mental illnesses who have been determined eligible for the plan. Reimbursement to providers who have prescriptive authority or who provide medication management will continue to be reimbursed on a fee-for-service basis. The provider types that are not affected by these amendments include physicians, psychiatrists, mid-level practitioners, labs, rural health clinics, and federally qualified clinics.

The proposed amendments do not alter the provider network and does not adversely affect the consumer's freedom of choice that is currently in place.

Additional amendments to existing rules are proposed that modify language in existing rule for clarification or accuracy.

The proposed changes are described as follows:

ARM 37.89.103

The department is proposing the amendment of ARM 37.89.103(1) to remove language referring to another definition in the same rule that was removed earlier, and inserts language that provides a definition of "adult".

ARM 37.89.103(12) proposes that the term "Mental Health Services Plan" be accurately identified and adds the acronym "MHSP" which is used throughout the rule to the definition.

ARM 37.89.114

The department proposes an amendment to ARM 37.89.114(1) to provide clarification of physician services and mid-level practitioner services included under the plan; and to amend the language for mental health center services to limit those services to those provided by a licensed mental health center that is contracted with the department. This change is necessary because, under the current proposed amendments, mental health center services will be reimbursed under a contract methodology rather than the existing fee-for-service arrangement.

Language in ARM 37.89.114(2) was repeated in ARM 37.89.114(10) and the proposed amendment removes the redundancy.

In ARM 37.89.114(8)(a)(iii) language is deleted because the reference to an earlier portion of the rule is not accurate.

ARM 37.89.115

The proposed amendment to ARM 37.89.115 includes providers who may request enrollment and specifically identifies physicians and mid-level practitioners as an alternative to the broad category of primary care providers.

ARM 37.89.125

The proposed amendment to ARM 37.89.125 identifies providers that will continue to submit claims through the department's Medicaid MMIS contractor. For these provider types, reimbursement is unchanged. The proposed amendment to ARM 37.89.125 states that licensed mental health centers who are contracted with the department for services to adults enrolled in the plan will be reimbursed according to the provisions of their contract with the department. This represents a change in reimbursement methodology for this provider type.

ARM 37.89.131

The proposed amendments to ARM 37.89.131 change the references elsewhere in ARM for the grievance process. The references that are currently in place are not correct.

Statement of Necessity

The proposed changes are necessary to ensure the fiscal sustainability of the Mental Health Services Plan. Prior to February 2008, all MHSP services were provided through contracts with four community mental health centers. In order to improve access to services, the department expanded the provider network to include any willing provider with prescriptive authority and labs to submit claims for reimbursement. In July 2008, fee-for-service reimbursement was expanded to any licensed mental health center. Although MHSP operated within its appropriation for fiscal year (FY) 2009, growth and expenditures were projected to exceed the appropriation for FY 2010. The department implemented cost-saving measures in January 2010, but the actions were not sufficient to bring the program into fiscal alignment. By the end of FY 2010, the claims expenditures for MHSP exceeded the appropriation by $1.4 million. As an alternative to drastically reducing services or being forced to terminate benefits, the department has chosen to return to a contractual arrangement with mental health centers. This change will allow the department to operate MHSP with fixed expenditures for the remainder of FY 2011 and into the future.

The proposed amendments were developed after a historical review of approaches that had been utilized in the past to address funding shortfalls in the MHSP. Rather than return to the contracted program that was in place between 2003 and 2008, the department wanted to preserve the ability to reimburse individual providers who were available to assist enrolled beneficiaries with timely access to medications

prescribed for the treatment of symptoms of mental illness. The remaining provider type in the MHSP provider network was licensed mental health centers and the department is proposing that this group be reimbursed with fixed-price contracts. If the department is unable to implement this change in reimbursement methodology, it is unlikely that the program's appropriation is sufficient to continue services to the end of the fiscal year. The department is unable to make up for the shortfall during FY 2011 because of other budget considerations.

Fiscal Impact

The proposed amendments will decrease the monetary amount that will be reimbursed to licensed mental health centers because the contracts that would be established under this amendment will be based upon the legislative appropriation, not upon a fee-for-service reimbursement methodology.

The cumulative amount of the fiscal impact is estimated to be a decrease of $1.4 million based upon the billable expenditures for FY 2010.

This decrease will impact eight licensed mental health centers in Montana that currently provide services to individuals enrolled in the Mental Health Services Plan.

5. Concerned persons 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: Gwen Knight, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., January 6, 2011.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its

web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

/s/ John Koch
Rule Reviewer

/s/ Anna Whiting Sorrell
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State November 29, 2010.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of ARM 37.86.3515 pertaining to case management services for adults with severe disabling mental illness, reimbursement	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On December 29, 2010, at 10:30 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on December 17, 2010, to advise us of the nature of the accommodation that you need. Please contact Gwen Knight, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-9503; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

3. The rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

37.86.3515 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, REIMBURSEMENT (1) Case management services for adults with severe disabling mental illness will be reimbursed on a fee per unit of service basis as follows. For purposes of this rule, a unit of service is a period of 15 minutes.

~~(a) The department will pay the lower of the following for case management services:~~

~~(i) the provider's actual submitted charge for services; or~~

~~(ii) the amount specified in the department's Medicaid fee schedule~~

(2) The department adopts the method of establishing rates for mental health case manager providers approved by the Centers for Medicare and Medicaid Services (CMS) on February 1, 2011. That method is:

(a) The department determined the total costs of providing case management services by using case management provider reports of the most recent wage costs, benefit costs, and other case management costs.

(b) The department used actual time units billed from the providers of the most complete fiscal year.

(c) The department determined yearly wage cost per case manager full-time employee (FTE) added to the yearly benefit costs per case manager FTE, and yearly other costs per FTE. The total costs are divided by the average units billed per FTE. This final calculation will be the rate per 15-minute unit.

(d) The department will update the rate setting methodology every three years or whenever significant changes in services occur.

(3) The department adopts and incorporates by reference the department's fee schedule dated February 1, 2011 which sets forth the reimbursement rates for case management. A copy of the fee schedule is posted at the Montana Medicaid provider web site at http://medicaidprovider.hhs.mt.gov. A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Addictive and Mental Disorders Division, PO Box 202905, Helena, MT 59620-2905.

(2) remains the same but is renumbered (4).

AUTH: 53-2-201, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-113, MCA

4. The Department of Public Health and Human Services (the department) is proposing the amendment of ARM 37.86.3515 pertaining to the method for setting the rates for case management services for adults with severe disabling mental illness. Case management services is defined as "services furnished to assist Medicaid and mental health services plan eligible individuals who reside in a community setting, or are transitioning to a community setting, in gaining access to needed medical, social, educational, and other services".

The proposed rule amendment to ARM 37.86.3515 states the new method for setting Montana Medicaid provider rate and adds the effective date of the most recent Medicaid Fee Schedule for reimbursement. The reference to the Medicaid Fee Schedule for reimbursement is clarified by the addition of the effective date of that fee schedule. The fee schedule's effective date will be updated in administrative rule prior to future case management provider rate changes.

The proposed amendment to ARM 37.86.3515 is necessary to state a specific reimbursement rate for mental health case management services.

Fiscal Impact

The providers for case management services for adults with severe disabling mental illness participated in the Cost Study and provided the data needed to complete the rate determination. The method of establishing rates for mental health case management, as approved by the Centers for Medicare and Medicaid Services (CMS), determined a reimbursement rate of $16.83 per unit which is lower than the current reimbursement rate. The current rate of reimbursement rate for case manager services is $18.91 per unit. It is necessary to lower the rate to reflect the actual cost of providing case management services.

5. Concerned persons 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: Gwen Knight, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., January 6, 2011.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

/s/ John Koch
Rule Reviewer

/s/ Anna Whiting Sorrell
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State November 29, 2010.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 4.14.303, relating to Montana Agricultural Loan Authority	)))	NOTICE OF REPEAL

TO: All Concerned Persons

1. On October 28, 2010 the Department of Agriculture published MAR Notice No. 4-14-198 pertaining to the public hearing on the repeal of the above-stated rule at page 2424 of the 2010 Montana Administrative Register, Issue Number 20.

2. The department has repealed the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ Cort Jensen
Cort Jensen
Rule Reviewer

/s/ Ron de Yong
Ron de Yong
Director
Department of Agriculture

Certified to the Secretary of State November 29, 2010.

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 8.99.901, 8.99.904, 8.99.908, and 8.99.912 pertaining to the award of grants and loans under the Big Sky Economic Development Program	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 14, 2010, the Department of Commerce published MAR Notice No. 8-99-85 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 2281 of the 2010 Montana Administrative Register, Issue Number 19.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ G. MARTIN TUTTLE
G. MARTIN TUTTLE
Rule Reviewer

/s/ DORE SCHWINDEN
DORE SCHWINDEN
Director
Department of Commerce

Certified to the Secretary of State November 29, 2010.

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.6.2201, 12.6.2203, 12.6.2208, 12.6.2210, and 12.6.2215 and the adoption of NEW RULE I regarding exotic species	)))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On July 29, 2010 the Fish, Wildlife and Parks Commission (commission) published MAR Notice No. 12-364 pertaining to the public hearing on the proposed amendment and adoption of the above-stated rules at page 1643 of the 2010 Montana Administrative Register, Issue Number 14.

2. On September 9, 2010 the commission published amended MAR Notice No. 12-364 and extension of comment period on page 1928 of the 2010 Montana Administrative Register, Issue Number 17.

3. The commission has amended ARM 12.6.2201, 12.6.2203, 12.6.2208, 12.6.2210, and 12.6.2215 and adopted New Rule I [ARM 12.6.2204] as proposed.

4. The commission has thoroughly considered the comments and testimony received. No comments were received for the proposed controlled classification of the Barbary Falcon and the proposed prohibited classification of the Hyaenidae family. Forty-seven comments were received on the proposed classification of coho salmon. A summary of the comments received and the commission's responses are as follows:

Comment 1: One person opposed the listing of coho salmon as controlled. This person stated that they preferred coho salmon be classified as a prohibited species because the importation of coho presents an unacceptable risk to the state's wild and hatchery stocks. They also stated that if coho salmon get classified as a controlled species, the rule should clarify that no live fish are to be moved into or out of the state or transferred between facilities without strict penalties.

Response 1: The commission adopted New Rule I [ARM 12.6.2204] prohibiting the transfer of live fish into or out of the facility in order to minimize the risk to Montana's wild and hatchery fish stocks.

Comment 2: One person supported restricting the importation of coho salmon to eggs. Limiting the importation of coho salmon to eggs only would be one of the most important control measures to minimize disease risks while still allowing the rearing of coho salmon in Montana.

Response 2: The commission appreciates the comment and agrees that disease risks are minimized by restricting the transportation of live fish into or out of the facility.

Comments 3: Ten people including a county commissioner, mayor, five officers and members of Hutterite colonies, local businesses, and individuals are in support of the classification of coho salmon as controlled stating that there is no significant impact to the environment and it will promote the local economy.

