



DEPARTMENT OF CORRECTIONS

Reginald D. Michael, Director

STATE OF MONTANA

Legal Services Division

Colleen Ambrose, Legal Services Director
Ira Eakin, Staff Attorney
Robert Lishman, Staff Attorney
Lorraine Schneider, Staff Attorney
Kara Thompson, Paralegal
Dayna Gilman, Legal Assistant
Jared Hardman, Legal Assistant

5 South Last Chance Gulch
P.O. Box 201301
Helena, Montana 59620
Phone (406) 444-2778
Fax (406) 444-4920

TO: Montana Board of Crime Control
FROM: Lorraine Schneider, Staff Attorney
Montana Department of Corrections (Department)
DATE: November 8, 2018
RE: Authority of the Montana Board of Crime Control (Board)

ISSUE PRESENTED

The Montana Board of Crime Control (“Board”) requested a written outline of its authority. Specifically, the Board requested proof that the Department has no authority to override the Board’s funding decisions on grant applications that come before the Board in its capacity as the State Administering Agency for Montana.

SHORT ANSWER

The Department of Corrections has no authority to override the Board of Crime Control’s funding decisions on grant applications that come before the board in its capacity as the State Administering Agency for Montana¹.

LEGAL AUTHORITIES

¹ No reference to the term “State Administering Agency” was found in state or federal laws, rules or regulations except under VOCA Victim Assistance Program regulation 28 CFR §94.102 wherein the term, abbreviated SAA, is defined as “the governmental unit designated by the chief executive of a State to administer grant funds *under this program*”.

Mont. Code Ann. §2-15-112(2)(c), MCA, states, in pertinent part, that: *Except as otherwise provided by law*, each department head may: ...apply for, accept, administer, and expend funds, grants, gifts, and loans from the federal government or any other source *in administering the department’s functions*.

The Department of Corrections (Department) is an executive branch agency of the State of Montana; the head of the Department is the Director of Corrections. §2-15-2301, MCA. The Director is a gubernatorial appointee. §2-15-111, MCA. “Director” means a department head specifically referred to as a director in this chapter and does not mean a commission, board, commissioner, or constitutional officer. §2-15-102(6)(a), MCA.

Within the organizational structure of the Director’s Office is a Bureau of Crime Control (Bureau) whose purpose is to provide staff and support to the Board of Crime Control (Board). §2-15-2307, MCA.

There is a Board of Crime Control (Board) which is administratively allocated to the Department of Corrections. §§2-15-121 and 2-15-2306(2), MCA. The Board is comprised of 18 members appointed by the governor. §2-15-2306(3), MCA.

The respective authority of the Board and the Department is set out below.

DEPARTMENT FUNCTION and AUTHORITY

The department to which an agency is “allocated for administrative purposes only” and the “department head” have specific statutory functions in relation to the allocated agency. See, respectively, §2-15-121(2) and (3), MCA.

2-15-121. (Temporary) Allocation for administrative purposes only.

...

(2) The department to which an agency is allocated for administrative purposes only in this title shall:

(a) direct and supervise the budgeting, recordkeeping, reporting, and related administrative and clerical functions of the agency;

(b) include the agency's budgetary requests in the departmental budget;

(c) collect all revenues for the agency and deposit them in the proper fund or account. Except as provided in **37-1-101**, the department may not use or divert the revenues from the fund or account for purposes other than provided by law.

(d) provide staff for the agency. Unless otherwise indicated in this chapter, the agency may not hire its own personnel.

(e) print and disseminate for the agency any required notices, rules, or orders adopted, amended, or repealed by the agency.

(3) The department head of a department to which any agency is allocated for administrative purposes only in this chapter shall:

(a) represent the agency in communications with the governor;

(b) allocate office space to the agency as necessary, subject to the approval of the department of administration. (*Terminates July 1, 2021--sec. 8, Ch. 322, L. 2017.*)

More directly on point is §2-15-112(1)(a), (2)(c) and (2)(d), MCA, which state as follows:

2-15-112. Duties and powers of department heads. (1) *Except as otherwise provided by law*, each department head shall:

(a) supervise, direct, account for, organize, plan, administer, and execute the *functions vested in the department by this chapter or other law*;

(2) *Except as otherwise provided by law*, each department head may:

(c) apply for, accept, *administer*, and expend funds, *grants*, gifts, and loans from the federal government or any other source *in administering the department's functions*;

(d) enter into agreements with federal, state, and local agencies necessary to carry out the *department's functions*[.]

(Emphasis added).

BOARD AUTHORITY

Under §2-15-121(1)(a)(i), MCA, an agency² “allocated to a department for administrative purposes only” in [chapter 15], shall exercise its *quasi-judicial, quasi-legislative, licensing and policymaking functions* independently of the department and without approval or control of the department except as provided in §2-15-121(1)(a)(ii), MCA [which is not pertinent to the Board’s instant inquiry].

