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# ARTICLES

## ADMINISTRATIVE PROCEDURES IN MONTANA: A VIEW AFTER FOUR YEARS WITH THE MONTANA ADMINISTRATIVE PROCEDURE ACT

John P. McCrorry\*

### I. INTRODUCTION

It has been said that:

The determinations of administrative agencies significantly affect the personal life of every citizen. Many men can avoid "court trouble," but few indeed can avoid the administrative agencies. Like death and taxes (both of which, incidentally, are matters of agency concern), the agencies reach everyone.<sup>1</sup>

This observation is unquestionably true with respect to the State of Montana which, like other States, has experienced a proliferation of administrative agencies and administrative regulations. Agencies regulate many important aspects of the lives and existence of citizens of the State, including the quality of the air they breath, the price and quality of food consumed, the cost of utilities required for day-to-day existence, and the access to many occupations and professions as a means of livelihood.

Administrative agencies adopt rules and regulations which have the force and effect of law.

Qualitatively speaking . . . , rules and regulations have the same legal effect as statutes. Their provisions have the force of law and they are backed by the same sanctions as statutes and, in particular, by the criminal sanctions designed to coerce obedience to the law. Administrative legislation may be only quasi or sublegislation, since its provisions are subordinate to those enacted by the legislature. But this does not change the fact that its impact is comparable to that of statute-law itself.<sup>2</sup>

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1. 1 COOPER, STATE ADMINISTRATIVE LAW 3 (1965).

2. B. SCHWARTZ, ADMINISTRATIVE LAW 148 (1976). In *Montana Milk Control Bd. v. Community Creamery Co.*, 139 Mont. 523, 528, 366 P.2d 151, 153 (1961), the court stated: From a reading of this statute, it is apparent that there can be no violation of the statute itself. The subsections are merely mandatory provisions to guide the Milk Control Board in promulgating their rules and regulations. A violation of fair trade occurs when a party violates properly promulgated rules and regulations of the Board, enacted pursuant to this statute. The statute was not intended to stand independently, but rather as a mandatory guide for the Milk Control Board in preparing their rules and regulations.

In *Columbia Broadcasting System v. United States*,<sup>3</sup> Justice Stone made the following comments regarding the practical effect and impact of administrative rules:

. . . a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails.<sup>4</sup>

In some instances, statutes provide that the violation of agency rules is a misdemeanor which is punishable by fine or imprisonment or both.<sup>5</sup> The Montana Supreme Court considered and sustained the constitutionality of such statutes in *Bacus v. Lake County*.<sup>6</sup> The court held that although the board had the power to make rules, the violation of which would be punishable by criminal penalties, the statute was not subject to constitutional attack:

The rule in this respect has been stated as follows: "Prescribing of penalties is a legislative function, and a commission may not be empowered to impose penalties for violations of duties which it creates under a statute permitting it to make rules. However, the legislature may validly provide a criminal or penal sanction for the violation of the rules and regulations which it may empower administrative authorities to enact." 42 Am.Jur., *Public Administrative Law*, § 50, p. 355, and authorities cited therein.

In the case at bar, the fact that a violation of these rules and regulations may constitute a criminal offense is of no consequence since the legislature has provided this penalty by section 69-813, and the board is without the power to prescribe what the penalty will be.<sup>7</sup> (emphasis in the original)

Rule-making is a quasi-legislative function. Agencies are also

3. 316 U.S. 407 (1942).

4. *Id.* at 418.

5. See REVISED CODES OF MONTANA (1947) [hereinafter cited R.C.M. 1947], §§ 27-422 [Milk Control Board], 66-2613 [Water Well Contractors Examining Board], 28-127 [State Board of Forestry], 66-817(c) [State Examining Board of Cosmetology], 66-1314 [State Board of Examiners in Optometry], 90-188(2) [Secretary of Agriculture as the Sealer of Weights and Measures], and 42-210 [Livestock Sanitary Board] (Supp. 1975).

6. 138 Mont. 69, 354 P.2d 1056 (1960). *Bacus* was decided under the 1889 Montana Constitution, but the language of Art. IV § 1 is the same under the existing Montana Constitution except for the substitution of the word "branches" for "department." This change was to distinguish the three branches of government from the twenty (20) departments in the executive branch. MONT. CONST. art. III, § 1.