Response 3: The commission appreciates the interest in this rulemaking process.

Comments 4: Thirty-five people including three county commissioners, a district conservationist, Director of the Chamber of Commerce, eight officers and members of the Hutterite colonies, local businesses, and individuals are in general support of the fish farm operation stating that it will diversify and boost the agricultural-based economy.

Response 4: The commission appreciates and respects the comments submitted and has considered the communities' support of the coho salmon fish farming project when determining this final action.

/s/ Bob Ream	/s/ Rebecca Jakes Dockter
Bob Ream	Rebecca Jakes Dockter
Chairman	Rule Reviewer
Fish, Wildlife and Parks Commission	Department of Fish, Wildlife and Parks

Certified to the Secretary of State November 29, 2010

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 18.9.102, 18.9.108, 18.9.109, 18.9.112, 18.9.117, 18.9.205, 18.9.303, 18.10.104, 18.10.302, 18.10.314, 18.10.322, 18.10.323, 18.10.324 pertaining to licensed distributors and special fuel users and the repeal of ARM 18.9.106, 18.9.107, 18.10.102 pertaining to invoice errors, multi-distributor invoice requirements, and special fuel users	))))))))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On October 28, 2010 the Department of Transportation published MAR Notice No. 18-126 pertaining to the proposed amendment and repeal of the above-stated rules at page 2454 of the 2010 Montana Administrative Register, Issue Number 20.

2. The department has amended and repealed the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ Carol Grell Morris
Carol Grell Morris
Rule Reviewer

/s/ Jim Lynch
Jim Lynch
Director
Department of Transportation

Certified to the Secretary of State November 29, 2010.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 18.9.111, 18.9.401, 18.9.402, 18.9.403, 18.9.501, 18.9.601, 18.9.602, 18.9.603, 18.9.605, 18.9.606, 18.9.608, and 18.9.704 pertaining to gasohol and alcohol blended fuel	))))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 28, 2010 the Department of Transportation published MAR Notice No. 18-129 pertaining to the proposed amendment of the above-stated rules at page 2460 of the 2010 Montana Administrative Register, Issue Number 20.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ Carol Grell Morris
Carol Grell Morris
Rule Reviewer

/s/ Jim Lynch
Jim Lynch
Director
Department of Transportation

Certified to the Secretary of State November 29, 2010.

BEFORE THE BOARD OF PARDONS AND PAROLE
DEPARTMENT OF CORRECTIONS
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULES I through IV, the amendment of ARM 20.25.101, 20.25.102, 20.25.201, 20.25.202, 20.25.401, 20.25.501, 20.25.504, 20.25.505, 20.25.601, 20.25.701, 20.25.702, 20.25.704, 20.25.705, 20.25.801, 20.25.901, 20.25.901A, 20.25.902, 20.25.903, 20.25.904, the amendment and transfer of ARM 20.25.302, 20.25.302A and the repeal of ARM 20.25.301, 20.25.303, 20.25.304, 20.25.502, 20.25.602, 20.25.603, 20.25.703, and 20.25.802 pertaining to the Board of Pardons and Parole	))	NOTICE OF ADOPTION, AMENDMENT, AMENDMENT AND TRANSFER, AND REPEAL

TO: All Concerned Persons

1. The Board of Pardons and Parole has adopted, amended, amended and transferred, and repealed the above-stated rules.

2. The new rules provide as follows:

NEW RULE I (20.25.103) DISSEMINATION OF INFORMATION (1) As a public agency, all board records including any audio/video recordings are public. All board records are subject to disclosure except in cases in which the individual right of privacy clearly exceeds the merits of public disclosure, and in cases in which statute makes the record confidential.

(2) An individual will have a right of privacy if the person has a reasonable expectation of privacy in the material and society is willing to recognize that expectation as reasonable.

(3) The courts have ruled that the rights society recognizes as reasonable include but are not limited to:

(a) information that, if released, would create a risk of physical harm to a person;

(b) information that, if released, would create a safety or security risk to a correctional facility;

(c) personal medical information; and

(d) personal personnel information.

(4) When someone requests board records, the board's executive director or designee will conduct an analysis of the requested material and determine whether,

in the executive director's opinion, any information contains an individual privacy interest that clearly exceeds the merits of public disclosure.

(5) The executive director or the board may assert a claim of individual privacy on behalf of an individual if the board executive director believes requested information contains a reasonable privacy interest that exceeds the merits of public disclosure. The board executive director will attempt to notify the individual to advise the individual of the request for information and ascertain if the individual agrees with or objects to the release of the information. If notification is not possible, the board executive director will independently weigh the privacy interest against the public's right to know to determine if the board should release the information.

(6) The board may not withhold from public scrutiny any more information than is required to protect an individual privacy interest.

(7) Whenever a crime victim asserts an individual privacy interest, the board may not disseminate to the public the name, address, telephone number, or place of employment of the victim or a member of the victim's family unless otherwise required by law.

(8) The executive director or the board may not disseminate to the public any information directly or indirectly identifying the victim of the following sex crimes: 45-5-502 (Sexual Assault), 45-5-503 (Sexual Intercourse Without Consent), 45-5-504 (Indecent Exposure), or 45-5-507 (Incest), MCA.

(9) The executive director or the board will disseminate research findings to all appropriate parties. The executive director or designee must approve all dissemination of research data. All research dissemination must consider the potential effect of the security and operation of correctional facilities, the public, and the operational integrity of the board. Privacy interests of offenders and other parties for cases under study will be ensured when research projects are considered.

(10) When releasing board records the executive director or the board will consult with board legal counsel when necessary.

(11) The board may charge reasonable copying costs, including an administration fee, for all requested copies of board documents, including an individual offender's parole file.

(12) An offender may request to view his/her individual parole file by making a request in writing to the board executive director. Board staff will provide the offender an opportunity to inspect the file except for information deemed confidential.

AUTH: 46-23-218, MCA
IMP: 2-6-102, 44-5-311, 46-18-243, 46-23-218, MCA

<u>NEW RULE II (20.25.305) ELIGIBILITY</u> (1) An offender in prison or the state hospital, or an offender whom the prison has placed in prerelease, is eligible for parole unless the offender is under a sentence of death, the sentencing court has made the offender ineligible for parole, or the offender is ineligible for parole by operation of statute. The department shall receive parole eligibility dates for eligible offenders as calculated by the department pursuant to statutory and court-imposed criteria.

(a) An offender committed to the department and placed in prison temporarily for assessment or medical treatment is not eligible for parole.

(b) An offender against whom a detainer or hold is filed is eligible for parole.

(c) An offender committed to the director of the Department of Public Health and Human Services pursuant to 46-14-312, MCA is only eligible for parole when the offender is placed at the Montana State Hospital or in a prison.

(2) If the offender receives a consecutive sentence after reception at prison, but before the board makes an initial ruling on the offender's parole on the original sentence, parole eligibility is determined on the statutory or court-imposed criteria based on the aggregate sum of the original sentence and the consecutive sentence.

(3) If the offender receives a consecutive sentence after reception at prison and after the board makes an initial ruling on the offender's parole on the original sentence, the offender will not be eligible for parole on the consecutive sentence until the offender discharges the original sentence, unless the board orders otherwise. However, the offender remains eligible for parole consideration in regard to the original sentence. The board may allow commencement of the consecutive term for purposes of calculating parole eligibility. If the board allows commencement of the consecutive term, it only changes the parole eligibility calculation, but does not shorten the consecutive term.

(4) An offender who waives his/her parole hearing will have a mandatory parole hearing within six months or as close to six months as scheduling permits. The hearing month will be automatically set and the offender will come before a regularly scheduled hearing panel, unless the offender requests a hearing prior to this date and provides at least 30 days written notice to the board. The board, through its staff, will review all waivers for legitimacy and may accept or reject any waiver. An offender may voluntarily waive two consecutive parole hearings for up to six months each time.

(5) Unless the board otherwise orders, before an offender in a community-based program appears before the board, the offender must have at least 90 days free of severe (Class 100) or major (Class 200) disciplinary violations. An offender in a secure facility must have 120 days free of major disciplinary violations.

(6) Unless the board otherwise orders, an offender incarcerated at a prison must be classified and have been living in an assigned housing unit for a minimum of 60 days before the offender may appear for parole consideration.

AUTH: 46-23-218, MCA
IMP: 46-23-201, 46-23-218, MCA

NEW RULE III (20.25.506) FURLOUGH (1) When a board hearing panel has granted an offender a parole, it may grant the offender a furlough for the sole purpose of finding employment, making suitable living arrangements, or fulfilling any other board condition that is difficult to fulfill while incarcerated.

(2) Furlough is for ten days, but board staff may grant an extension of up to another consecutive ten-day period to allow the offender to fulfill the furlough purposes.

(3) While on furlough the offender remains in the legal custody of the department and is subject to the department's furlough program rules, standard parole conditions, and any other special conditions recited by the hearing panel.

(4) The offender may be immediately returned to the institution from which the furlough was granted if the offender violates the furlough program rules, any of the standard parole rules, any of the board's special conditions, or if the offender is unable to fulfill the employment, housing, or other furlough conditions.

(5) If the offender violates any of the conditions listed in (4) it is considered a major disciplinary violation and is handled in accordance with the department's disciplinary policy and ARM 20.25.601 concerning rescission.

(6) If the offender successfully fulfills the furlough conditions, the offender must sign the rules of parole and the board will issue a parole certificate. The offender is not officially on parole until the rules are signed and the certificate is issued.

AUTH: 46-23-218, MCA
IMP: 46-23-215, MCA

NEW RULE IV (20.25.402) ADMINISTRATIVE REVIEW, REAPPEARANCE, AND EARLY REVIEW (1) After the initial parole hearing, if the hearing panel does not grant a parole it may set a date on which the offender may reappear for a parole hearing. If the hearing panel does not set a reappearance date, an administrative review of the offender's case will be conducted at intervals as outlined below:

(a) The purpose of administrative review is to consider any significant developments or changes in the offender's status that may have occurred subsequent to the last parole consideration; it is not a hearing, but is a review based on the record.

(b) For the administrative review, board staff will submit a report outlining the offender's developments, including the offender's progress and conduct since the last consideration and present the information to the board.

(2) Unless the offender presents good cause for earlier administrative review pursuant to (5), the reviews will be conducted according to the following schedule:

(a) If the offender's prison discharge date is less than five years away, the offender's case will be reviewed no less than annually.

(b) If the offender's prison discharge date is between five and ten years away, the offender's case will be reviewed no less than every three years.

(c) If the offender's prison discharge date is ten or more years away, the offender's case will be reviewed no less than every eight years.

(3) Following an administrative review, the hearing panel in its sole discretion may order no change in the previous parole decision, may schedule the offender to reappear before a hearing panel for a parole hearing, may modify or rescind a previously granted parole, or may grant a parole. If the panel grants a parole, board staff must inform any registered victim.

