

Unofficial Draft Copy

As of: November 16, 2005 (9:46am)

LC9995

**** Bill No. ****

Introduced By *****

By Request of the State Administration and Veterans' Affairs

Interim Committee

A Bill for an Act entitled: "An Act providing for the payment of the expenses of a private entity, group, or individual incurred in challenging the adoption, amendment, or repeal of a rule proposed or adopted in knowing or willful violation of the Montana Administrative Procedure Act; providing for the payment of expense claims by the Department of Administration from money appropriated to the agency that violated the Act; authorizing the department of administration to adopt rules; requiring a state agency subject to the rulemaking provisions of the Montana Administrative Procedure Act to provide for payment of expenses as part of the agency's operating budget; providing definitions; amending sections 17-7-138, and 17-7-301, MCA; providing an immediate effective date and an applicability date."

WHEREAS, the process of making rules by administrative agencies of state government is a process involving many individuals, organizations, and other members of the public subject to agency rulemaking powers; and

WHEREAS, in many instances, state agencies have more resources than private persons to devote to the rulemaking process and rulemaking can therefore be a process weighted in favor of the agency proposing the rule; and

Unofficial Draft Copy

As of: November 16, 2005 (9:46am)

LC9995

WHEREAS, the State Administration and Veterans' Affairs Committee is concerned that a state agency might violate, with relative impunity, a requirement of the Montana Administrative Procedure Act in the process of rulemaking and that persons in the private sector subject to a rule adopted in violation of the Montana Administrative Procedure Act may not be able to adequately challenge the rule because of limited resources; and

WHEREAS, the Committee's purpose is therefore to level the playing field between state agencies and members of the public involved in the rulemaking process by providing a mechanism for payment of expenses incurred by a member of the public in challenging a rule adopted in willful or knowing violation of the Montana Administrative Procedure Act.

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. Section 1. Violation of rulemaking provisions - challenge of proposed or adopted rule -- recovery of expenses - definitions. (1) If, in the course of proposing, adopting, or both proposing and adopting, a rule pursuant to this chapter, an agency, including an individual within an agency, knowingly or purposefully commits a substantive violation of this chapter, a person challenging the proposed or adopted rule in an administrative or judicial proceeding pursuant to this chapter may recover, in the manner provided in this section, the expense of making the challenge.

(2) A claim for payment pursuant to this section must be

Unofficial Draft Copy

As of: November 16, 2005 (9:46am)

LC9995

submitted to the department of administration for payment. Before denying a claim, the department shall provide an opportunity for a hearing pursuant to the contested case procedure of the Montana Administrative Procedure Act. If a hearing is held, it must be held before a hearing officer provided by the attorney general.

(3) If the department is the agency alleged to have violated the Montana Administrative Procedure Act, an order written by the hearing officer is the final order.

(4) A payment made by the department, or ordered by a hearing officer pursuant to subsection (3), must be made, notwithstanding any other law to the contrary, from money appropriated to the agency that is alleged to have violated the Montana Administrative Procedure Act.

(5) A decision pursuant to this section by the department, or by a hearing officer pursuant to subsection (3), not to pay a claim is subject to judicial review pursuant to 2-4-702. A person to whom expenses of a challenge to a rule are awarded by a court because of a review pursuant to 2-4-702 shall also be awarded the expenses incurred because of judicial review. Expenses incurred because of a review pursuant to 2-4-702 are not limited to \$10,000.

(6) The department may adopt rules to implement this section.

(7) The remedy provided by this section is in addition to any other remedy provided by law.

(8) As used in this section, unless the context indicates otherwise, the following definitions apply:

Unofficial Draft Copy

As of: November 16, 2005 (9:46am)

LC9995

(a) "Department of administration" or "department" means the department of administration provided for in 2-15-1001.

(b) "Expense" means an out-of-pocket payment, including attorney fees, other professional services fees, and the cost of submitting a claim for payment pursuant to this section, including the cost of a contested case proceeding, up to and including a maximum of \$10,000.

(c) "Person" does not include an agency of state government.