It is not clear under which, if any, of the four functions in §2-15-121(1)(a)(i), MCA, making grants and administering them would fall. What is clear, however, is that those functions are not quasi-judicial in nature for the reasons set out below.

https://leg.mt.gov/bills/mca/title_0440/chapter_0070/parts_index.html

a) Quasi-legislative and Policy Making Functions

² Agency is defined in §2-15-102(2), MCA, as an office, position, commission, committee, **board**, department, council, division, bureau, section, or any other entity or instrumentality of the executive branch of state government.

The Board is designated by the governor as the “state planning agency” under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. §44-7-101(1), MCA. The statute states:

44-7-101. Functions. (1) As designated by the governor *as the state planning agency* under the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the board of crime control shall perform the functions assigned to it under that act. The board shall also provide to criminal justice agencies technical assistance and supportive services that are approved by the board or assigned by the governor or legislature.

(2) The board shall consider all appeals brought from decisions of the Montana public safety officer standards and training council pursuant to **44-4-403**. A board member designated as a member of the Montana public safety officer standards and training council, as provided in **44-4-402**, may not participate in appeals brought to the board from decisions of the council. The board shall promulgate rules governing the manner and method of the appeals.

Sec. 44-4-301, MCA 2015; redes. 44-7-101 by Sec. 25(4)(a)(ii), Ch. 384, L. 2017.

The Board’s “planning” functions referred to in §44-7-101(1), MCA, are those set out in ARM 20.24.101, particularly (3) and (5) of that rule. The text of the rule, in pertinent part, states:

20.24.101 BOARD OF CRIME CONTROL FUNCTIONS

...

(3) It is the responsibility of the board to administer the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351)³, as amended by the Victims of Crime Assistance Act and the Drug Free Schools and Communities Act. Under these provisions, the board may:

(a) develop a comprehensive statewide plan defining needs and problems and outlining priorities for the improvement of the criminal and juvenile justice system throughout the state.

(b) develop and coordinate police, courts and corrections programs and projects for the state and units of general local government.

³ https://transition.fcc.gov/Bureaus/OSEC/library/legislative_histories/1615.pdf - The title name and catchphrases for the “Parts” are noteworthy: Title I – Law Enforcement Assistance: Part A Law Enforcement Assistance Administration; Part B Planning Grants; Part C Grants for Law Enforcement Purposes; Part D Training, Education, Research, Demonstration, and Special Grants. This memorandum focuses on Part C Grants for Law Enforcement Purposes.

(c) be responsible for administering planning grants in the funding and implementation of state and local justice programs.

(5) Information regarding justice planning and grant administration may be acquired by contacting the board's office at 3075 North Montana Avenue, P.O. Box 201408, Helena, Montana 59620-1408, telephone (406) 444-3604, or fax (406) 444-4722.

The development of comprehensive statewide plans, programs and projects can best be described as quasi-legislative in nature or as policymaking. The planning functions of the Board appear to be outside the scope of the Board's inquiry.

b) Quasi-judicial Function

The reference in §44-7-102(2), MCA, to consideration of appeals brought from decisions of the Public Safety Officer Standards and Training Council, is the only apparent quasi-judicial function of the Board. See, also, ARM 20.24.1001 through 20.24.1009 which establish a due process hearing procedure that is applicable to such appeals. The Board's decisions in such matters are subject to judicial review under Title 2, Chapter 4, Part 7, MCA.

By contrast, ARM 20.24.203 specifically provides that the subgrant requests or applications for financial assistance are not "contested cases" within the meaning of §2-4-101, MCA. Accordingly, no quasi-judicial authority under the Montana Administrative Procedure Act pertains to that Board function.

BOARD'S AUTHORITY UNDER THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, AS AMENDED, TO AWARD AND ADMINISTER CERTAIN FEDERAL GRANTS

As stated above, §44-7-102(1), MCA (2017) provides that the Board is the *state planning agency* under the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and shall perform the functions assigned to it under that act. ARM 20.24.101 is the Board's administrative rule that implements §44-7-102, MCA. Subsection (3) of the **administrative rule** arguably refers indirectly to the Board's authority with respect to awarding and administering certain federal grants that are not "planning grants". It states, in pertinent part, that the Board is responsible to administer the provisions of the Omnibus Crime Control and Safe

Streets Act of 1968 (P.L. 90-351), as amended⁴ (“the Act”). Although ARM 20.24.101 is no longer consistent with the Montana Code Annotated due to the 2017 legislative changes affecting the Board, the substantive authority of the Board vis a vis the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351), as amended, was not affected by that legislation.

The Board, by adopting ARM 20.24.304, MCA, declared that upon receipt of an award letter, signed and returned to the board, a binding contract is created between the applicant and the board, contingent upon availability of federal funds. The rule must be considered in conjunction with ARM 20.24.305(1)(b), which states that [a] grant received by an applicant shall be *subject to* the grant conditions *and other policies, regulations and rules* issued by the U.S. Department of Justice, U.S. Department of Education, or other federal grantor agency[.]