(4) A hearing panel may not grant a parole upon administrative review to a sexual or violent offender, an offender with a history of felony sexual or violent convictions, or an offender for whom criminal justice authorities or victims have previously objected to parole.

(5) Whenever the scheduled administrative review is over one year away, the offender may submit to board staff a request for early administrative review if the offender can show new information or a change in circumstances that would affect suitability for parole.

(a) The passage of time alone is not considered new information.

(b) The offender may not submit more than one request every six months for earlier administrative review.

(c) Staff will screen the request and determine if one of the following criteria is met:

(i) a change in the offender's status since the last administrative review that would demonstrate that the offender is able and willing to fulfill the obligations of a law-abiding citizen;

(ii) the offender has maintained good conduct and if not, the nature and severity of the misconduct is negligible;

(iii) the offender has completed treatment or educational programs;

(iv) the offender has fulfilled other conditions ordered by the board or has been unable to fulfill them due to factors outside the offender's control;

(v) the board's previous disposition was based on erroneous information or misinformation;

(vi) the offender has developed a suitable release plan or there has been a substantial change in the offender's previous release plan to warrant reconsideration;

(vii) the victim or community no longer objects to the offender's release; or

(viii) correctional staff has made a recommendation for earlier administrative review.

(d) If board staff determines the offender meets one of the above-listed criteria, it will refer the request for early review to the board chair or designee to determine whether to schedule an early review. Board staff may not refer an offender for early administrative review if the offender has been involved in multiple or major misconduct since the board's last hearing or administrative review or the board has specifically prohibited early administrative review.

(e) Board staff will notify the offender in writing if early review has been granted or denied. If the request is denied the notice to the offender will state the reasons for the denial. If the request is granted, the notice will state the date on which the review will be conducted.

AUTH: 46-23-218, MCA
IMP: 46-23-218, 46-24-212, MCA

3. The amended rules provide as follows:

20.25.101 ORGANIZATION OF THE BOARD (1) The board is a quasi-judicial body and is administratively attached to the Department of Corrections. The board consists of seven members who are appointed by the governor; three members and four auxiliary members. The board shall administer executive clemency and parole processes and procedures, and ensure the effective

application of and improvements to the clemency and release system as well as of the laws upon which they are based.

(2) The board chair is specifically designated by the governor and the vice-chair is designated by a majority vote of the board. The vice-chair assumes the duties of the chair when the chair is not present. Individual board members shall, prior to hearing a case, disclose any conflict of interest and recuse themselves in cases in which it has been determined that a conflict of interest is clearly identified.

(3) The board's main office is located in Deer Lodge, Montana.

(4) The board, by majority vote of all members, hires an executive director, who oversees the day to day financial, administrative, and personnel policies and procedures of the board. The executive director also coordinates board member, hearing panel, and board staff work schedules, and fulfills other duties as assigned by the board chair. The executive director hires board staff as deemed necessary and as provided by legislative appropriation. Board administrative personnel represent the board in official board actions. All board personnel are state employees with all the benefits and protections afforded state employees.

(5) The board will meet at least monthly to conduct hearings and transact its business. The board may conduct meetings and hearings at any location suitable for that purpose.

(6) The board chair or designee, in consultation with the board members:

(a) assigns hearing panels to conduct parole hearings, revocation hearings, rescission hearings, administrative parole reviews, reconsideration of previous parole decisions, and to make final decisions and recommendations in matters of executive clemency;

(b) requests out-of-state adult correctional releasing authorities to conduct courtesy hearings on behalf of the board; and

(c) designates presiding hearing panel members.

(7) The vote of at least a majority of all members of the board is required to adopt any change in established rule, policy, and/or procedure, unless otherwise provided by law.

(8) The board will set hearing and meeting dates suitably in advance and publish them on the board's official web site, but the dates are subject to change.

(9) The board executive director will maintain, review, and update at least annually a written description and an organizational chart that accurately reflects the structure of authority, responsibility, and accountability within the board.

AUTH: 46-23-218, MCA
IMP: 2-15-121, 2-15-124, 2-15-2302, 46-23-104, MCA

20.25.102 BOARD TRAINING (1) All board members shall receive training that addresses the following American Indian issues:

(a) the cultures and problems of Montana tribes and reservations;

(b) statistical and comparative data regarding correctional populations;

(c) distinctions between urban and reservation populations; and

(d) federal, state, and local community services available to paroled or discharged American Indian offenders.

(2) A board member who has not received training regarding American Indian issues may not hear or decide American Indian cases until the member has completed the training.

(3) Board members may attend nationally recognized correctional training or a comparable program for parole board members.

(4) Before participating on a hearing panel, a new board member must receive orientation from board staff regarding:

(a) state and federal law and rules pertinent to board operations;

(b) offender pathology, treatment, and supervision; and

(c) Department of Corrections' organization, programs, and policy.

(5) The executive director in consultation with the board chair will develop, evaluate, and update training curricula annually based on the board's needs.

AUTH: 46-23-218, MCA
IMP: 2-15-2302, 46-23-218, MCA

20.25.201 OBJECTIVES (1) The principal objective of the board is to affect the release from confinement of appropriate eligible offenders before the completion of the full term of commitment while still fully protecting society. The board may only grant a release when, in the board's opinion, there is a reasonable probability it can release the offender without detriment to the offender or the community. When the board grants a release the offender is subject to the conditions imposed by the board and the supervision authorized by governing statutes, rules, and policies of the department. The board will conduct business fairly and consistently and base decisions on public safety concerns, successful offender reentry, and sensible use of state resources.

(2) An offender must serve the statutorily or court-imposed amount of time before the board may consider the offender for release. Release before the offender serves the entire sentence is a privilege, not a right. The board may only grant a release for the best interest of society and when the board believes the offender is able and willing to fulfill the obligations of a law-abiding citizen and not as an award of clemency or a reduction of sentence or pardon.

(3) The department, after it utilizes its screening process, may transfer an offender from prison to prerelease before the offender is eligible for parole. In the case of such transfer, when the offender is eligible for parole, the board, after review of the entire offender file or summary, will conduct an impartial hearing.

(4) Board members and designated staff will participate in federal, state, and regional criminal justice planning efforts and meet periodically with relevant criminal justice personnel.

AUTH: 46-23-218, MCA
IMP: 46-23-201, 46-23-218, MCA

20.25.202 DEFINITIONS For the purposes of this chapter, these definitions apply:

(1) "Board" means the Board of Pardons and Parole as authorized in 2-15-2302, MCA, the board staff and the board's duly constituted hearing panels.

(2) "Chair" means the person appointed by the governor to serve as the presiding officer of the board.

(3) "Controlling sentence" means the sentence(s) that, based on a district court judgment, requires the longest period of time served to parole eligibility.

(4) "Dead time" means the time an offender is not serving his/her sentence of incarceration either because the offender has absconded or is serving another sentence of incarceration.

(5) "Department" means the Department of Corrections as authorized in 2-15-230, MCA.

(6) "Furlough" means temporary absence from confinement for the purposes authorized by the board.

(7) "Hearing" means the personal appearance of an offender before the board for release consideration, executive clemency, or revocation.

(8) "Hearing panel" means two or three board members assigned by the chair to hear and decide cases of parole, revocation, rescission, administrative review, and clemency.

(9) "Offender" means any person sentenced by a state district court to a term of confinement in a state correctional institution or committed to the department.

(10) "Parole" means the release of an offender into the community prior to the completion of sentence subject to the orders of the board and the supervision of the department.

(11) "Parolee" means a person whom the board has granted parole, who has signed the rules of parole and been given a parole certificate, and whose parole has not been revoked.

(12) "Parole certificate" means the document signed by the board chairman and executive director authorizing the release from confinement to parole.

(13) "Parole eligibility" means the earliest possible date an offender may be released from confinement to parole supervision.

(14) "Prior conviction" means a sentence which the offender has completed.

(15) "Rescission" means an action of the board that annuls or voids a prior release decision.

(16) "Review" means the informal administrative process of considering the conduct and progress of an offender to determine if a reappearance or parole is desirable.

(17) "Rules" means the conditions, limitations, and restrictions upon which parole or furlough is based.

(18) "Sentence" means the penalty imposed by a court for a specific criminal offense.

(19) "Term" means the total period of time, minus applicable good time, that an offender was ordered to serve in prison or committed to the Department of Corrections or the Department of Public Health and Human Services for the commission of a criminal offense.

(20) "Victim" means a person who has suffered loss of property, bodily injury, or reasonable apprehension of bodily injury as a result of the commission of a criminal offense or a member of the immediate family of a person who was killed as a result of a crime.

AUTH: 46-23-218, MCA
IMP: 46-23-218, MCA

20.25.401 HEARING PROCEDURE (1) An eligible offender may apply and come before a board hearing panel or an out of state releasing authority for nonmedical parole consideration within two months of time fixed by law as calculated by the prison records department. During the parole hearing the hearing panel will consider all pertinent information regarding each eligible offender including:

(a) the circumstances of the offender's current offense and any other offenses the offender has committed;

(b) the offender's social history and criminal record;

(c) the offender's prison record including disciplinary conduct, work history, treatment programs, classification and placement, and adjustment to prison; and

(d) any physical or psychological reports done on the offender.

(2) The presiding board member shall conduct hearings informally and shall have discretion to allow or not allow any proposed testimony. Board staff shall make a record of all hearings.

(3) Interested persons who wish to appear before the board must:

(a) notify the board staff not less than ten working days prior to the regularly scheduled hearing; and

(b) inform the board staff of the reason they wish to appear before the board and the relationship of the person to the offender at whose hearing the person intends to appear.

(4) Interested persons may submit written comments about an offender's possible parole to board staff at any time before the hearing. The hearing panel will give interested persons' comments due consideration at the offender's hearing.

(5) A victim may present a statement concerning:

(a) the effects of the crime on the victim;

(b) the circumstances surrounding the crime; and

(c) the victim's opinion regarding whether the board should grant the offender parole.

(6) At the presiding hearing panel member's discretion, the victim's statement and testimony will be kept confidential if the presiding member finds the victim's privacy interest outweighs the public's right to know.

(7) The board shall consider the victim's statement along with the other information presented in determining whether to grant parole.

(8) The presiding hearing panel member may close a hearing to hear or consider confidential information.

(a) Information is confidential when the presiding member finds a person's privacy interest outweighs the public's right to know.

(b) When the hearing panel has finished hearing or discussing the confidential information, it shall reopen the meeting and complete the hearing in public.

(9) When the board denies an offender parole, it must give the offender written notification of the decision and include reason(s) for the decision and when the offender may reapply for parole consideration.

(10) The board will consider an eligible offender for parole release even if the offender does not submit an application for parole. The board will render a decision based on the written record and on the fact the offender did not apply for parole.

(11) The board may conduct hearings via two-way interactive video teleconferencing and may conduct administrative reviews by means of telephone conference.