7. *Bacus v. Lake County*, 138 Mont. 69, 78, 354 P.2d 1056, 1061 (1960). The United States Supreme Court upheld the constitutionality of a similar statutory provision in *United States v. Grimaud*, 220 U.S. 506 (1911). For a brief discussion of *Grimaud* and related cases, see B. SCHWARTZ, *supra* note 2, at 69-70.

commonly delegated quasi-judicial adjudication powers.<sup>8</sup> In the performance of this function, agencies apply rules and statutory requirements in individual cases and actually litigate legal rights, duties, and privileges of parties.<sup>9</sup>

The 1969 Montana Legislative Assembly recognized the need for reform and standardization in the state administrative procedures. By joint resolution, the legislature directed the Montana Legislative Council to conduct a detailed study of statutes granting quasi-legislative and quasi-judicial powers to the state administrative agencies, determine whether it would be feasible and desirable to adopt a uniform administrative procedure act like the REVISED MODEL STATE ACT recommended by the National Conference of Commissioners on Uniform State Laws, and prepare a written report, together with necessary implementing legislation, for consideration of the 1971 Legislative Assembly.<sup>10</sup> The resulting study included a proposal for a Montana Administrative Procedure Act which was patterned after the REVISED MODEL STATE ACT.<sup>11</sup> The proposed act was amended and adopted in the special session of the 1971 Legislative Assembly and entitled the "Montana Administra-

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8. For a general discussion of the traditional distinctions between agency rule-making and adjudication, see B. SCHWARTZ, *supra* note 2, at 143-47. It appears that courts are becoming increasingly concerned that this distinction is too simplistic and may be difficult to apply in particular cases. See *Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1268 (3d Cir. 1974); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973).

9. Under the REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, drafted and approved by the National Conference of Commissioners on Uniform State Laws [hereinafter cited as REVISED MODEL STATE ACT], an agency adjudication proceeding is termed a "contested case." A contested case is defined as ". . . a proceeding, including but not restricted to ratemaking, [price fixing], and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing;" REVISED MODEL STATE ACT § 1(2) (1961). The REVISED MODEL STATE ACT has been widely used by state legislatures as a model state administrative procedure act.

10. The joint resolution did an excellent job of identifying major problem areas. It is set forth in full in the appendix to this article.

11. The Legislative Council retained the author of this article to make a study of state administrative procedures, submit a report reflecting the product of that study, make recommendations regarding the feasibility and desirability of adopting a state act, and draft a proposed act for submission to the 1971 Legislative Assembly. The resulting MONTANA ADMINISTRATIVE PROCEDURE STUDY [hereinafter cited as the 1970 STUDY] is in two parts. Part I contains detailed findings regarding state administrative procedures as they existed and a detailed explanation of the proposed Montana Administrative Procedure Act. The proposed act was patterned after the REVISED MODEL STATE ACT.

Part II of the study is a copy of the proposed Act with explanatory comments. The comments provide explanations for the various sections and subsections, remarks regarding the effect they would have on state administrative procedures, and explanations of variations from the REVISED MODEL STATE ACT.

It was the author's conclusion that "the adoption of a state administrative procedure act is not only feasible and desirable, but is also an urgent necessity." 1970 STUDY, *supra*, Part I at 2-3.

tive Procedure Act" [MAPA].<sup>12</sup> The effective date of the MAPA was delayed, however, until December 31, 1972. Each successive legislative assembly has amended the act to some degree.

This article will survey developments in Montana administrative procedures since the effective date of the MAPA. It will examine statutory amendments and decisions of the Montana Supreme Court. In addition, because the MONTANA LAW REVIEW has not previously published any material regarding MAPA, this article will briefly summarize the most significant provisions of the MAPA, as passed by the 1971 Legislative Assembly.