(d) "Substantive violation": (i) includes proposing or adopting a legislative rule without express legal authority for the rule, proposing or adopting a legislative rule without reasonable necessity for making a rule, implementing a proposed or adopted legislative rule or otherwise treating a proposed or adopted legislative rule as adopted before its effective date, proposing or adopting a legislative rule that is contrary to a statute implemented by the rule.

(ii) does not include a violation by the secretary of state in the publication, arrangement, or distribution of the Montana Administrative Register or the MAR, a typographical or other clerical error, an incorrect citation to the law authorizing a rule to be adopted or to the law implemented by a proposed or adopted rule, or repetition in a rule of statutory language.

Section 2. Section 17-7-138, MCA, is amended to read:

"17-7-138. Operating budget. (1) (a) Expenditures by a state agency must be made in substantial compliance with the

Unofficial Draft Copy

As of: November 16, 2005 (9:46am)

LC9995

budget approved by the legislature. Substantial compliance may be determined by conformity to the conditions contained in the general appropriations act and to legislative intent as established in the narrative accompanying the general appropriations act. An explanation of any significant change in agency or program scope must be submitted on a regular basis to the interim committee that has program evaluation and monitoring functions for the agency pursuant to Title 5, chapter 5, part 2. An explanation of any significant change in agency or program scope, objectives, activities, or expenditures must be submitted to the legislative fiscal analyst for review and comment by the legislative finance committee prior to any implementation of the change. A significant change may not conflict with a condition contained in the general appropriations act. If the approving authority certifies that a change is time-sensitive, the approving authority may approve the change prior to the next regularly scheduled meeting of the legislative finance committee. The approving authority shall submit all proposed time-sensitive changes to the legislative fiscal analyst prior to approval. If the legislative fiscal analyst determines that notification of the legislative finance committee is warranted, the legislative fiscal analyst shall immediately notify as many members as possible of the proposed change and communicate any concerns expressed to the approving authority. The approving authority shall present a report fully explaining the reasons for the action to the next meeting of the legislative finance committee. Except as provided in subsection (2), the expenditure of money

Unofficial Draft Copy

As of: November 16, 2005 (9:46am)

LC9995

appropriated in the general appropriations act is contingent upon approval of an operating budget by August 1 of each fiscal year. An approved original operating budget must comply with state law and conditions contained in the general appropriations act.

(b) For the purposes of this subsection (1), an agency or program is considered to have a significant change in its scope, objectives, activities, or expenditures if:

(i) the operating budget change exceeds \$1 million; or

(ii) the operating budget change exceeds 25% of a budget category and the change is greater than \$25,000. If there have been other changes to the budget category in the current fiscal year, all the changes, including the change under consideration, must be used in determining the 25% and \$25,000 threshold.

(2) The expenditure of money appropriated in the general appropriations act to the board of regents, on behalf of the university system units, as defined in 17-7-102, is contingent upon approval of a comprehensive operating budget by October 1 of each fiscal year. The operating budget must contain detailed revenue and expenditures and anticipated fund balances of current funds, loan funds, endowment funds, and plant funds. After the board of regents approves operating budgets, transfers between units may be made only with the approval of the board of regents. Transfers and related justification must be submitted to the office of budget and program planning and to the legislative fiscal analyst.

(3) The operating budget for money appropriated by the general appropriations act must be separate from the operating

Unofficial Draft Copy

As of: November 16, 2005 (9:46am)

LC9995

budget for money appropriated by another law except a law appropriating money for the state pay plan or any portion of the state pay plan. The legislature may restrict the use of funds appropriated for personal services to allow use only for the purpose of the appropriation. Each operating budget must include expenditures for each agency program, detailed at least by first-level categories as provided in 17-1-102(3). Each agency shall record its operating budget for all funds, other than higher education funds, and any approved changes on the statewide budget and accounting state financial system. Documents implementing approved changes must be signed. The operating budget for higher education funds must be recorded on the university financial system, with separate accounting categories for each source or use of state government funds. State sources and university sources of funds may be combined for the general operating portion of the current unrestricted funds.

(4) A state agency subject to the requirements of Title 2, chapter 4, part 3, must include in its operating budget money sufficient to pay a claim pursuant to [section 1]."