(12) Board hearings are open to the public; however, all persons attending hearings that take place in a secure facility must gain approval to enter the facility from the facility's chief of security or designee as required by the facility's policy. While at the facility, persons must comply with the facility's policies including applicable security policies. The facility may exclude or escort from the facility any person who fails to gain approval to enter the facility or fails to comply with the facility's policies. At the discretion of the hearing panel additional witnesses may be heard outside of the secure facility.

(13) Offenders who appear for parole hearings may have a representative, including an attorney, present with them.

(14) At the conclusion of the hearing, the board will either notify the offender of the board's decision and the reasons for the decision or the board may take the decision under advisement.

AUTH: 46-23-108, 46-23-218, MCA
IMP: 46-23-109, 46-23-202, MCA

20.25.501 DECISION AND RECONSIDERATION (1) A final decision of the hearing panel must be by a majority vote, must be in writing, and must be signed by at least two panel members.

(2) Following the parole hearing, the hearing panel may make any of the following dispositions:

(a) grant parole;

(b) grant conditional parole, subject to approval and verification of the parole plan;

(c) grant conditional parole to occur within a specified time period or upon completion of a contingency, including but not limited to completion of treatment or prerelease, completion of additional clear conduct, or completion of a specific amount of time on the sentence;

(d) continue the offender to a subsequent reconsideration hearing at an interval not to exceed eight years, during which time the offender is not subject to administrative review;

(e) schedule an administrative review; and

(f) pass the offender to discharge if the date of discharge is less than three years away.

(3) If the hearing panel denies the offender parole, the disposition must state the reasons for denial.

(4) The decision of the hearing panel, including reasons for such, will be delivered to the offender and any victims who have requested the board's decision within 21 calendar days of the hearing.

(5) Board staff will post information regarding hearing panel decisions on individual cases on its web site within 21 calendar days of the hearing panel's decision.

(6) If a two-member hearing panel is unable to reach a unanimous decision, the board chairman will convene a panel of three members as soon as practical to reconsider the application.

(7) If the offender can present evidence that the hearing panel's decision was based on erroneous or false information, or that a hearing was not conducted according to board procedure, a newly appointed hearing panel may reconsider the decision.

(a) The offender must submit a written request for reconsideration to the board chair or designee within 60 days following the delivery of the written disposition.

(b) If the offender presents sufficient evidence the chair or designee will forward the case to a hearing panel for its consideration.

(8) A duly constituted hearing panel will make the following administrative decisions at the board's monthly business meeting after panel members have reviewed the offender's case record. These decisions do not require the approval of the members who made the most recent parole determination:

(a) revocation of parole if the offender has waived the hearing;

(b) rescission of previously granted parole;

(c) the addition or deletion of special conditions;

(d) requests for supervision fee waivers;

(e) requests for conditional discharges from supervision; and

(f) a change or modification of a previous hearing panel decision that does not reverse a parole denial or a parole grant decision.

AUTH: 46-23-218, MCA
IMP: 46-23-104, 46-24-212, MCA

20.25.504 INVESTIGATION (1) Before a hearing panel considers an offender for release on parole, the board staff will make the following information available for the panel's consideration:

(a) the offender's previous social history and criminal record;

(b) the offender's education, conduct, and associations;

(c) the offender's occupation or prospects for employment;

(d) the offender's treatment record in prison;

(e) facts and circumstances of the crime for which the offender was sentenced;

(f) information received from the community where the crime was committed; and

(g) any reports of physical or mental examinations which have been made of the offender.

(2) If a hearing panel grants a parole the panel shall request an officer of the department's probation and parole bureau or an out-of-state supervising authority investigate the offender's release plan including victim concerns and give board staff a summary and recommendation concerning the plan.

AUTH: 46-23-218, MCA
IMP: 46-23-202, 46-23-203, MCA

20.25.505 CRITERIA FOR RELEASE GRANT DECISIONS ON NONMEDICAL PAROLE (1) A board hearing panel may release an eligible offender on nonmedical parole only when, in its opinion:

(a) there is reasonable probability that the offender can be released without detriment to himself/herself or to the community;

(b) release is in the best interests of society;

(c) the offender is able and willing to fulfill the obligations of a law-abiding citizen; and

(d) the offender does not require continued correctional treatment, or mental health therapy, vocational or other programs available in the correctional facility that will substantially enhance the offender's capacity to lead a law-abiding life if released.

(2) In making its determination regarding release, the board hearing panel may consider each of the following factors:

(a) the offender's maturity, stability, sense of responsibility and development of traits and behaviors which increase the likelihood the offender will conform his/her behaviors to the requirements of law;

(b) the adequacy of the offender's release plan;

(c) the offender's ability and readiness to assume obligations and undertake responsibilities;

(d) the offender's education and training;

(e) the offender's family status and whether the offender has relatives who display an interest or whether the offender has other close and constructive associations in the community;

(f) the offender's employment history, occupational skills, and the stability of the offender's past employment;

(g) the type of residence, neighborhood or community in which the offender plans to live;

(h) the offender's past use of chemicals (including alcohol), and past habitual and/or abusive use of such chemicals;

(i) the offender's mental and/or physical makeup;

(j) the offender's prior criminal record, including the nature and circumstances of the offense, date of offense and frequency of previous offenses;

(k) the offender's attitude toward law and authority;

(l) the offender's conduct in the institution, including particularly whether the offender has taken advantage of opportunities for treatment, and whether the offender is clear of major disciplinary violations prior to the hearing;

(m) the offender's behavior and attitude during any previous experience of supervision and the recency of such experience;

(n) any statement of the victim or victims of the offense;

(o) whether parole at this time would diminish the seriousness of the offense; and

(p) any and all other factors which the board determines to be relevant.

AUTH: 46-23-218, MCA
IMP: 46-23-201, 46-23-218, MCA

20.25.601 RESCISSION HEARING (1) A board hearing panel may conduct a hearing and rescind a previously granted parole if the offender has not left confinement or is on furlough status and the panel finds one of the following has occurred:

(a) the offender has committed disciplinary violations;

(b) there is a substantial change in the approved release plan; or

(c) new evidence or information shows the offender does not deserve a release.

(2) The panel will make its decision regarding rescission after it has considered all relevant information including the offender's own testimony regarding extenuation or mitigation.

(3) The presiding hearing panel member will conduct the rescission hearing informally and will make a record of it. The offender has the right to be present at the hearing, but may waive that right and admit the allegations are true.

(4) In lieu of scheduling a rescission hearing the board, through its staff, may delay the offender's release from confinement for up to 120 days for the reasons listed in (1).

(5) Unless a board hearing panel otherwise orders, before an offender leaves prison confinement on parole, the offender must be clear of major disciplinary misconduct for a minimum of 120 days. If the offender is a resident of a community-based program, the offender must be clear of Class 100 and 200 disciplinary violations for at least 90 days.

AUTH: 46-23-218, MCA
IMP: 46-23-218, MCA

20.25.701 RELEASE (1) While on parole release an offender on nonmedical or medical parole is serving the sentence of imprisonment or commitment imposed by the court until the sentence is discharged. The offender must remain under supervision or in custody until the sentence is discharged unless the offender is granted a conditional discharge from supervision pursuant to ARM 20.25.704.

(2) An offender granted a parole is subject to revocation of the release for violation of the law or of any of the conditions of the supervision agreement including conditions imposed by the hearing panel.

(3) Parole is not effective until the conditions are signed by the offender and the board issues the parole certificate. If a violation is established, the board may continue or revoke the parole, or enter such other order as it may see fit. The

determination of further release shall be consistent with the rules adopted for release hearings.

AUTH: 46-23-218, MCA
IMP: 46-23-215, MCA

20.25.702 CONDITIONS OF SUPERVISION (1) When a board hearing panel orders an offender paroled, the offender is subject to the following standard rules unless otherwise ordered by the panel:

(a) The offender must obtain prior approval from his/her supervising officer before taking up residence in any location. The offender shall not change his/her place of residence without first obtaining written permission from his/her supervising officer or the officer's designee. The offender must make the residence open and available to an officer for a home visit or for a search upon reasonable suspicion. The offender will not own dangerous or vicious animals and will not use any device that would hinder an officer from visiting or searching the residence.

(b) The offender must obtain permission from his/her supervising officer or the officer's designee before leaving his/her assigned district.

(c) The offender must seek and maintain employment or maintain a program approved by the Board of Pardons and Parole or the supervising officer. Unless otherwise directed by his/her supervising officer, the offender must inform his/her employer and any other person or entity, as determined by the supervising officer, of his/her status on probation, parole, or other community supervision.

(d) Unless otherwise directed, the offender must submit written monthly reports to his/her supervising officer on forms provided by the probation and parole bureau. The offender must personally contact his/her supervising officer or designee when directed by the officer.

(e) The offender is prohibited from using, owning, possessing, transferring, or controlling any firearm, ammunition (including black powder), weapon, or chemical agent such as oleoresin capsicum or pepper spray.

(f) The offender must obtain permission from his/her supervising officer before engaging in a business, purchasing real or personal property, or purchasing an automobile, or incurring a debt.

(g) Upon reasonable suspicion that the offender has violated the conditions of supervision, a probation and parole officer may search the person, vehicle, and residence of the offender, and the offender must submit to such search. A probation and parole officer may authorize a law enforcement agency to conduct a search, provided the probation and parole officer determines reasonable suspicion exists that the offender has violated the conditions of supervision.

(h) The offender must comply with all municipal, county, state, and federal laws and ordinances and shall conduct himself/herself as a good citizen. The offender is required, within 72 hours, to report any arrest or contact with law enforcement to his/her supervising officer or designee. The offender must be cooperative and truthful in all communications and dealings with any probation and parole officer and with any law enforcement agency.

(i) The offender is prohibited from using or possessing alcoholic beverages and illegal drugs. The offender is required to submit to bodily fluid testing for drugs or alcohol on a random or routine basis and without reasonable suspicion.

(j) The offender is prohibited from gambling.

(k) The offender must pay all fines, fees, and restitution ordered by the sentencing court.

(2) A parolee shall pay a supervisory fee of at least $10 a month for each month under supervision. A board hearing panel may reduce or waive the fee or suspend the monthly payment if payment would cause the parolee significant financial hardship.

(3) A board hearing panel may order additional special conditions. Additionally, a hearing panel shall consider Department of Corrections' requests for special conditions. Any special conditions imposed by the department must be approved by a board hearing panel. Special conditions must not be unrealistic or vague and must be reasonably related to the offender's crime, public safety, or the circumstances and rehabilitation of the offender.

(4) All rules and conditions must be stated in writing and must be made a part of any agreement signed by the offender.

(5) Any conditions of medical parole ordered by a hearing panel are considered parole special conditions.

