Montana Law Review

Volume 44
Issue 2 *Summer 1983*

Article 10

July 1983

Administrative Law

Richard W. Hompesch II
University of Montana School of Law

MONTANA SUPREME COURT SURVEY

ADMINISTRATIVE LAW

Richard W. Hompesch II

INTRODUCTION

Since the enactment of the Montana Administrative Procedure Act[1] (MAPA) in 1971, administrative law decisions continue to represent a small but vital part of the Montana Supreme Court's calendar. The cases that do reach the supreme court continue to have a substantial impact on the interaction between state agencies and residents. This survey contains the more important Montana Supreme Court decisions from the years 1981 and 1982 which directly construe MAPA. Cases involving substantive administrative law have been excluded.

I. JUDICIAL REVIEW OF CONTESTED CASES

A. *The Hearing Requirement*

Under Montana law "[a] person who has exhausted all administrative remedies available within the agency and is aggrieved by a final decision in a contested case is entitled to judicial review. . . ."[2] A contested case is defined as "any proceeding before an agency in which a determination of legal rights, duties, privileges of a party is required by law to be made *after an opportunity for hearing.*"[3]

Selon v. Board of Personnel Appeals[4] involved the state Department of Administration's (DOA) appeal of a decision made by the Board of Personnel Appeals (BPA). The district court dismissed the petition for judicial review for lack of jurisdiction. On appeal the supreme court affirmed the dismissal. The court held

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1. *See generally* MONT. CODE ANN. §§ 2-4-101 to -711 (1981).
2. MONT. CODE ANN. § 2-4-702(1)(a) (1981).
3. MONT. CODE ANN. § 2-4-102(4) (1981) (emphasis added). The phrase "required by law . . . has broader meaning than merely a statutory requirement for an opportunity for hearing. It includes situations where a hearing is required as a matter of constitutional right." MONT. CODE ANN § 2-4-102 (1981) comments.
4. ___ Mont. ___, 634 P.2d 646 (1981).

that DOA was not entitled to judicial review because the "final order of the BPA was not a final order in a contested case. It was not a determination made after an opportunity for a hearing."[5]

The case began when Selon filed a complaint with BPA challenging the wage and classification of his position as office clerk with the Department of Highways.[6] The Montana Public Employees Association (MPEA) represented Mr. Selon. Three of the four steps of BPA's grievance procedure were followed.[7] DOA and MPEA then agreed to follow an alternative grievance procedure in order to facilitate the appeal before BPA. The appeal continued according to the agreed procedure and BPA's preliminary decision approved Selon's claim. DOA was notified on November 14, 1979 of BPA's preliminary decision to reclassify Selon's position at a higher grade. On December 5, DOA mailed to BPA its exceptions to BPA's preliminary decision. BPA disregarded DOA's exceptions and adopted the preliminary decision as its final order.

The *Selon* decision turns on BPA's ruling that DOA's exceptions were not timely filed. Under the terms of the alternative grievance procedure "any hearing would be limited in scope to the issues presented and the filed exceptions."[8] The supreme court reasoned that DOA was not entitled to a hearing under the terms of the agreement since the exceptions were untimely filed and since the scope of the hearing was limited to the filed exceptions.[9]

The opinion may be criticized as being harsh from DOA's perspective. DOA never did obtain judicial review of whether DOA's exceptions were timely filed or not.[10] The case illustrates that the hearing requirement has crucial importance and that parties may consent to an administrative procedure other than that required by law.

B. *Regulation Creating Right to Judicial Review*

In *Nye v. Department of Livestock*,[11] the supreme court affirmed a district court denial of a petition for judicial review of a

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5. *Id.* at ____, 634 P.2d at 648.

6. MONT. CODE ANN. § 2-18-1011(1) (1981) states that "[a]n employee or his representative affected by the operation of parts 1 through 3 of [Title 2, Chapter 18] is entitled to file a complaint with the board of personnel appeals provided for in 2-15-1705 and to be heard under the provisions of a grievance procedure to be prescribed by the board."

7. BPA's four step grievance procedure is set forth in MONT. ADMIN. R. § 24.26.508 (1981).

8. *Selon*, ____ Mont. ____, 634 P.2d at 648.

9. *Id.*

10. *See infra* note 2.