{*Internal References to 17-7-138: None.*}

Section 3. Section 17-7-301, MCA, is amended to read:

"17-7-301. Authorization to expend during first year of biennium from appropriation for second year -- proposed supplemental appropriation defined -- limit on second-year expenditures. (1) An agency may make expenditures during the first fiscal year of the biennium from appropriations for the

second fiscal year of the biennium if authorized by the general appropriations act. An agency that is not authorized in the general appropriations act to make first-year expenditures may be granted spending authorization by the approving authority upon submission and approval of a proposed supplemental appropriation to the approving authority. The proposal submitted to the approving authority must include a plan for reducing expenditures in the second year of the biennium that allows the agency to contain expenditures within appropriations. If the approving authority finds that, due to an unforeseen and unanticipated emergency, the amount actually appropriated for the first fiscal year of the biennium with all other income will be insufficient for the operation and maintenance of the agency during the year for which the appropriation was made, the approving authority shall, after careful study and examination of the request and upon review of the recommendation for executive branch proposals by the budget director, submit the proposed supplemental appropriation to the legislative fiscal analyst.

(2) The plan for reducing expenditures required by subsection (1) is not required if the proposed supplemental appropriation is:

(a) due to an unforeseen and unanticipated emergency for fire suppression;

(b) requested by the superintendent of public instruction, in accordance with the provisions of 20-9-351, and is to complete the state's funding of guaranteed tax base aid, transportation aid, or equalization aid to elementary and secondary schools for

the current biennium; or

(c) requested by the attorney general and:

(i) is to pay the costs associated with litigation in which the department of justice is required to provide representation to the state of Montana; or

(ii) in accordance with the provisions of 7-32-2242, is to pay costs for which the department of justice is responsible for confinement of an arrested person in a detention center.

(3) Upon receipt of the recommendation of the legislative finance committee pursuant to 17-7-311, the approving authority may authorize an expenditure during the first fiscal year of the biennium to be made from the appropriation for the second fiscal year of the biennium. Except as provided in subsection (2), the approving authority shall require the agency to implement the plan for reducing expenditures in the second year of the biennium that contains agency expenditures within appropriations.

(4) The agency may expend the amount authorized by the approving authority only for the purposes specified in the authorization.

(5) The approving authority shall report to the next legislature in a special section of the budget the amounts expended as a result of all authorizations granted by the approving authority and shall request that any necessary supplemental appropriation bills be passed.

(6) As used in this part, "proposed supplemental appropriation" means an application for authorization to make expenditures during the first fiscal year of the biennium from

appropriations for the second fiscal year of the biennium.

(7) (a) Except as provided in subsections (2) and (7)(b), an agency may not make expenditures in the second year of the biennium that, if carried on for the full year, will require a deficiency appropriation, commonly referred to as a "supplemental appropriation".

(b) An agency shall prepare and, to the extent feasible, implement a plan for reducing expenditures in the second year of the biennium that contains agency expenditures within appropriations. The approving authority is responsible for ensuring the implementation of the plan. If, in the second year of a biennium, mandated expenditures that are required by state or federal law will cause an agency to exceed appropriations or available funds, the agency shall reduce all nonmandated expenditures pursuant to the plan in order to reduce to the greatest extent possible the expenditures in excess of appropriations or funding. An agency may not transfer funds between fund types in order to implement a plan.

(8) A supplemental appropriation may not be proposed or approved for payment of a claim awarded pursuant to [section 1]."

{*Internal References to 17-7-301: None.*}

NEW SECTION. Section 4. {standard} Codification instruction. [Section 1] is intended to be codified as an integral part of Title 2, chapter 4, and the provisions of Title 2, chapter 4, apply to [section 1].

Unofficial Draft Copy

As of: November 16, 2005 (9:46am)

LC9995

NEW SECTION. **Section 5. {standard} Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 6. Applicability.** [This act] applies to a rule proposed or adopted in violation of Title 2, chapter 4, after [the effective date of this act].

- END -

{Name : David S. Niss
Title : Staff Attorney
Agency: Legislative Services Division
Phone : (406) 444-3064
E-Mail: dniss@mt.gov}