AUTH: 46-23-218, MCA
IMP: 46-23-215, 46-23-1031, MCA

20.25.704 CONDITIONAL DISCHARGE FROM SUPERVISION (1) Upon recommendation of the supervising parole officer, a board hearing panel may conditionally discharge a parolee from parole supervision before the expiration of the sentence, if the panel determines that such conditional discharge is in the best interests of the parolee and society, and will not present an unreasonable risk of danger to society or the victim of the offense. However, the board may revoke a parole, even when the parolee is conditionally discharged from supervision, if the parolee violates any laws or ordinances and/or conditions that the board has imposed upon the parolee's conditional discharge.

(2) The parole officer will review the parolee's file and may recommend a parolee for conditional discharge after the parolee has served one year of active supervision. The parole officer will recommend conditional discharge unless a reason exists to continue parole supervision.

(3) When a hearing panel considers granting a conditional discharge from supervision, it will consider the achievement credits the parolee has accrued pursuant to 46-23-1027, MCA.

(4) If a hearing panel grants a conditional discharge from supervision it must order the conditions the parolee must meet while on conditional discharge. At a minimum, the panel must order that the parolee report once a year, report any address or employment changes immediately to the parolee's supervising officer, and report any contacts with law enforcement. The parolee also remains subject to search upon a parole officer's reasonable suspicion the parolee has violated parole.

(5) A board hearing panel may return a parolee to active supervision or amend the conditions of the conditional discharge upon request of the supervising agency, if, in the panel's opinion, this action is in the best interest of society and the parolee.

AUTH: 46-23-218, MCA
IMP: 46-23-215, 46-23-1021, 46-23-1027, MCA

20.25.705 FINAL DISCHARGE (1) When a parolee has completed the full term of imprisonment or commitment, the board will issue a final discharge certificate.

AUTH: 46-23-218, MCA
IMP: 46-23-215, 46-23-216, MCA

20.25.801 ON-SITE HEARING AND REVOCATION OF PAROLE (1) If an officer of the department has reason to believe a parolee has violated any of the conditions of the parolee's release, the department must conduct an on-site hearing unless the parolee waives the right to an on-site hearing or pursuant to (3), no on-site hearing is necessary.

(2) In order to waive the right to an on-site hearing the parolee must sign a waiver that clearly specifies the rights the parolee is relinquishing and admit to at least one of the violations as outlined in the report of violation.

(3) No on-site hearing is necessary if the parolee is convicted of a felony offense during the period of supervision, or if the parolee is arrested in a state in which the parolee had no permission to travel or reside. If no on-site hearing is necessary the board may utilize the court judgment and conviction or out-of-state arrest documents in lieu of the on-site hearing summary.

(4) Unless the parolee waives the revocation hearing, the board will schedule a revocation hearing within 90 days of receipt of the on-site hearing summary or of receipt of notice of conviction or return to Montana custody. If the parolee waives the revocation hearing the parolee must sign a waiver that clearly specifies the rights the parolee is relinquishing. Once the hearing is scheduled, the parolee may request a continuance and board staff may grant the continuance if the parolee can show good and substantial cause for the continuance.

(5) At the revocation hearing the parolee may be represented by counsel at the parolee's expense, and may present witness testimony if the testimony relates to the violations. An indigent parolee may request appointed counsel if difficult or complex issues are present and if the parolee is unable to articulate the issues. A decision on the request for appointed counsel will be rendered by a board hearing panel after due consideration of the request.

(6) A parolee who contests parole revocation or the parolee's counsel shall, at least 20 days before the revocation hearing, present to the board staff:

(a) any requests for information from the parolee's file that the parolee needs for the hearing;

(b) a list of witnesses and exhibits the parolee intends to present at the revocation hearing;

(c) a list of information the parolee will present at the hearing; and

(d) any requests for subpoenas the parolee wants the board to issue. The board will only issue subpoenas for extraordinary reasons and in cases where the board considers a person's testimony is crucial to a determination of the issue of revocation.

(7) The presiding hearing panel member will conduct the revocation hearing and will record the hearing. The decision of the board in a revocation hearing is by a preponderance of the evidence. The board may consider:

(a) reports of the supervising officer;

(b) the report of the on-site hearing, if one was conducted; and

(c) the information and evidence presented at the hearing.

(8) If the board decides the parolee has violated parole, the hearing panel may, considering the nature of the violations and the criteria for release grant decision, take any of the following actions:

(a) continue the parolee on parole with release to the community;

(b) continue the parolee on parole, but authorize the parolee's detention in custody until the parolee satisfies conditions imposed by the board;

(c) revoke the parole and set no re-parole date;

(d) revoke the parole, but order the offender's re-parole on a date certain;

(e) revoke the parole and set a date within one year when a board hearing panel will conduct an administrative review of the offender's case; or

(f) make any other appropriate order.

(9) The board staff will deliver a copy of the board's written decision to the offender within 21 days of the decision. The written decision will include reasons for the decision and disposition, and a summary of the evidence upon which the board relied.

(10) If a revoked parolee has absconded supervision, a board hearing panel, at its sole discretion, will determine whether the time from the issuing of the violation warrant to the date of the parolee's arrest within the state or return to Montana custody if the parolee was arrested out of state, or any part of that time, will be counted as time served under the sentence, or whether the time was dead time and did not diminish the time the offender had to serve to discharge the sentence.

(11) A parole violation warrant will remain active until the parolee is in Montana custody and may not be quashed without the approval of a board hearing panel. If the parolee's sentence expiration date is reached, a hearing panel will review the case to determine if keeping the warrant active is in the interests of justice. If the panel decides to keep the warrant active after the parole discharge date, not including dead time, a panel will review the parolee's status annually.

AUTH: 46-23-218, MCA
IMP: 46-23-215, 46-23-1024, 46-23-1025, MCA

20.25.901 APPLICATIONS FOR CLEMENCY (1) Application forms for executive clemency may be obtained at the board's main office in Deer Lodge, Montana or from the board's web site.

(2) Applications must be in writing, signed by the applicant, notarized, and filed with the board's Deer Lodge office. Applications may be filed only by the

offender convicted of the crime, by the offender's attorney acting on the offender's behalf and with his/her consent, or by a court-appointed next friend, guardian, or conservator acting on the offender's behalf.

(a) The applications shall state the type of executive clemency requested; pardon, commutation, respite, or remission of fines or forfeitures.

(b) The application for clemency must include:

(i) a certified copy of all court documents relating to the particulars of the crime and sentencing;

(ii) details concerning the circumstances relating to the social conditions of the applicant prior to the commission of the crime, at the time the offense was committed, and at the time of the application;

(iii) three letters of support from reputable persons;

(iv) psychological reports as requested by the board;

(v) verification that supports the reasons for the applicant's request for executive clemency; and

(vi) a signed waiver of confidentiality.

(3) Unless the board otherwise orders or there has been a substantial change in circumstances, as determined by the board, an offender whose application has been denied may not reapply for executive clemency.

(4) In cases in which the death penalty has been imposed, the application for executive clemency must be received at the board's Deer Lodge office no later than ten days after the district court sets a date of execution.

(5) Any person convicted of a crime after July 1, 1973, will automatically have restored, upon completion of custody and supervision, all civil rights that were lost with the conviction. The person need not apply for executive clemency to have the person's civil rights restored.

AUTH: 46-23-218, MCA
IMP: 42-23-301, MCA

20.25.901A EXECUTIVE CLEMENCY CRITERIA (1) Pardon is a declaration of record that an individual is to be relieved of all legal consequences of a prior conviction. An individual may not apply for a pardon unless the offense for which he/she seeks a pardon has been commuted or discharged. A board hearing panel may recommend a pardon for an individual who:

(a) can satisfactorily prove innocence of a crime for which the individual has served time;

(b) has demonstrated an extended period of exemplary performance;

(c) submits newly discovered evidence showing complete justification or nonguilt on the part of the individual; or

(d) can satisfactorily prove extraordinary mitigating or extenuating circumstances exist.

(2) Commutation involves the mitigation of a criminal punishment through the substitution of a lesser sentence for a greater one. A hearing panel may recommend commutation for an individual who:

(a) can prove by overwhelming evidence the individual is innocent of a crime for which the individual was convicted;

(b) has demonstrated an extended period of exemplary performance;

(c) submits evidence discovered subsequent to the conviction that clearly shows the individual was completely justified in committing the crime; or

(d) can satisfactorily prove that further incarceration would be grossly unfair, that a death penalty should be avoided, or extraordinary mitigating or extenuating circumstances exist.

(3) The board may also recommend to the governor that a respite or a remission of fines or forfeitures be granted.

(4) When considering an application for executive clemency the board hearing panel shall consider the nature of the crime, the comments of the sentencing judge, the prosecuting attorney, the community, and the victims and victims' family regarding clemency for the applicant, and whether release would pose a threat to the public safety.

AUTH: 46-23-218, MCA
IMP: 46-23-301, MCA

20.25.902 INVESTIGATIONS FOR CLEMENCY AND ORDER FOR HEARING (1) The board staff will conduct a preliminary review of the application for clemency and submit a report to a board hearing panel for its consideration. In cases in which the death penalty has not been imposed the hearing panel, based on the staff's preliminary review, may accept or reject the application. The panel will base its decision to accept or reject an application on:

(a) all the circumstances surrounding the crime for which the applicant was convicted; and

(b) the individual circumstances relating to social conditions of the applicant prior to commission of the crime, at the time the offense was committed, and at the time of the application for clemency.

(2) Upon a hearing panel decision to accept the application, and in all cases in which the death penalty has been imposed, it will request the department to conduct an investigation within 90 days of its request.

(3) Within 90 days of receiving the investigation report, board staff will compile all the information for a hearing panel's consideration. In cases in which the death penalty has not been imposed, board staff will make a recommendation that the panel either reject the application or order a hearing on the application. The panel may require other reports that, in the panel's opinion, are necessary.

(4) In cases in which the death penalty has not been imposed, after receipt of the investigation report, the board staff's recommendation, and any other reports the panel has required, a hearing panel will consider the application and decide whether to deny the application or hold a hearing concerning the application.

(5) If in the opinion of the hearing panel sufficient cause appears to conduct a hearing on the application, and in all cases in which the death penalty has been imposed, the panel will set a date for the hearing and order board staff to give notice of the hearing date as prescribed by law to all concerned including the applicant, law enforcement, the sentencing court, the county attorney in the county in which the crime was committed, and victims of the crime.

(6) If the panel denies the application without a hearing, it will give notice to all concerned.

AUTH: 46-23-218, MCA
IMP: 46-23-301, MCA

20.25.903 HEARING PROCEDURE FOR CLEMENCY (1) A hearing panel of the board will, after having ordered a hearing and after appropriate notice has been given, conduct a public nonadversarial hearing.

(a) In cases in which the death penalty has not been imposed the hearing panel may hold the hearing via interactive video-conference or telephone conference.

