



Law and Justice Interim Committee

62nd Montana Legislature

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TO: Law and Justice Interim Committee

FROM: David Niss, Staff Attorney

RE: Department of Justice and Department of Corrections Rulemaking Notices

DATE: April 6, 2012

The Montana Department of Justice (DOJ) and the Montana Department of Corrections (DOC) have filed rulemaking notices with the Secretary of State that have been published in recent issues of the Montana Administrative Register. Those rulemaking notices that required LJIC staff to contact the agency proposing the rule or the Presiding Officer of the LJIC are summarized below, along with the substance of the staff contact and any agency response.

1. MAR Notice No. 23-14-224, pertaining to the Duties and Functions of the Board of Crime Control. The DOJ has proposed to both repeal and amend existing rules dealing with various functions of the Board of Crime Control. Committee staff contacted the DOJ statutory rule reviewer and pointed out that many of the authorizing and implemented sections cited by the DOJ were incorrect because the sections of law had been previously renumbered. Committee staff also pointed out that the statute, section 44-4-301, MCA, cited as authority for amendment of rules governing financial assistance from the U.S. Department of Justice only authorizes the Board of Crime Control to adopt rules governing appeals from the Public Safety Officer Standards and Training Council. DOJ staff responded that the public comment period had closed but that the DOJ would look into correcting the citations on the ARM replacement pages.

2. Emergency Rulemaking Notice Amending ARM 23.4.217, pertaining to Recertification of Breath-Test Personnel. The DOJ recently adopted an emergency rule on this subject as the result of a District Court opinion holding that a DOJ rule governing the timing of recertification of breath-test specialists did not mean what the DOJ intended it to mean because some language was inadvertently left in the rule the last time it was amended and, consequently, the Court ruled the breath test in the case before the Court to be inadmissible. Committee staff commented to the DOJ statutory rule reviewer that the statement of reasonable necessity was likely insufficient because the statement in the notice only addressed the reason for clarification of the rule and not the reason for a complete change in the method of certification of breath-test specialists. In the notice of adoption, the DOJ says it has appealed the holding of the District Court as to the inadmissibility of the breath test to the Montana Supreme Court.

3. MAR Notice No. 20-26-51, pertaining to Education of Exonerated Persons. The DOC has proposed five new rules to implement section 53-1-214, MCA, passed in 2003, requiring the DOC to adopt rules providing educational grants to persons whose convictions have been overturned as a result of postconviction forensic DNA testing. Committee staff pointed out to the DOC statutory rule reviewer that the proposed rules engraft additional noncontradictory provisions on the implemented statute (a practice prohibited by the opinions of the Montana Supreme Court when rules conflict with the statute being implemented or add additional noncontradictory provisions not envisioned by the Legislature. See, e.g., *Bell v. State*, 182 Mont. 21, 594 P.2d 331 (1979)). The proposed rule adds additional noncontradictory provisions by authorizing educational assistance in those instances when a conviction is “later dismissed”, rather than when a decision is only “overturned”, as the statute provides. The DOC rule reviewer responded that in the Bromgard case, Bromgard’s conviction was not “overturned” based upon DNA evidence, but his conviction was “dismissed”. Committee staff responded that the meaning of the statute could not be changed by the proposed rule and suggested that the DOC may want to seek an amendment to the statute. Committee staff also noted that the rule purports to limit the college degrees that may be earned to a bachelor’s degree and a master’s degree although the statute authorizes “any” degree, to which the rule reviewer agreed. Committee staff also noted that the rationale for the rule may be deficient because it doesn’t appear to comply with section 2-4-305(6)(b), MCA.

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