11. ____ Mont. ____, 639 P.2d 498 (1982).

decision to terminate the employment of a Department of Livestock employee. The case involved the petition of a permit clerk for the Department who was promoted to a higher position. According to department policy the promotion placed Nye in probationary status for six months. During the period of probation, Nye's supervisors determined that her performance was deficient and they terminated her employment. Nye invoked the department's grievance procedure to challenge the termination of her employment. A committee was formed and after a hearing took place the committee recommended that Nye should be reinstated in her previous position. The director of the department, however, disregarded the committee's recommendation.

Judicial review was denied in *Nye* on two grounds. First, the case is not a "contested case"[12] under MAPA, because an "opportunity for hearing"[13] was not "required by law"[14] before a decision could be made to terminate Nye's employment. Second, the Department's regulation which provided for judicial review was invalid.[15] The regulation stated that "[t]hose grievances not allowed redress with the aforementioned [review bodies] may pursue it at the district court level."[16] The court held that the Department could not itself create a right of judicial review; only the legislature has the power to provide for judicial review.[17]

C. *Statute of Limitations and Judicial Review*

In 1981, the Montana Supreme Court granted a rehearing of *Rierson v. State*.[18] *Rierson* illustrates how the statute of limitations operates on severable claims for relief when one of the causes is adjudicated by an agency. In effect, the court stated that the statute of limitations is tolled on severable claims while one of the claims is being resolved through administrative procedure.[19] However, the court also stated that the statute of limitations again be-

12. MONT. CODE ANN. § 2-4-102(4) (1981).

13. *Id.*

14. *Id.*

15. MONT. ADMIN. R. § 2.21.8008(4) (1981). The Department of Livestock adopted personnel regulations originally promulgated by the Department of Administration.

16. *Id.*

17. *Nye*, ___ Mont. ___, 639 P.2d at 500. The court cites MONT. CONST. art. VII, § 4, cl. 2, which states that: "[t]he legislature may provide for direct review by the district court of decisions of administrative agencies."

18. ___ Mont. ___, 614 P.2d 1020 (1980), *aff'd on rehearing*, ___ Mont. ___, 622 P.2d 195 (1981). For a detailed discussion of the original appeal see Survey, *Administrative Law*, 42 MONT. L. REV. 329, 311-32 (1981).

19. *Rierson*, ___ Mont. ___, 622 P.2d at 198.

gins to run upon final decision by the agency.[20]

In *Rierson*, the statute of limitations began when appellant retired from the State Highway Patrol. Nearly two years later Rierson's attorney sent a letter to the Board of Administration of the Public Employees Retirement System demanding an adjustment of Rierson's retirement benefits.[21] An administrative proceeding was formally requested by Rierson and a hearing was held before an examiner. The Board adopted the hearing examiner's proposed decision which denied Rierson any additional retirement benefits. Within thirty days after the proposed decision was adopted, appellant's attorney filed a petition for judicial review in state district court.[22] The Board did not receive notice of the petition until sixteen and one-half months after the original petition had been filed, when the Board was served with a summons and an amended petition. On motion by the Board, the district court dismissed the original and amended petition as required under Montana Code Annotated section 2-4-702(1)(a) (1981).[23] The supreme court ruled that the words "promptly served" required "service of the petition for judicial review within thirty days or thereabouts."[24] The court held that the sixteen and one-half month delay of service to the Board after filing in district court was neither reasonable nor prompt.[25]

Rierson's rehearing was based on the contention that the district court failed "to treat his petition for judicial review as an independent civil action to which the 'prompt service' requirement would not apply."[26] Rierson argued that his claim was severable

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20. *Id.*

21. The dispute surfaced in 1971 when the administration of the highway patrol retirement system was moved from the Highway Patrolman's Retirement Board [hereinafter cited as HPRB] to the Board of Administration of the Public Employees Retirement System [hereinafter cited as the Board]. Before 1971, HPRB determined that a patrolman with over twenty-five years of service would receive retirement benefits exceeding one-half of regular pay. The Board interpreted HPRB's determination to be in violation of MONT. REV. CODES ANN. § 31-209 and § 31-213 (1947). On April 21, 1972 the Board adopted its interpretation as policy. The interpretation was applied prospectively and highway patrolmen retiring after April 21 could not receive greater than half pay regardless if they had worked over twenty-five years. Rierson retired on April 4, 1974 with over twenty-five years of service.