(b) If the hearing takes place in a secure facility, all persons who wish to attend must gain approval to attend from the facility's chief of security or designee as required by facility policy and while at the facility must comply with the facility's policies including applicable security policies. The facility may exclude or escort from the facility any person who fails to comply with the facility's policies. The board has the discretion to hear testimony outside the facility.

(2) The hearing panel that conducts the hearing will hear all relevant facts and information of the petitioner, petitioner's counsel and witnesses, as well as any opponents to the petition, and will make a recording of the hearing including proof of publication of the order for hearing.

(3) Unless a majority of the hearing panel otherwise orders, procedures for the hearing on an accepted application for executive clemency are as follows:

(a) Before the hearing, the presiding hearing panel member will determine an appropriate amount of time for proponents and opponents to present their individual cases and to present closing arguments.

(b) Hearsay is allowed.

(c) The presiding hearing panel member may allow cross examination if he/she finds extraordinary circumstances are present. Hearing panel members may question witnesses in all cases.

(4) Applicants may be represented by counsel at their own expense. An indigent applicant may request counsel if difficult or complex issues are present and if the applicant is unable to articulate the issues. A decision on the request for appointed counsel will be rendered by the presiding hearing panel member after due consideration.

(5) Opponents and proponents of the application may submit written testimony, but it must be received by the board no later than 21 days prior to the scheduled hearing. The hearing panel may request submissions from proponents or opponents.

AUTH: 46-23-218, MCA
IMP: 46-23-306, MCA

20.25.904 DECISION CONCERNING CLEMENCY (1) Upon conclusion of the hearing the hearing panel will take the entire case under advisement or may issue an immediate decision.

(a) In cases in which the death penalty has not been imposed, if the hearing panel makes a recommendation that the governor grant clemency, it will within 30 days of the decision forward all relevant documents and a proposed executive order to the governor for the governor's final determination. If the panel does not recommend a grant of clemency, it will not forward the application to the governor.

(b) In cases in which the death penalty has been imposed, the board will forward all relevant documents and a recommendation to grant or deny clemency to the governor for the governor's final determination.

(2) The board staff will notify the applicant of the panel's decision in writing within 30 days of the hearing.

(3) If the governor grants executive clemency, the signed executive order will be sent to the Secretary of State. The Secretary of State will file the attested order and return the attested order to the board for dissemination to the applicant, Department of Corrections, Department of Justice, and Federal Bureau of Investigation ID bureau for appropriate action.

AUTH: 46-23-218, MCA
IMP: 46-23-315, MCA

4. The amended and transferred rules provide as follows:

20.25.302 (20.25.306) PAROLE PLAN (1) The board through its pre-parole program, will make available to offenders a copy of a packet outlining the parole process and the recommended treatment release plan. The board, through its staff, may review and amend an offender's recommended parole release plan as necessary and advise the offender when it changes its recommendations.

(2) Each offender who applies for a grant of parole should prepare a comprehensive release plan for the board's consideration. The parole plan should include the following:

(a) the offender's proposed living situation;

(b) the offender's proposed gainful employment or other suitable means of support, or a training or schooling program;

(c) the offender's proposed aftercare programs; and

(d) the offender's proposed budget for payment of court-ordered fines, fees, restitution, and other financial obligations including child support.

(3) Substantial changes in the parole plan that is submitted at the time of the parole hearing must be reviewed and approved by the board.

AUTH: 46-23-218, MCA
IMP: 46-23-215, 46-23-216, MCA

20.25.302A (20.25.307) MEDICAL PAROLE (1) Except for an offender under sentence of death or of life imprisonment without the possibility of parole, the board may release on medical parole:

(a) a Montana offender confined in a prison or the state hospital;

(b) an offender whom the prison has placed in prerelease or other correctional program; or

(c) an offender for whom the court has restricted parole for a number of years under 46-18-202(2), MCA, but who has obtained the approval of the sentencing court.

(2) The board, the department, the offender, or the offender's spouse, parent, child, grandparent, or sibling may submit an application for medical parole. The application must contain the following:

(a) details of the offender's proposed living arrangement on medical parole;

(b) details of how the offender will acquire and pay for medical care while the offender is on medical parole;

(c) a report of an examination and written diagnosis by a licensed physician that includes:

(i) a detailed description of the offender's medical condition and the medical attention required to treat that condition;

(ii) an assessment of the offender's likelihood of recovery;

(iii) a description of the offender's most recent past medical condition and treatment; and

(iv) an assessment of whether, to a reasonable degree of medical certainty, there is a high probability the offender's medical condition will cause death within six months or less.

(3) The diagnosis must be reviewed and accepted by the department's medical director or designee before the board may hear the case for medical parole.

(4) In order to grant a medical parole the board must find:

(a) release of the offender is unlikely to pose a detriment to the offender, victim, or community; and

(b) the offender has a medical condition that requires extensive medical attention or the offender suffers from a medical condition that will likely cause his/her death within six months or less.

(5) In considering whether an offender is likely to pose a detriment to the victim or community, the board may consider:

(a) whether the offender's medical condition renders him/her unable to engage in criminal activity;

(b) any statement submitted by the victim of the offense for which the offender is currently incarcerated;

(c) the progression of the offender's medical condition, as documented by a licensed physician;

(d) the offender's conduct, employment, and attitude in prison;

(e) reports of any physical and mental examinations that have been made;

(f) the offender's previous social and criminal record; and

(g) the circumstances of the offense for which the offender is incarcerated.

(6) In determining whether to grant or deny an application for medical parole, the board may consider whether:

(a) there is support or opposition from the community including the victim or victim's family, the court, or law enforcement;

(b) the offender suffered from the medical condition at the time the offender committed the offense or was sentenced for the offense for which the offender is presently incarcerated and if so, whether the medical condition has progressed to

such a degree that it is unlikely that the offender is able to engage in criminal activity;

(c) the care and supervision that the offender requires can be provided in a more medically appropriate or cost-effective manner than by the department;

(d) the offender is incapacitated to an extent that incarceration does not impose significant additional restrictions on the offender;

(e) the offender is likely to continue to suffer from the medical condition throughout the entire period of parole or to die while the offender is on medical parole and there is no reasonable expectation that the offender's medical condition will improve noticeably; and

(f) an appropriate discharge plan has been formulated that addresses basic life domains of the offender, including care coordination, housing, eligibility for public benefits and health care including necessary medication.

(7) The board shall require as a condition of medical parole that the offender agree to placement in a setting chosen by the department during the parole period, including but not limited to a hospital, nursing home, or family home. The board may require as a condition of parole that the offender agree to periodic examinations and diagnosis at the offender's expense. Reports of each examination and diagnosis must be submitted to the board and department by the examining physician. If either the board or department determines that the offender's physical capacity has improved to the extent that the offender is likely to pose a possible detriment to society, the board may revoke the medical parole and return the offender to the custody of the department.

(8) Prior to the medical parole hearing, the board, through its staff, shall gather for the board's deliberations, all pertinent information on the offender, including but not limited to the nature of the offense, social history, criminal history, institutional performance, and any medical and mental examinations which may have been made while in custody.

(9) Upon receiving notification from the department that a medical parolee is eligible for nonmedical parole, the board may consider the offender for nonmedical parole according to the rules established for nonmedical parole consideration.

(10) A grant or denial of medical parole does not affect an offender's eligibility for nonmedical parole. The board will first consider an offender for nonmedical parole if the offender has reached parole eligibility.

(11) If the board denies the application, the department may not accept another application regarding the same offender, unless the offender's medical condition has deteriorated to such a degree that the factors previously considered by the board are affected.

(12) Revocation procedures for medical parole are the same as those for nonmedical parole and statutory provisions for nonmedical parole apply to medical parole.

(13) By submitting an application for medical parole, the offender waives any right to privacy in his/her medical information.

AUTH: 46-23-218, MCA
IMP: 46-23-210, MCA

5. The department is repealing the following rules:

20.25.301 MINIMUM TIME; PERIODIC EVALUATION, is found on page 20-811 of the Administrative Rules of Montana.

AUTH: 46-23-218, MCA
IMP: 46-23-201, MCA

20.25.303 FURTHER ELIGIBILITY, is found on page 20-813 of the Administrative Rules of Montana.

AUTH: 46-23-218, MCA
IMP: 46-23-218, MCA

20.25.304 ADDITIONAL CONSECUTIVE SENTENCES, is found on page 20-814 of the Administrative Rules of Montana.

AUTH: 46-23-218, MCA
IMP: 46-18-401, 46-23-217, MCA

20.25.502 FORM AND DELIVERY, is found on page 20-823 of the Administrative Rules of Montana.

AUTH: 46-23-218, MCA
IMP: 46-23-202, MCA

20.25.602 PROCEDURE, is found on page 20-831 of the Administrative Rules of Montana.

AUTH: 46-23-218, MCA
IMP: 46-23-204, MCA

20.25.603 DECISION, is found on page 20-831 of the Administrative Rules of Montana.

AUTH: 46-23-218, MCA
IMP: 46-23-204, MCA

20.25.703 SPECIAL CONDITIONS, is found on page 20-837 of the Administrative Rules of Montana.

AUTH: 46-23-218, MCA
IMP: 46-23-215, MCA

20.25.802 CONTESTED REVOCATION HEARINGS, is found on page 20-844 of the Administrative Rules of Montana.

AUTH: 46-23-218, MCA
IMP: 46-23-1025, MCA

/s/ Diana Koch
Diana Koch
Rule Reviewer

/s/ Mike Ferriter
Mike Ferriter
Director
Department of Corrections

Certified to the Secretary of State November 29, 2010

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
AND THE BOARD OF PERSONNEL APPEALS
STATE OF MONTANA

In the matter of the amendment of ARM 24.16.7506, 24.16.7541, 24.16.7544, 24.16.7547, 24.25.101, 24.25.102, 24.25.103, 24.25.104, 24.25.105, 24.25.107, 24.25.201, 24.25.203, 24.25.204, 24.25.206, 24.25.301, 24.25.302, 24.25.303, 24.25.304, 24.25.305, 24.25.306, 24.25.307, 24.25.308, 24.25.401, 24.25.501, 24.25.502, 24.25.503, 24.25.504, 24.25.505, 24.25.601, 24.25.701, 24.25.702, 24.25.703, 24.25.704, 24.25.801, 24.25.802, 24.25.803, 24.25.804, 24.26.102, 24.26.201, 24.26.202, 24.26.203, 24.26.206, 24.26.212, 24.26.215, 24.26.501, 24.26.502, 24.26.503, 24.26.508, 24.26.518, 24.26.614, 24.26.620, 24.26.630, 24.26.644, 24.26.655, 24.26.666, 24.26.680, 24.26.680B, 24.26.681, 24.26.682, 24.26.684, 24.26.685, the adoption of NEW RULES I through IX, and the repeal of 24.25.106, 24.25.108, 24.25.109, 24.25.120, 24.25.202, 24.25.602, 24.25.603, 24.25.604, 24.25.605, 24.25.606, 24.25.607, 24.25.608, 24.25.609, 24.25.610, 24.25.611, 24.25.612, 24.26.213, 24.26.216, 24.26.217, 24.26.701, 24.26.702, 24.26.705, 24.26.706, 24.26.707, 24.26.710, 24.26.711, 24.26.712, all related to collective bargaining proceedings heard by the Board of Personnel Appeals	)	NOTICE OF AMENDMENT, ADOPTION, AND REPEAL

TO: All Concerned Persons

1. On July 29, 2010, the Department of Labor and Industry (department) and the Board of Personnel Appeals (board) published MAR Notice No. 24-16-248 regarding the proposed amendment, adoption, and repeal of the above-stated rules at page 1652 of the 2010 Montana Administrative Register, Issue Number 14.

