



Montana Legislative Services Division
Legal Services Office

January 14, 2008

TO: Legislative Council

FROM: Greg Petesch

RE: Delegations of Legislative Authority

There are approximately 775 specific authorizations for the adoption of administrative rules in the MCA. Section 2-4-305, MCA, concerning the requisites for an administrative rule, provides that a rule must include a citation to the specific grant of rulemaking authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and adopted rule must include a citation to the specific section or sections in the MCA that the rule purports to implement. Section 2-4-102, MCA, defines a substantive rule as including legislative rules that, if adopted in accordance with Title 2, chapter 4, MCA, and under expressly delegated authority to promulgate rules to implement a statute, have the force of law.

The area of separation of powers that most often involves the Legislature is the area of an alleged unlawful delegation of legislative authority. When the Legislature confers authority on an administrative agency, it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power given to the agency. In Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960), the Montana Supreme Court set the standard for a delegation of legislative power as follows:

The law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid.

Bacus, 138 Mont. at 78, 354 P.2d at 1061.

A statute granting legislative power to an administrative agency will be held to be invalid if the Legislature has failed to prescribe a policy, standard, or rule to guide the exercise of the delegated authority. If the Legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, the statute is invalid. For example, in In re Gate City S & L Association, 182 Mont. 361, 597 P.2d 84 (1979), section 32-2-231, MCA (renumbered 32-2-271), directed the Department of Business Regulation (now Department of Labor and Industry) to rule on merger applications by savings and loan associations but provided no standards or guidelines either expressed or otherwise ascertainable. There was nothing in the statute to enable the agency to know its rights and obligations, and therefore it was an unconstitutional delegation of legislative power.

By way of contrast, in Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977), the plaintiff challenged the constitutionality of Chapter 533, Laws of 1975, which provided for development of renewable natural resources. Bonds were to be issued and the money used by the Board of Natural Resources and Conservation (now abolished) to make loans to farmers and ranchers for the development and preservation of natural resources. The loans could be made only on proper application to and recommendation by the Department of Natural Resources and Conservation. Total control over granting the loans was vested in the Department. The Montana Supreme Court determined that when the Legislature confers authority on an administrative agency, it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power given to the agency. The provisions of the statutes involved here were sufficiently clear, definite, and certain to enable the agency to know its rights and obligation. However, section 90-2-105, MCA (since repealed), providing that a fund created by the sale of revenue bonds from which the Board of Natural Resources and Conservation was to make loans to farmers and ranchers "for any worthwhile project" for conservation and other renewable resources, was an unconstitutional delegation of legislative power because the standards and guides laid down by this statute were insufficient. In effect, the only limit on the Board's power to loan money was its subjective determination of whether a project was worthwhile.

There is a caveat to the legal requirement for clear, definite, and certain standards and guides. In State ex rel. Department of Health and Environmental Sciences v. Lincoln County, 178 Mont. 410, 584 P.2d 1293 (1978), a challenge was brought to the adoption of a rule governing open burning, implementing section 75-2-203, MCA, of the Clean Air Act of Montana as an unconstitutional delegation of legislative power to the Board of Health and Environmental Sciences (now Board of Environmental Review). The Montana Supreme Court held that even though the statute was phrased in broad and general language, the delegation was valid because the field of environmental protection lacked detailed and precise standards. Air pollution control was an emerging field for which detailed and precise standards had not been fully developed, and the authority granted necessarily had to be phrased broadly.

Administrative rules are inconsistent with legislative guidelines if they engraft additional requirements on the statute that were not envisioned by the Legislature. When the statutes set forth experience and character requirements for a barber school operator but did not mention an instructor's examination, an administrative rule requiring such an examination was void. Bell v. State, 182 Mont. 21, 594 P.2d 331 (1979).

One of the most recent challenges to a statute based on the unlawful delegation of authority doctrine involved the Public Employees' Retirement System. In that case, the District Court held that the 2001 amendments contained in House Bill No. 294, which included a definition of actuarial equivalent that changed the method by which the Public Employees' Retirement Board calculated certain benefits, unconstitutionally delegated unconstrained discretion to the Board in violation of the separation of powers doctrine. On appeal, the Board asserted that Article VIII, section 15, of the Montana Constitution gave the Board the authority to make actuarial evaluations and thus to implement the 2001 amendments, so there was no constitutional

violation. The Supreme Court agreed. Article III, section 1, of the Montana Constitution allows one branch of government to exercise power properly belonging to another branch if the constitution expressly directs or permits that exercise. Because Article VIII, section 15, of the Montana Constitution delegated authority to the Board to make actuarial determinations, the District Court committed reversible error in concluding that the Legislature and House Bill No. 294 unconstitutionally delegated authority to the Board to make determinations allowed by another section of the constitution. Baumgardner v. Public Employees' Retirement Board, 2005 MT 199, 328 Mont. 179, 119 P.3d 77 (2005).

A recent controversy has developed over a proposal being considered by the Department of Revenue to draft rules to implement Title 7, chapter 15, part 42 and part 43, MCA, concerning tax increment financing districts. Section 15-1-201, MCA, provides:

Administration of revenue laws. (1) (a) The department has general supervision over the administration of the assessment and tax laws of the state, except Title 15, chapters 70 and 71, and over any officers of municipal corporations having any duties to perform under the laws of this state relating to taxation to the end that all assessments of property are made relatively just and equal, at true value, and in substantial compliance with law. The department may make rules to supervise the administration of all revenue laws of the state and assist in their enforcement.

(b) In the administration of any tax over which it has general supervision, the department may require all individuals subject to the tax laws of the state to provide to the department the individual's social security number, federal employee identification number, or taxpayer identification number.

(c) The department may contract with the U.S. department of the interior or any other federal agency to perform federal royalty audits, collection services, and any other delegable functions related to mining operations on federal lands within the state pursuant to the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996.

(d) The department shall adopt rules specifying which types of property within the several classes are considered comparable property as defined in 15-1-101.

(e) The department shall also adopt rules for determining the value-weighted mean sales assessment ratio for all commercial and industrial real property and improvements.

(2) The department shall confer with, advise, and direct officers of municipal corporations concerning their duties, with respect to taxation, under the laws of the state.

(3) The department shall collect annually from the proper officers of the municipal corporations information, in a form prescribed by the department, about the assessment of property, collection of taxes, receipts from licenses and other sources, expenditure of public funds for all purposes, and other information as may be necessary and helpful in the work of the department. It is the duty of all

public officers to fill out properly and return promptly to the department all forms and to aid the department in its work. The department shall examine the records of all municipal corporations for purposes considered necessary or helpful.
(emphasis added)

It appears that rules adopted under the authority of section 15-1-201, MCA, to implement Title 7, chapter 15, part 42 and part 43, MCA, concerning tax increment financing districts would be subject to scrutiny as engrafting additional requirements on the tax increment financing district statutes that were not envisioned by the Legislature.

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