22. MONT. CODE ANN. § 2-4-703(2)(a) (1981) states that:

> "[p]roceedings for review shall be instituted by filing a petition in district court within 30 days after service of the final decision thereon. Except as otherwise provided by statute, the petition shall be filed in the district court for the county where the petitioner resides or has his principal place of business or where the agency maintains its principal office. Copies of the petition shall be promptly served upon the agency and all parties of record."

23. *Id.*

24. *Rierson* (I), ___ Mont. ___, 614 P.2d at 1024.

25. *Id.* at ___, 614 P.2d at 1023.

26. *Rierson* (II), ___ Mont. ___, 622 P. at 197.

and that the agency lacked subject matter jurisdiction to hear the severable claims. Therefore, his failure to "promptly serve" the agency should not limit his district court action based on the severable claims which the agency lacked jurisdiction to hear.[27]

In a three to two decision, the Montana Supreme Court held that even if Rierson's district court claim was an independent civil action, his claim was barred because the statute of limitations had expired.[28] Retirement benefits are personal property rights and therefore are subject to the two-year statute of limitations.[29] Rierson's case accrued when he retired, and one year, three hundred sixty days elapsed before his attorney demanded that his retirement benefits be adjusted. The supreme court reasoned that the statute of limitations again commenced when the proposed decision was adopted.[30] Rierson filed his district court claim twenty-five days after the board's adoption of the decision, twenty days too late.

The *Rierson* rehearing decision contains two major points. First, the supreme court has held that retirement benefits are personal property rights and are subject to a two-year statute of limitations.[31] The second and more important point is that although

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27. *Id.* Justice Sheehy's dissent in Rierson's original appeal characterized Rierson's claim as one that included a claim adjudicable by the administrative agency, namely that Rierson was entitled to credit toward his retirement for the time he worked over twenty-five years. Rierson's "independent civil action" was based on the two severable claims which were: (1) that the Board had tortiously misled him into working beyond twenty-five years by promising that the additional work years would be credited to his retirement; and (2) that Rierson was deprived of due process and equal protection under the laws.

The Board had exceeded its rule making and interpretative powers since it did not have the power to decide a tort claim against itself nor did it have the power to decide constitutional issues. MONT. CODE ANN. § 2-4-702(1)(a) (1981) states that:

> A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the chapter. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo as provided by statute.

Justice Sheehy reasoned, therefore, that Rierson's failure to promptly serve the agency could not limit Rierson's right of judicial review of the severable causes outside the agency's subject matter jurisdiction. *Rierson*, ___ Mont. ___, 614 P.2d at 1025 (Sheehy, J., dissenting).

28. *Rierson*, ___ Mont. ___, 622 P.2d at 198.

29. *Id.* at ___, 622 P.2d at 197-98. MONT. CODE ANN. § 27-2-207(1) (1979) states that "[w]ithin 2 years is the period prescribed for the commencement of an action for injury to personal property."

30. *Id.* at ___, 622 P.2d at 198.

31. Justices Sheehy and Daly did agree with the majority that Rierson's tort claim would have been barred by the statute of limitations. However, the Justices would hold "that the pension dispute grows out of the relationship of master and servant which is contractual in nature, and that either the five-year or eight-year period applies under Mont. Code Ann. § 27-2-202 (1981)." *Rierson*, ___ Mont. ___, 622 P.2d at 199. Ironically, the

Montana Code Annotated section 2-4-702(2)(a) (1981) allows thirty days for an appeal of an agency decision, the statute of limitations on severable claims runs concurrently within that thirty-day period.[32] Apparently the supreme court did not want to allow the statute of limitations to be extended by boot-strapping the thirty days for appeal onto the original period of limitations.[33]

D. *Exhaustion of Administrative Remedies*

In *Barnicoat v. Commissioner of Department of Labor and Industry*,[34] the appellant brought an action against the Commissioner of the Department of Labor and Industry claiming a refund of unemployment benefits that he had repaid the Department. After being terminated from his employment at Boulder River School and Hospital, appellant received $1,022 in unemployment benefits. He also filed a grievance with his union which resulted in an award of $1,004. He then repaid the State Employment Security Division $1,000. Appellant's repayment prompted a reconsideration of his claim by the division.[35] The division determined that appellant owed the division the entire $1,022 he had received as unemployment compensation and sent him a letter demanding the balance of $22. The division's letter contained a notice of appeal provision.[36] Appellant did not file an appeal, nor did he request a rede-

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majority's position was supported by Rierson's attorney in his letter received by the Board on March 18, 1976 which stated that "a suit will be filed no later than April 9, 1976" and that "[t]ime is of the essence in that the statute of limitations is about to run on this matter." *Id.* at ____, 622 P.2d at 197.