2. On August 26, 2010, the department and the board held a public hearing in Helena at which time members of the public made oral and written comments and submitted documents. Additional comments were received during the comment period.

3. The department and the board have thoroughly considered the comments and testimony received from the public. The following is a summary of the public comments received and the agency's response to those comments:

Comment 1: Butch Plowman commented that in two board rules, Rule 24.25.701 and Rule 24.25.801, the inclusion of "the" immediately prior to "authorized representative" is unnecessary and may cause confusion with "the exclusive representative." A party, such as an employer, may work with more than one authorized representative, but a bargaining unit can only have one exclusive representative. Therefore, changing the "the" to an "an" would work.

Response 1: The board agrees and will change the article to "an" in the rules mentioned in the comment.

Comment 2: Department of Labor and Industry staff noted during the rulemaking process that there were minor typographical or word usage errors in various board rules. Specifically, staff noted that in Rule 24.25.503 (1), the board had inadvertently omitted changing a reference from "division" to "board" as it had done elsewhere throughout the board's rules. Staff also noted that in Rule 24.26.680 (5) service of documents should be made "upon" a party, rather than "to" a party. Likewise, in NEW RULE II (2), staff suggested that the board agent works "on behalf" of the board, rather than "in behalf" of the board, and that a comma appears to have been omitted in the text of NEW RULE VI (1). Finally, staff notes that proposed NEW RULE IX, Consent Elections, should include 39-31-209, MCA, as part of the rule's IMP citation.

Response 2: The board agrees and will correct the wording, punctuation, and implementation citations in the rules mentioned as in the comment.

4. The department has amended ARM 24.16.7506, 24.16.7541, 24.16.7544, and 24.16.7547 as proposed.

5. The board has amended ARM 24.25.101, 24.25.102, 24.25.103, 24.25.104, 24.25.105, 24.25.107, 24.25.201, 24.25.203, 24.25.204, 24.25.206, 24.25.301, 24.25.302, 24.25.303, 24.25.304, 24.25.305, 24.25.306, 24.25.307, 24.25.308, 24.25.401, 24.25.501, 24.25.502, 24.25.504, 24.25.505, 24.25.601, 24.25.702, 24.25.703, 24.25.704, 24.25.802, 24.25.803, 24.25.804, 24.26.102, 24.26.201, 24.26.202, 24.26.203, 24.26.206, 24.26.212, 24.26.215, 24.26.501, 24.26.502, 24.26.503, 24.26.508, 24.26.518, 24.26.614, 24.26.620, 24.26.630, 24.26.644, 24.26.655, 24.26.666, 24.26.680B, 24.26.681, 24.26.682, 24.26.684, and 24.26.685 as proposed.

6. The board has amended the following rules as proposed, but with the following changes from the original proposal, stricken matter interlined, new matter underlined:

24.25.503 NOTICE OF DECERTIFICATION PROCEEDINGS (1) The board shall require the employer to post in a conspicuous manner, a notice of decertification proceedings. Such notice shall be provided by the ~~division~~ board and shall remain posted for a period of 20 days.

(2) remains as proposed.

AUTH: 39-32-103, MCA
IMP: 39-32-113, MCA

24.25.701 COMPLAINT (1) remains as proposed.

(2) A complaint shall be in writing. The original shall be signed and verified by the complainant or ~~the~~ an authorized representative. The original and three copies of the complaint shall be filed with the board. The board shall serve one copy of the complaint on each party named in the complaint.

(3) through (5) remain as proposed.

AUTH: 39-32-103, MCA
IMP: 39-32-109, 39-32-112, MCA

24.25.801 PETITION (1) In the event of an impasse, a petition, in writing, requesting assistance of the board, may be filed with the board by an employee or group of employees, a labor organization, or an employer. The original of the petition shall be signed by the petitioner or ~~the~~ an authorized representative, and the original and three copies thereof shall be filed with the board. The petitioner shall serve a copy of the petition simultaneously upon any party in the petition. The petition shall contain:

(a) through (2) remain as proposed.

AUTH: 39-32-103, MCA
IMP: 2-4-201, MCA

24.26.680 COMPLAINT (1) through (4) remain as proposed.

(5) The board shall serve a copy of the complaint ~~to~~ upon each party charged with unfair labor practice.

AUTH: 39-31-104, MCA
IMP: 39-31-406, MCA

7. The board has adopted the following rules as proposed, but with the following changes from the original proposal, stricken matter interlined, new matter underlined:

NEW RULE II [24.26.207] DEFINITIONS (1) remains as proposed.

(2) "Board Agent" means any person designated by the board to act ~~in~~ on its behalf.

(3) through (10) remain as proposed.

AUTH: 2-4-201, 39-31-104, MCA
IMP: 2-4-201, MCA

NEW RULE VI [24.26.222] OBJECTIONS TO BOARD'S AGENT'S RECOMMENDED ORDER (1) The parties shall have 20 days from the issuance of a recommended order to file specific written objections with the board. Upon good cause shown, the board may extend the time within which the objections shall be filed. When objections are filed, the party making the objections shall serve a copy of the objections on all parties of record in the case and provide the board with proof of service. A failure to so serve, and provide proof of service shall, in the absence of good cause shown, invalidate any such objections as being untimely and the board may disregard same in making a final determination in the case.

AUTH: 2-4-201, 39-31-104, MCA
IMP: 2-4-201, MCA

NEW RULE IX [24.26.617] CONSENT ELECTIONS (1) remains as proposed.

AUTH: 2-4-201, 39-31-104, MCA
IMP: 2-4-201, 39-31-209, MCA

8. The board has adopted NEW RULE I [24.26.221], NEW RULE III [24.26.208], NEW RULE IV [24.26.209], NEW RULE V [24.26.211], NEW RULE VII [24.26.224], and NEW RULE VIII [24.26.229] as proposed.

9. The board has repealed ARM 24.25.106, 24.25.108, 24.25.109, 24.25.120, 24.25.202, 24.25.602, 24.25.603, 24.25.604, 24.25.605, 24.25.606, 24.25.607, 24.25.608, 24.25.609, 24.25.610, 24.25.611, 24.25.612, 24.26.213, 24.26.216, 24.26.217, 24.26.701, 24.26.702, 24.26.705, 24.26.706, 24.26.707, 24.26.710, 24.26.711, and 24.26.712 as proposed.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ JACK HOLSTROM
Jack Holstrom, Chair
BOARD OF PERSONNEL APPEALS

Certified to the Secretary of State on November 29, 2010.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of New Rule I and II and the amendment of ARM 37.79.102, 37.79.326, 37.79.503, and 37.79.505 pertaining to Healthy Montana Kids	)))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On October 28, 2010 the Department of Public Health and Human Services published MAR Notice No. 37-524 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 2521 of the 2010 Montana Administrative Register, Issue Number 20.

2. The department has adopted New Rule II (37.79.117) as proposed.

3. The department has amended the ARM 37.79.326, 37.79.503, and 37.79.505 as proposed.

4. The department has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.79.102 DEFINITIONS Definitions as used in this subchapter, unless expressly provided otherwise, the following definitions apply:

(1) through (3) remain as proposed.

~~(4) "Benchmark plan" means a health benefit plan which is actuarially equivalent to the state of Montana employee group health plan.~~

(5) through (7) remain as proposed but are renumbered (4) through (6).

~~(8) "Cost effective" means the total amount paid in expenses on behalf of a child under an employer-sponsored plan is less than the department would pay for equivalent services for a child enrolled in HMK.~~

(9) through (11)(c) remain as proposed but are renumbered (7) through (9)(c).

~~(12) "Employer-sponsored plan" means any plan, including a self-insured plan, that meets HMK requirements for creditable coverage and provides health care to employees, former employees, or the families of such employees.~~

(13) through (32) remain as proposed but are renumbered (10) through (29).

~~(33) "Premium assistance" means a program to help subsidize the purchase of qualified employer-sponsored health care coverage for children eligible for the HMK coverage group.~~

(34) through (42) remain as proposed but are renumbered (30) through (38).

AUTH: 53-4-1004, 53-4-1009, 53-4-1105, MCA

IMP: 53-4-1003, 53-4-1004, 53-4-1009, 53-4-1103, 53-4-1104, 53-4-1105, 53-4-1108, MCA

5. The department has withdrawn New Rule I and amended ARM 37.79.102 with the changes shown above.

6. No comments or testimony were received. The department is withdrawing proposed New Rule I and related amendments to definitions that would have allowed the department to pay cost-effective employer-sponsored plan premiums if the employer-sponsored insurance coverage was equivalent to the existing HMK benchmark plan. The Centers for Medicare and Medicaid Services (CMS) notified the department that it would require HMK to use actuarial services to compare all employer-sponsored group coverage with the existing HMK coverage before a determination of premium assistance eligibility could be completed. This mandatory administrative expense would result in premium assistance payments never being cost effective. The department does not anticipate a material impact from this change. Relatively few parents or guardians were expected to choose the premium assistance option because the HMK coverage group's benefit plan coverage is broad and the maximum out of pocket expense is $215 for most HMK enrolled families.

/s/ John Koch
Rule Reviewer

Laurie Lamson for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State November 29, 2010

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.31.1002 relating to the hospital utilization fee	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 14, 2010, the department published MAR Notice No. 42-2-850 regarding the proposed amendment of the above-stated rule at page 2301 of the 2010 Montana Administrative Register, issue no. 19.

2. A public hearing was held on November 4, 2010, to consider the proposed amendment. No one appeared at the hearing to testify and no written comments were received.

3. The department amends ARM 42.31.1002 as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at www.mt.gov/revenue, under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State November 29, 2010

VOLUME NO. 53 OPINION NO. 6

CONSTITUTIONAL CONSTRUCTION - In interpreting a provision of the Montana Constitution, the rules of statutory construction apply;
EDUCATION, HIGHER - Article VIII, section 13 of the Montana Constitution does not require that endowments granted to Montana's public universities be invested through the unified investment program;
PUBLIC FUNDS - The phrase "public funds" in article VIII, section 13 of the Montana Constitution does not include endowments granted to Montana's public universities;
UNIVERSITY SYSTEM - Article VIII, section 13 of the Montana Constitution does not require that endowments granted to Montana's public universities be invested through the unified investment program;
MONTANA CODE ANNOTATED - Sections 17-2-102(4), 17-3-1001(2), -1003(1), 20-25-307(2), 77-1-101(7), -108;
MONTANA CONSTITUTION OF 1889 - Article XI, section 12;
MONTANA CONSTITUTION - Article VIII, section 13, (1), (2), (3), (4); article X, sections 2, 10;
OPINIONS OF THE ATTORNEY GENERAL - 36 Op. Att'y Gen. No. 106 (1976).