## II. SIGNIFICANT FEATURES OF MAPA AS ADOPTED BY THE 1971 LEGISLATIVE ASSEMBLY

MAPA, like the Federal Administrative Procedure Act and the REVISED MODEL STATE ACT, focuses on three aspects of administrative law and procedures: agency rule-making, agency adjudication,<sup>13</sup> and judicial review of agency decisions. The basic features of MAPA, as originally adopted in 1971, are the following:

1. It requires that agencies adopt procedural rules which set forth the nature and requirements of all formal and informal procedures used by the agency including a description of all forms and instructions;<sup>14</sup>

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12. Montana Administrative Procedure Act, R.C.M. 1947, §§ 82-4201 to 4225 (Supp. 1975) [hereinafter referred to as MAPA].

13. Agency adjudication proceedings are termed "contested cases" under MAPA, R.C.M. 1947, § 84-4202(3) (Supp. 1975).

14. R.C.M. 1947, § 82-4203 (Supp. 1975).

Fundamental principles of fairness dictate that a person who has business before an agency should have a reliable means of determining procedures which must be followed to accomplish that business. If a person is seeking a license, information should be available so that he or she will know the steps which must be taken and the filings which must be made. If a person is a party to a contested case proceeding, the outcome of which will determine legal rights and duties, he or she should have full access to a description of the procedures which the agency will follow and the procedures which are available in defense of his or her position. The procedures should be a matter of public record and should be readily available.

Part I of the 1970 STUDY [hereinafter cited as 1970 STUDY Findings] revealed that: The statutes for very few state agencies require the adoption of procedural rules. Some statutes authorize, but do not require their adoption. In most cases agencies are given general rule-making authority, e.g., to adopt rules and regulations 'deemed necessary to carry out the intent of the act' or similar language. In some cases, rule-making authority is not mentioned at all, but power may reasonably be inferred from the functions which the legislature has delegated to the agency. Typically, there is a lack of specific instructions regarding what should be covered by procedural rules. As a result, most agencies that fully responded to inquiries made during the study were found to have no procedural rules or procedural rules that are incomplete and inadequate.

. . . .

2. It specifies procedures which agencies must follow in adopting substantive and interpretive rules,<sup>15</sup> including written notice of intended action and the requirement that interested parties be given an opportunity to submit data, views, and argument;<sup>16</sup>

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[T]he pattern emerges . . . that state agencies do a better job of informing the public of the manner in which they function and procedures which must be followed when there is a requirement that procedural rules be adopted and there are instructions given as to the matters which should be covered in the rules.

Moreover, the lack of specific and mandatory direction has caused some misunderstanding among some agency personnel as to the extent of their authority.

1970 STUDY Findings, at 17, 25.

15. A substantive rule is the administrative equivalent of a statute, compelling compliance with its terms on the part of those within the agency ambit. Substantive rules are issued pursuant to statutory authority and implement the statute; they create law just as the statute itself does, by changing existing rights and obligations. An interpretative rule is a clarification or explanation of existing laws or regulations, rather than a substantive modification of them. Interpretative rules are statements as to what the agency thinks a statute or regulation means; they are statements issued to advise the public of the agency's construction of the law it administers.

B. SCHWARTZ, *supra* note 2, at 154.

The minutes for the December 6, 1975, and January 15, 1976, meetings of the Administrative Code Committee indicate that there is confusion as to whether MAPA is applicable to interpretive rules. Such rules are expressly covered by the definition of "rule" in MAPA. R.C.M. 1947, § 82-4202(2) (Supp. 1975).

Unlike the Federal Administrative Procedures Act, the REVISED MODEL STATE ACT, after which MAPA was patterned, does not contain an exception from rule-making procedures for interpretive rules. COOPER, *supra* note 2, at 186.

16. R.C.M. 1947, § 82-4204 (Supp. 1975).

1970 STUDY Findings at 33-36:

Relatively few statutes for state agencies provide for rule-making procedures. In some instances procedures are specified, including a hearing requirement. . . . The usual situation is for agency statutes (and rules as well) to be silent regarding rule-making procedures. In response to an inquiry on the questionnaire, most agencies stated that they have no rule-making procedures. This response was received from larger agencies, such as the Industrial Accident Board, the Department of Public Welfare, and Milk Control Board, as well as smaller agencies which have less business. The bulk of rule-making is done informally without specific procedures or public notice. Typically, rules are adopted in the same fashion as routine business which comes before the agencies. In most instances, public participation is neither sought nor involved. Some agencies seek the advice of the Attorney General with regard to the validity of their rules under the statutes which created them. Nothing in the Revised Model Act or the MAPA would prohibit the procedure. However, it must be recognized that such review of rules does not perform the same function as the public participation, which is to assist agencies in reaching legislative-type decisions.