32. *Id.* at ____, 622 P.2d at 198.

33. *Id.* The members of the court felt that "[t]he entire history of this case is one of neglect and procrastination" and that "the appellant, from beginning to end, slept on his rights." *Id.* Rierson knew of the Board's interpretation of his retirement benefits by June 20, 1972. Until his retirement two years later he did nothing to seek a remedy. An additional two years passed until he requested a hearing. At the hearing Rierson's attorney was asked to submit a brief by August 9, 1976. The deadline passed and the Board notified Rierson's attorney that a decision would be reached with or without the brief. On March 11, 1977, the brief was finally submitted. After the petition for judicial review was filed no action was taken on the claim nor was the agency served until sixteen and one-half months later when Rierson's attorney filed and served an amended complaint.

34. ____ Mont. ____, 653 P.2d 498 (1982).

35. MONT. CODE ANN. § 39-51-2404(2) (1981) states that: "[t]he deputy may for good cause reconsider his decision. . . ."

36. The Division's standard notice of appeal provides that:

> "[a]ny claimant or employer who believes that the decision of a Claims Examiner is contrary to the law or the facts, may request a redetermination from the Claim Examiner, or may appeal from his decision through a local office of the commission, requesting a review and stating the reasons therefor. Appeals must be filed within five (5) days after receipt of this notification or within seven (7) days after notification is mailed."

Barnicoat, ____ Mont. ____, 653 P.2d at 499.

termination of the deputy's decision.[37] He did, however, sue the division and his complaint was dismissed.

The supreme court affirmed the district court and held that Barnicoat had ignored the "general principle that if an administrative remedy is provided by statute, that relief must be sought from the administrative body and the statutory remedy exhausted before relief can be obtained by judicial review."[38] *Barnicoat* illustrates that a case such as this should not have been appealed to the supreme court in the first place.

II. JUDICIAL REVIEW OF AGENCY RULES

The validity of an agency's rules may be attacked in three ways. One is through a declaratory judgment action in district court.[39] Another is by requesting a declaratory ruling from an agency and then by seeking judicial review of the ruling.[40] The third is by appealing the agency decision in a contested case proceeding.[41] In the last two years, the Montana Supreme Court has decided cases which utilize the latter two methods.

In *Board of Barbers v. Big Sky College*,[42] respondents asked the Board for a declaratory ruling regarding the question of whether a graduate of Big Sky College could teach at the college and thereby fulfill the one-year apprenticeship requirement for be-

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37. MONT. CODE ANN. § 39-51-2402(4) (1981) states that: "[a] determination or redetermination shall be deemed final unless an interested party entitled to notice thereof applies for reconsideration of the determination or appeals therefrom within 5 days after delivery of such notification or within 7 days after such notification was mailed to his last known address, provided that such period may be extended for good cause." *Barnicoat*, ___ Mont. ___, 653 P.2d at 499.

38. State v. Giles, 168 Mont. 130, 132, 541 P.2d 355, 357 (1975). *See also* MONT. CODE ANN. § 2-4-702(1)(a) (1981) which states that: "[a] person who has exhausted *all* administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review. . . ." (emphasis added).

39. MONT. CODE ANN. § 2-4-506(5) (1981) states that a declaratory judgment "action may be brought in district court . . . ." MONT. CODE ANN. § 2-4-506(1) states that "a rule may be declared invalid . . . if it is found that the rule or its threatened application interferes with or impairs . . . with the legal rights or privileges of the plaintiff . . . ." MONT. CODE ANN. § 2-4-506(2) (1981) states that "a rule may also be declared invalid if it was adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute."