HELD: Article VIII, section 13 of the Montana Constitution does not require that endowments granted to Montana's public universities be invested through the unified investment program.

November 19, 2010

Ms. Tori Hunthausen, CPA
Legislative Auditor
Room 160
State Capitol Building
Helena, MT 59620-1705

Dear Ms. Hunthausen:

You have requested my opinion as to a question that I have rephrased as:

> Must endowments granted to Montana's public universities be invested under the unified investment program established under article VIII, section 13 of the Montana Constitution?

Your opinion request informs me that during a recent audit it came to the attention of the Legislative Audit Division that funds endowed to the University of Montana are invested in "equity pools." While you acknowledge that the endowments are properly recorded on the state's financial records and are used in accordance with the conveying instruments, you question whether these endowments are subject to the restrictions of article VIII, section 13 of the Montana Constitution, particularly the restriction against investing "public funds" in private corporate capital stock.

The first subsection of article VIII, section 13 provides:

> (1) The legislature shall provide for a unified investment program for public funds and public retirement system and state compensation insurance fund assets and provide rules therefor, including supervision of investment of surplus funds of all counties, cities, towns, and other local governmental entities. Each fund forming a part of the unified investment program shall be separately identified. Except as provided in subsections (3) and (4), no public funds shall be invested in private corporate capital stock. The investment program shall be audited at least annually and a report thereof submitted to the governor and legislature.

The Regents have set up "private, independent" foundations, such as the University of Montana Foundation, to invest funds endowed to the universities by private or federal donors, and to raise these funds. See Regents Policy 901.9 (Campus-Affiliated Foundations). You have clarified that "[d]onations given directly to the respective university foundations are not in question," as these nonprofit foundations may fundraise and invest free of the restrictions of article VIII, section 13. The question, then, is whether the phrase "public funds" as used in this constitutional provision includes donations or grants endowed directly to Montana universities for a specific purpose (hereinafter "university endowments").[1]

In interpreting a provision of the Montana Constitution, I utilize the rules of statutory construction. Montanans for Laws v. State ex rel. Johnson, 2007 MT 75, ¶ 46, 336 Mont. 450, 154 P.3d 1202. In determining the framers' intent, I first look to the plain meaning of the words. Only if a phrase is ambiguous do I resort to extrinsic methods of interpretation. Id., ¶¶ 46-47. I also consider the constitutional provision as a whole, and read it in context with other relevant constitutional provisions. See Oster v. Valley County, 2006 MT 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079 ("[T]his Court must harmonize statutes relating to the same subject, as much as possible, giving effect to each").

Reading article VIII, section 13 in its entirety, subsection (2) expressly refers to certain university funds: "the public school fund and the permanent funds of the Montana university system . . . ." As to the former, the Constitution separately defines "public school fund" in article X, section 2 in a manner that would not include university endowments. As to the latter, the "permanent funds of the Montana university system" are not separately defined in the Constitution, but in my opinion they do not include university endowments. The Enabling Act which admitted Montana to the Union established a land grant "exclusively for university purposes,"

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[1] This opinion therefore includes grants from governmental entities other than the state of Montana, such as the federal government. It also includes what have been referred to as "quasi" endowments, such as a donated gift for a particular use that is not required to be permanently invested but that the university chooses to invest with an affiliated foundation.

the proceeds of which "constitute a permanent fund to be safely invested and held by [Montana]." Enabling Act, § 14 (emphasis added). It is consistent with a plain-meaning review of this provision that the Constitutional Convention Delegates had this specific Enabling Act language in mind when they crafted the reference to "permanent funds of the Montana university system" in article VIII, section 13(2). See also V 1972 Mont. Const. Conv. 1539 ("Conv. Tr.") (Delegate Barnard) (the purpose of subsection (2) would be to "stay within the limits of the Enabling Act and [ensure] the funds remain inviolate").

This is particularly true given the variability of the conditions imposed on university endowments. There is no rule requiring that such endowment gifts establish a "permanent fund." If donors wish, they can create an endowment that allows the invasion of principle, or even expenditure of the entire principle. There is no sense in which the endowments collectively can be characterized as "permanent."

Moreover, in implementing subsection (2), the university land grant created by the Enabling Act is administered not by the Regents, but by the Department of Natural Resources and Conservation in the "Trust Land Administration Account" established in Mont. Code Ann. § 77-1-108. See Mont. Code Ann. § 77-1-101(7) (including "lands granted to the state by the United States for any purpose" within the definition of "state lands"); cf. Mont. Code Ann. § 20-25-307(2) (precluding Regents from alienating "land granted to the state in trust for the support and benefit of the system.") The "permanent funds" referred to in subsection (2) then, should not be construed to include university endowments.

Nor does the constitutional requirement that the Legislature provide for a "unified investment program for public funds" lead to the conclusion that these public funds include university endowments. In interpreting article VIII, section 13, "unified" does not necessarily mean "exclusive." Huber v. Groff, 171 Mont. 442, 460, 558 P.2d 1124, 1133 (1976) ("The Constitution's provision for the unified investment fund does not require that all agencies participate regardless of the nature of the agency."). While the funds at issue in Huber were specifically not "state funds," and the agency had set up "its own specialized investment fund with a particular purpose," id., this distinction does not alter the analysis. Here, the university endowments at issue do not derive from "state funds." Instead, they are private and federal funds "restricted by law, trust agreement, or contract." Board of Regents v. Judge, 168 Mont. 433, 446, 543 P.2d 1323, 1331 (1975) (excluding from the appropriation power of the Legislature private funds, including federal grants, granted to the university system for university purposes, as opposed to "the public operating funds of state government."). And while Mont. Code Ann. § 17-3-1001(2) states that a gift made directly to the Montana university system "is a gift . . . to the state," any attempt to legislatively define university endowments as "public" or "state" funds, and thereby exert "legislative control" over these types of funds, "is invalid to the extent it may be so read." Id.

This appears to be the understanding of the Delegates to the Constitutional Convention when they debated article VIII, section 13. V Conv. Tr. 1521 (remarks of

Delegate Toole) (limit in article VIII, section 13(1) on investments of "public funds" in corporate stock would not apply to University of Montana Foundation). Accordingly, though Montana's public universities are part of the state, the funds of university endowments are not "public funds" of the state, but instead are private or federal funds invested for the purpose of supporting a Montana university or specific program.

Other textual considerations also do not lend support to the conclusion that university endowments must be invested through the unified investment program. While article X, section 10 of the Montana Constitution places restrictions on university funds, this does not lead to the conclusion that article VIII, section 13 also applies to university endowments. The first sentence of article X, section 10 states: "The funds of the Montana university system and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated." In addition, these funds "shall be respectively invested under such regulations as may be provided by law, and shall be guaranteed by the state against loss or diversion." Id.

This provision is identical to article XI, section 12 of the 1889 Constitution, which was primarily concerned with land grant funds, not private endowments. See Blume v. Board of Education, 97 Mont. 371, 381, 34 P.2d 515, 519 (1934) (considering article XI, section 12 in the context of the land grant fund and analyzing the Enabling Act to determine applicable restrictions). It was adopted by the Delegates without debate. VII Conv. Tr. 2142. While the reference to funds "from whatever source accruing" may cover university endowments, the section provides only that they be invested "under such regulations as provided by law." Since article VIII, section 13, does not require that university endowments be part of the unified investment program, I must consider whether other provisions of law regulate the investment of endowments.

Montana Code Annotated § 17-3-1003(1) requires that "[a]ll money received or collected in connection with permanent endowments by all higher educational institutions . . . must be paid to the state treasurer, who shall deposit the money to the credit of the proper fund." This statute, however, requires that university endowments be "deposited" with the treasurer, not invested in any particular way, and then credited to "the proper fund." This is essentially an accounting statute requiring that receipts and expenditures be recorded in a specific manner. The proper fund for a donated endowment is one of the "higher education funds" established at Mont. Code Ann. § 17-2-102(4). If the endowment is set up so that "the principal portion of the amount received is nonexpendable but is available for investment," then the "endowment fund" would be the proper specific fund. See Mont. Code Ann. § 17-2-102(4)(c). Once credited to this fund, the Regents transfer the endowment funds to a "foundation for management and investment" pursuant to the Regent's policies, which are in this context "regulations provided by law."

Therefore, university endowments, when invested by the Regents with foundations, are invested under "such regulations as may be provided by law." They are

deposited in the appropriate fund, pursuant to Mont. Code Ann. §§ 17-3-1003(1) and 17-2-102(4), and then invested according to the Regent's policies.

The Legislature has not enacted a statute specifically requiring the Regents to invest University funds through the unified investment program. I therefore need not reach the question of whether the Legislature may, by statute, direct the investment of university endowments in a manner that is contrary to the Regent's policies. In any event, the constitutionality of such a statute in light of the constitutional authority of the Regents is an issue on which the Attorney General ordinarily would not issue an opinion.

In an earlier opinion relating to gifts to the School of the Deaf and Blind, Attorney General Woodahl opined "[i]f the board of public education chooses to invest any gifts, investment must be done pursuant to the unified investment program . . . ." 36 Op. Att'y Gen. No. 106 at 556 (1976). This statement is not supported by detailed analysis, and is of limited value given the differing constitutional powers of the Board of Public Education and the Board of Regents. For that reason I do not consider it to be controlling here.

For the foregoing reasons, it is my opinion that university endowments are not "public funds" under article VIII, section 13(1) and are not "permanent funds of the Montana University System" under article VIII, section 13(2). I therefore conclude that the Constitution does not require that university endowment funds be invested through the unified investment program.

THEREFORE, IT IS MY OPINION:

> Article VIII, section 13 of the Montana Constitution does not require that endowments granted to Montana's public universities be invested through the unified investment program.

Sincerely,

/s/ Steve Bullock
STEVE BULLOCK
Attorney General

sb/jss/jym

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

Education and Local Government Interim Committee:

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration and Veterans' Affairs Interim Committee:

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

Environmental Quality Council:

- Department of Environmental Quality;
- Department of Fish, Wildlife, and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have 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. They also 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, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. Box 201706, Helena, MT 59620-1706.

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 or Register) 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

1. Consult ARM Topical Index.
   Update the rule by checking the accumulative 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 that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 2010. This table includes those rules adopted during the period July 1, 2010, through September 30, 2010, and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 2010, this table, and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule, and the page number at which the action is published in the 2010 Montana Administrative Register.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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