The case for public participation in the rule-making process was well stated by the Wisconsin Legislative Council:

There are 3 primary reasons why interested persons, as a general proposition, should be afforded opportunity to participate in administrative rule-making. The first is the general and theoretical one that, in a democracy, the governed should have opportunity to participate in their government, either personally or through their chosen representatives. Secondly, informed administrative action requires that all relevant facts be brought to light. Thirdly, it is important that those who be affected by a proposed rule are satisfied that their interests have received fair

3. It requires central filing of agency rules with the Secretary of State<sup>17</sup> and statewide distribution of a compilation of administrative rules, entitled the Montana Administrative Code;<sup>18</sup>

4. It specifies procedures which must be followed in agency adjudication (contested cases) which assure basic fairness, including:

- a. requirements with respect to reasonable notice of hearing and the record of a proceeding;<sup>19</sup>

consideration, for good public relations is important in the successful enforcement of a rule.

2 WISCONSIN LEGISLATIVE COUNCIL REPORT ON ADMINISTRATIVE RULE MAKING, Part II, at 111 (1955).

17. R.C.M. 1947, § 82-4205 (Supp. 1975).

18. R.C.M. 1947, § 82-4206 (Supp. 1975).

1970 STUDY Findings at 42-43:

There is no provision for central filing or statewide distribution of rules for all state agencies. As indicated previously, the rules for some state agencies are not even available for inspection or distribution at their offices because they are buried in minutes of meetings or out of print. Many state agencies are not located in the state capitol.

The location of the offices of some state agencies change periodically with a change in agency personnel.

The combination of circumstances described above means that there is no place in the state where a person can go to view all agency rules and that the rules for agencies are not accessible throughout the state. The problems are compounded by the fact that most rule-making is done without public notice or participation.

19. R.C.M. 1947, § 82-4209 (Supp. 1975).

1970 STUDY Findings at 25:

Many state agencies have the 'contested case' function. However, the statutes vary greatly with regard to notice and hearing. Some statutes are silent. Others mention the right, but do not give specific directions as to the requirements. Still others conform, either substantially or in part, with the provisions of Section 301 (enacted as Section 82-4209). In some instances, statutes make reference to notice and hearing for some of the agency's contested case functions, but not for others.

Similarly, statutes vary with regard to the record in contested cases. In many instances no mention is made of a record. In others, mention is made of a 'record' or 'minutes' of proceedings without giving specific directions as to the content. It is important that the content of the record be clearly specified and understood, because it is the basis for the agency's findings of fact and constitutes the record which is used for judicial review.

The fact that state agencies have not always clearly understood fair notice and hearing requirements is demonstrated by State *ex rel.* Opheim v. Fish and Game Comm'n., 133 Mont. 362, 323 P.2d 1116 (1958). In that case, the relator was called as a witness before his employing agency in a disciplinary proceeding against another employee. His only involvement in the proceeding was as a witness, and he had no prior notice that the Commission contemplated, or would consider, disciplinary action against him. When the Commission issued its decision, both the relator and the employee who was directly involved in the proceeding were discharged. The supreme court said:

[I]t is our view that the relator [the discharged employee] was entitled to have notice of the specific charges relied upon, and a hearing thereon at a time and place fixed therefor, of which he should have reasonable notice so that he may prepare to meet the charges; also, all of this should be done before and not after

- b. requirements with respect to the conduct of hearings, including evidentiary rules to be followed, the right to present evidence, and the right to conduct cross-examination for full and true disclosure of facts, and provision for the appointment of hearing examiners;<sup>20</sup>
- c. requirements with respect to agency decision-makers' familiarity with the hearing record;<sup>21</sup>
- d. requirements relating to the form, content, and service of final agency decisions;<sup>22</sup>
- e. a requirement that agencies index and make available for public inspection final agency decisions;<sup>23</sup>
- f. a ban against ex parte communications between agency decision-makers and parties.<sup>24</sup>

5. It provides for judicial review of contested cases, including requirements for standing, procedures to be followed in seeking judicial review, the requirement that review shall be on the basis of the record made before the agency, and scope of review.<sup>25</sup>

summary dismissal. Clearly from the application herein relator was not granted such consideration by the Commission.