40. MONT. CODE ANN. § 2-4-501 (1981) states that "[e]ach agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. . . . A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases."

41. MONT. CODE ANN. § 2-4-702 (1981) entitled "Initiating Judicial Review of Contested Cases" provides the means for judicial review of contested cases with a restriction that a "party may not raise any other question not raised before the agency unless . . . there was good cause for failure to raise the question before the agency."

42. ___ Mont. ___, 626 P.2d 1269 (1981).

coming a licensed barber.[43] The Board ruled that the teaching activity would count towards one-half of the apprenticeship requirement so long as another half year was obtained in a commercial barber shop.[44] The Board's ruling was based on its regulation which stated that: "Every apprentice must serve one normal work year, or its equivalent at the discretion of the Board, as an apprentice before he can take the barber examination."[45] Montana statutory law defines an apprentice as "a person who receives instruction in an approved barber school or college and from a barber authorized to practice barbering in the state."[46]

The district court held the Board's ruling invalid and the supreme court affirmed, stating that the ruling "engrafts an additional requirement on apprenticeship not contained in the statute."[47] The statute required that the apprentice serve under the supervision of a licensed barber for one year, but the Board's ruling required that the apprentice serve a normal work year in a "commercial barber shop."[48]

In *McPhail v. Montana Board of Psychologists*,[49] a psychologist applied to the Montana Board of Psychologists for a license to practice psychology. Statutory law at the time stated that a "license may be issued to an individual who has been a resident of the State . . . and who holds a master's degree . . . and in addition has five years of professional experience. . . ."[50] The Board denied McPhail the license based on the agency's rule that "applicants who meet the qualifications for licensure must have all five years of qualified professional experience obtained *after* receiving a master's degree . . . ."[51] McPhail did not have five years of experience after obtaining his master's degree.

McPhail petitioned the district court for review of his contested case. The district court agreed with the Board's decision based on the rule. The supreme court reversed and held that the

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43. MONT. CODE ANN. § 37-30-305 (1979) states that: "[o]n completion of one year of apprenticeship under the immediate supervision of a licensed barber, an apprentice must apply to the department to take the examination for a barber's certificate of registration." The 1981 amendment to this section changed "one year" to "three months." *See* MONT. CODE ANN. § 37-30-305 (1981).

44. *Barbers*, ___ Mont. ___, 626 P.2d at 1270.

45. MONT. ADMIN. R. § 40-3.18(6)-S1860 (1981).

46. MONT. CODE ANN. § 37-30-101(2) (1981).

47. *Barbers*, ___ Mont. ___, 626 P.2d at 1271.

48. *Id.* at ___, 626 P.2d at 1270.

49. ___ Mont. ___, 640 P.2d 906 (1982).

50. MONT. REV. CODES ANN. § 66-3208(4) (1947).

51. MONT. ADMIN. R. § 40-3.90(6)-S90090(2)(f) MAC (1971).

rule was "out of harmony" with the statute.[52] The rule engrafted a contradictory requirement on the statute because the statute required five years experience and a master's degree while the rule required the experience after the degree was obtained.

McPhail and *Board of Barbers* are indicative of the supreme court's adherence to a previously articulated test used to determine when agency regulations should be invalidated.[53] In *McPhail*, the supreme court stated that administrative regulations are "out of harmony" with legislative guidelines if they (1) "engraft additional and contradictory requirements on the statute"[54] or (2) "if they engraft additional non-contradictory requirements on the statute which were not envisioned by the legislature."[55] This two prong test is an interpretation of Montana statutory law which states that "no rule adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."[56] *McPhail* and *Board of Barbers* resolve any doubt about the importance of the "out of harmony" tests. In the future these tests may be relied upon with certainty to challenge the validity of administrative rules.

52. *McPhail*, ___ Mont. ___, 640 P.2d at 907.

53. *See* Bell v. Dept. of Professional and Occupational Licensing, 182 Mont. 21, 594 P.2d 331 (1979).

54. *McPhail*, ___ Mont. ___, 640 P.2d at 908 (quoting State of Montana v. Casne, 172 Mont. 302, 308, 564 P.2d 983, 986 (1977)).

55. *Id.* (quoting Bell v. Department of Licensing, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979)).

56. MONT. CODE ANN. § 2-4-305(6) (1981).