The Board secures grant funding from various sources each of which sets requirements for awarding and administering the grants. The sources include the U.S. Department of Justice’s Office of Justice Programs (OJP) and other federal agencies.

The Omnibus Crime Control and Safe Streets Act of 1968 (**Pub. L. 90-351**) established the Law Enforcement Assistance Administration (LEAA) which was subsequently superseded by the Office of Justice Programs (OJP). The OJP provides federal grant funding for criminology and criminal justice research and block grants to states which are partly earmarked for assistance to local law enforcement agencies. The Omnibus Crime Control and Safe Streets Act of 1968 is codified at 34 U.S.C. §10101 **et seq.**

34 U.S.C. §10109 – Office of Audit, Assessment, and Management states, in pertinent part, that:

(a)(1) There is established within the Office [of Justice Programs] an Office of Audit, Assessment, and Management, headed by a Director appointed by

⁴ ARM 20.24.101(5) states that information regarding justice planning *and grant administration* may be acquired by contacting the board office[.] It is unclear whether the reference to “grant administration” refers to the planning grants or whether it has a broader meaning. ARM 20.24.202 states that the policies and procedures which are adopted by the board for its “internal management” and which do not affect private rights shall be maintained in a policy and procedure manual” which shall be available to the public at the office of the board. The import of ARM 20.24.202 is that matters affecting private rights are subject to the Montana Administrative Procedure Act’s rulemaking requirements with notice and opportunity for public comment. Additionally, any information and internal management matters that are or may be inconsistent with federal laws, regulations and policies regarding award or administration of federal grants would be ineffective, i.e., would not override federal laws, regulations and policies.

the [U.S.] Attorney General....(a)(2) The purpose of the Office [of Audit, Assessment, and Management] shall be to take actions to ensure compliance with the terms of, and manage information with respect to, grants under programs covered by subsection (b).... Subsection (b) Covered Programs. The programs referred to in subsection (a) are the following ... (2) Any grant program carried out by the Office of Justice Programs.

34 U.S.C. §10110 – Office of Justice Programs⁵, grants, cooperative agreements and contracts states, in pertinent part, that:

Notwithstanding any other provision of law, during any fiscal year the [U.S.] Attorney General – (1) may make grants or enter into cooperative agreements and contracts, for the OJP and the **component organizations** of that Office **(including,...any organization that administers any program established in Title 1 of Public Law 90-351)**; and (2) shall have *final authority over all functions*, including any grantsmade, or entered into, for the OJP and the component organizations of that office (*including ... any organization that administers any program established in title 1 of Public Law 90-351*).

The Declaration and Purpose statement for Title I of the Omnibus Crime Control and Safe Streets Act of 1968 states, inter alia, that it is the purpose of [the] title to: (2) authorize grants to States and units of local government in order to improve and strengthen law enforcement ...

Based on the foregoing, it is clear the U.S. Attorney General’s Office retains authority to make grants for the OJP and its component organizations and has final authority over all functions pertaining to the subject grants. The component organizations of the OJP concerning those grants would include, in the opinion of the Department’s Legal Services Division, the Board which administers Law Enforcement Assistance program grants (now known as OJP programs) established under the Omnibus Crime Control and Safe Streets Act of 1968 (the Act), as amended. Part C of the Act, “Grants for Law Enforcement Purposes”, Sec. 302, states that “any State desiring to participate in the grant program “under this part” shall establish a “State planning agency” as described in Part B of this title[.] Therefore, it appears that the Board’s designation as the State Planning Agency under §44-7-102(1), MCA, means more than that it is the agency that administers the Omnibus Crime Control and Safe Streets Act of 1968 Part B - Planning Grants.

⁵ The Office of Justice Programs (OJP) was initially known as the Law Enforcement Assistance Administration.

It is also the source of the Board's authority to administer Part C – Grants for Law Enforcement Purposes.

The Board has long been recognized by both state and federal governments as having that authority. The law enforcement related grants made by the Board do not pertain to the "Department's functions" under §2-15-112, MCA, and thus, that statute does not give the Department authority to award, administer, or override such grants.

CONCLUSION

Oversight of federal grants awarded by the Board to subrecipients is maintained not by the Montana Department of Corrections to which the Board is allocated for administrative purposes but, rather, as described above, through federal regulatory requirements including recipient and subrecipient audits, mandatory disclosures, risk assessments for subawards, reporting requirements, requirements for written conflicts of interest policies, and the like. 2 C.F.R. Part 200 contains the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (commonly referred to as the Part 200 Uniform Requirements). Highlights of the Part 200 Uniform Requirements are at pages 17-18 of <https://ojp.gov/funding/pdfs/IntroductionPart200.pdf>

The Board is welcome to contact the Department's Legal Services Division if any further information or assistance is required. Thank you for the opportunity to address the Board's question concerning its authority.