EXHIBIT 5
DATE 1/20/15
HB 128

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Law and Justice Interim Committee
62nd Montana Legislature

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MEMORANDUM

TO: Members, Law and Justice Interim Committee

FROM: David Niss, Staff Attorney

RE: Legislative Review of Rules of Board of Pardons and Parole

DATE: July 13, 2012

I
Introduction

In keeping with my role as Counsel to the State Administration and Veterans' Affairs Interim Committee (SAVA) and the Law and Justice Interim Committee (LJIC), I have brought to the Committees' attention at various times potential changes to statutes that enhance or facilitate the role of the Legislature in its committee duties of monitoring functions of other branches of government. This is especially true regarding the application of the Montana Administrative Procedure Act (MAPA). For this reason, I've discussed below an issue concerning legislative review of proposed administrative rules to be adopted by the Board of Pardons and Parole that the LJIC or SAVA may wish to address by statutory amendment.

II
Discussion

Section 2-4-102, MCA, through the definition of "agency", defines those agencies that are subject to MAPA. Regarding the exclusion of the Board of Pardons and Parole, subsection (2)(a)(i) excludes that Board through the use of the following language: "(i) the state board of pardons and parole, except that the board is subject to the requirements of 2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ARM and the register".

Because section 2-4-306, MCA, contains the requirement for filing proposed or adopted rules with the Montana Secretary of State, the Board's rules are subject to legislative review because section 2-4-402(1), MCA, requires that legislative interim committees "shall review all proposed rules filed with the secretary of state." So there is little question that the proposed rules of the Board of Pardons and Parole are subject to review by the LJIC.[1]

However, virtually all of the standards to be met by Executive Branch agencies in administrative rulemaking are contained in section 2-4-305, MCA, which is not one of the sections of law cited for application to the Board in the definition of "agency" in section 2-4-102(2)(a), MCA, quoted above. The result is, in short, that while the rules of the Board are subject to legislative review, there are few if any standards against which those rules may be compared, and the purposes of that review are therefore questionable.

Section 2-4-305, MCA, contains the following primary standards applicable to most other Executive Branch agency rulemaking proposals:

1. The agency must consider and respond to comments made by others upon the proposed rule.
2. Each rule must cite the statutory authority for the rule and the statute implemented by the rule.
3. Each rule must be within the scope of authority delegated by the Legislature.
4. A rule may not conflict with statutes passed by the Legislature.
5. The rule must be reasonably necessary to implement the statute and must contain a statement showing why the rule is reasonably necessary.
6. The rule must comply with other statutes regarding notice, hearing, and submission of views.
7. If the rule is an emergency rule, it must comply with the statute governing emergency rules.
8. If the legislative committee reviewing a rule objects to it, the adoption of the rule must be delayed by the agency.

Research into the passage of MAPA by a 1971 Special Session of the Montana Legislature discloses that Mr. John P. McCrory, the contractor for a study compiled by the Legislative Council, recommended that including in MAPA the exemption of the Board from the standard requirements for lawful rules applicable to all other agencies

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[1] The LJIC is the appropriate Committee to review the rules because the Board is attached for administrative purposes to the Department of Corrections pursuant to section 2-15-2302(6), MCA, and that Department and its attached boards are subject to the LJIC's rule review authority pursuant to section 5-5-226, MCA.

was warranted in light of the broad grants of discretion given to the Board to grant or deny parole.[2]

While the Board may possess broad powers to grant or deny parole, it's questionable from a legislative policy standpoint whether that justifies an agency not following the law. The MAPA requirement that rules should not contravene law passed by the Legislature should apply to all state agencies, whether they have broad or narrow authority to implement other laws passed by the Legislature. Applying the two minimal requirements that rules may not contravene statute and rules must be reasonably necessary would give the LJIC staff a standard against which to review rules proposed by the Board and without which Committee review is incomplete.

III
Conclusion

Recent research into the provisions of MAPA discloses that the rules of the Board of Pardons and Parole are required to be reviewed by LJIC but that the rules of the Board are exempt from most of the rulemaking requirements applicable to other administrative agencies, including the requirements that those rules not contravene statute and that rules be reasonably necessary before they're adopted. Without any standards from section 2-4-305, MCA, against which to compare proposed Board rules, there is little the LJIC or its staff can do if a rule review finds a violation of those principles.

cc: SAVA

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[2]Montana Administrative Procedures Study, Report of Study on Montana Administrative Procedures and Proposal for a Montana Administrative Procedure Act, McCrory, p. 103 (1970).