



Montana Legislative Services Division
Legal Services Office

TO: State Administration and Veterans' Affairs Interim Committee

FROM: K. Virginia Aldrich

DATE: October 24, 2019

RE: Legislative Administrative Rule Review Report

Pursuant to 5-5-228, MCA, the State Administration and Veterans' Affairs Interim Committee is responsible for reviewing administrative rules within its jurisdiction. Staff for the State Administration and Veterans' Affairs Interim Committee has prepared this report for informational purposes only. This report does not represent any action or opinion of the State Administration and Veterans' Affairs Interim Committee and does not preclude additional action that may be taken by the State Administration and Veterans' Affairs Interim Committee pursuant to its authority under the Montana Administrative Procedure Act (Title 2, chapter 4, MCA).

MAR NOTICE NUMBER: 2-13-592

AGENCY/BOARD: Department of Administration

RULE CLASSIFICATION: (e.g. substantive/interpretive/emergency/temporary): Substantive

SUBJECT: Notice of Public Hearing on Proposed Amendment - Applicant Priority and Criteria for Awarding 9-1-1 Grants.

NOTICE DESCRIPTION: (e.g. proposal notice/adoption notice): Notice of Public Hearing on Proposed Amendment - Applicant Priority and Criteria for Awarding 9-1-1 Grants.

SUMMARY OF RULE(S): The Department of Administration (Department) proposes to amend one rule concerning the criteria for awarding competitive grants to private telecommunications providers and local government entities that host public safety answering points. Previously, the Department proposed and adopted its criteria in rule. The proposed changes delete the current criteria and provide that the Department "shall adopt the criteria annually, before providing notice that it is accepting applications. The criteria shall be posted on the department's website and made available with the grant applications." In addition, the proposal provides that the grant determinations are subject to the statutory priority placed in section 10-4-306(3) and that a "particular grant award may not be supported by all of the criteria adopted by the department."

The Department states that:

It is necessary to amend the rule to ensure grant criteria are not overly rigid, which could lead to arbitrary decisions and reduce the effectiveness of the grant program. By allowing the department and 9-1-1 Advisory Council to set and announce the grant criteria annually, this amendment would ensure flexibility to

allow the department to direct limited 9-1-1 grant funds to areas and projects where the grants will have the greatest impact during that particular grant cycle.

In addition, the department proposes to add flexibility by amending (3) to allow the department to make an award to a project that will have a significant impact although the project may not meet all the criteria adopted by the department. For example, if a major infrastructure improvement project would greatly enhance the 9-1-1 system but required more time than allowed by the criteria, the department could approve the application because it met other criteria and advanced the legislative goal of improving emergency telecommunications.

From the text of the proposal, it appears that the Department is trying to amend the rule to allow it to adopt policy outside of the Montana Administrative Procedure Act (MAPA) process located in Title 2, chapter 4, MCA. Under MAPA, prior to the adoption, amendment, or repeal of any rule, a proposal must be filed with the Secretary of State for publication in the Montana Administrative Register and comply with other procedural and substantive requirements.

A "rule" is defined by MAPA as "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency." Section 2-4-102, MCA. There are several exceptions to the definition of a "rule" provided in section 2-4-102, MCA. In discussions with staff, the Department stated that the criteria or, alternatively, "considerations" fall under the "internal management" exception. Specifically, it argues that the considerations would qualify as "statements concerning only the internal management of an agency or state government and not affecting private rights or procedures available to the public". The Department argues that this exception applies because a private party has "no legal right to receive a grant" and because it is not a "procedur[e] available to the public." However, the grant program is a procedure specifically created to select qualifying outside parties to receive grants, regardless of whether a party has a right to receive a particular grant. Aspects of procedures used to help select grant applicants cannot be qualified as purely internal when the grant program selects and administers grants to outside parties. Thus, although the Department argues that this exception applies, it does not appear that "internal management" exception would apply in this instance.

In addition, the Legislature specifically required the Department to adopt *rules* to provide criteria for awarding grants (*see* section 10-4-108(1)(a)(ii)). Thus, it is clear that the criteria must be adopted as a rule, complying with pertinent MAPA procedures. *See e.g. S. Mont. Tel. Co. v. Mont. PSC, Dept. of Pub. Serv. Regulation*, 2017 MT 123, 387 Mont. 415, 395 P.3d 473.

MAPA does allow an agency to adopt material by reference. Material adopted by reference must comply with statutory requirements provided in 2-4-307, MCA. To adopt material by reference, the publication must be "unduly cumbersome, expensive, or otherwise inexpedient" and it must be "reasonable for the agency to adopt the . . . rule . . . for the state of Montana." Section 2-4-307, MCA. In addition, any material adopted by reference "must be *in existence* at the time that

the agency's notice of proposed rulemaking is published in the register" (emphasis added). *Id.* In addition, the material adopted by reference "must be available to the public for comment . . . during the time that the rule adopting the model code, rule, or other publication is itself subject to public comment." *Id.* Because the proposed rule would allow the agency to adopt material in a fashion that is not contemplated by or subject to MAPA using material that is not currently in existence, the proposal raises a potential legal concern.

In addition to arguing that the "internal management" exception applies, the Department states that the criteria, or alternately, the "considerations" have a "temporal element that would be difficult to address and continually update in administrative rule, whether in the text of the rule itself or in a standard adopted by reference." The Department noted that the considerations "would be used to compare applications submitted by eligible applicants with the same priority." The Department stated that "we do not anticipate the considerations will be relevant to all of the applications we receive. Some applications may implicate several considerations while others will not implicate any considerations." Nevertheless, despite the Department's position that the "considerations will not prescribe law or policy," they *would* be used to evaluate, compare, and help decide between grant applications with the same priority status. As such, it appears that these considerations would likely fall into the definition of a "rule" under MAPA, requiring appropriate notice and MAPA procedures.

NOTES: A public hearing will be held on November 13, 2019, at 10:00 a.m. in Room 7 of the Mitchell Building, 125 N. Roberts St., Helena, Montana. The public comment period ends on November 18, 2019.

FULL TEXT OF NOTICE: The full text of the notice proposal and the amended proposal may be found online at http://www.mtrules.org/gateway/Cycle_Home.asp?CID=2993.

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