*Id.* at 369, 323 P.2d at 1120.

If MAPA had been adopted prior to *Opheim*, the agency would have had guidance to help it understand fair hearing requirements.

20. R.C.M. 1947, §§ 82-4209(3), 4210, 4211 (Supp. 1975).

The 1970 Study Findings at 27, 29 states:

Statutory provisions relating to the admission or exclusion of evidence fall into four basic categories: those which require that agencies follow the rules of evidence which courts follow; those which state that agencies are not bound by the rules of evidence; those which are ambiguous; and those which are silent on the subject. The statutes for many agencies fall into the final category. Similarly, many statutes make no reference to the right to cross-examine. These are areas where agencies need specific direction if they are to properly perform the contested case function.

As indicated in the previous comment, many agencies have little direction with regard to the conduct of hearings. Only a few statutes provide for the appointment of hearing examiners, which may be a useful procedure for busy agencies, as well as for smaller agencies who wish to delegate the hearing function in contested cases to persons they believe to be more qualified to handle such matters.

21. R.C.M. 1947, § 82-4212 (Supp. 1975).

This provision is identical to Section 11 of the Revised Model Act. The Commissioners provided the following explanation for the purpose of the section:

The purpose of this section is to make certain that those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, or reading the record or at the very least receiving briefs and hearing oral argument. It is intended to preclude 'signing on the dotted line.'

1970 Study, Part II at 30.

22. R.C.M. 1947, § 82-4213(1) (Supp. 1975).

23. R.C.M. 1947, § 82-4213(2) (Supp. 1975).

24. R.C.M. 1947, § 82-4214 (Supp. 1975).

25. R.C.M. 1947, § 82-4216 (Supp. 1975).

1970 Study Part II at 38:

Judicial review of agency decisions is one of the most confused and troublesome areas in state administrative procedures. There is a lack of uniformity among agen-



6. It provides for district court declaratory judgments with respect to the validity and application of agency rules.<sup>26</sup>

Other features of MAPA which are worthy of note are: the provision for declaratory rulings by agencies with respect to the application of statutes or agency rules or decisions,<sup>27</sup> provision for issuance of subpoenas by agencies and for enforcement of subpoenas,<sup>28</sup> and provision for the right to representation in agency proceedings.<sup>29</sup>

### III. MAJOR AMENDMENTS TO MAPA

The legislature has made three major additions to MAPA. Two amendments provide for legislative supervision of and participation in agency rule-making through a committee of legislators and legislative review of rules adopted by agencies. The third relates to public participation in agency decision-making and was adopted to implement a mandate in Montana's new constitution.<sup>30</sup>

#### A. Legislative Review of Agency Rules

The 1973 Legislature created, and the 1974 Legislature expanded, a new section of MAPA providing for legislative review of agency rules.<sup>31</sup> The Secretary of State is directed to transmit to each regular legislative session "all rules, which are in the Montana Administrative Code, adopted or amended by agencies since the convening of the previous regular session."<sup>32</sup> The legislature may, by joint resolution, repeal any rule in the Code, direct a change to be made in any rule or direct the adoption of a new rule.<sup>33</sup>

The 1975 Legislature further modified MAPA by establishing the Administrative Code Committee, to supervise and participate in agency rule-making.<sup>34</sup> The Committee consists of eight members,

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cies as to mode and scope of review. A number of statutes make no mention whatsoever of judicial review. Some mention only the right to appeal or review, but say little or nothing about how it should be accomplished or the extent to which a court may review the agency's findings. The statutes which are more specific with regard to method or scope of review lack uniformity and in many cases are ambiguous and incomplete. The methods of review specifically provided for include trial *de novo*, certiorari and injunction.

A more detailed discussion, including reference to specific agencies and specific statutes, is contained in the 1970 STUDY Findings at 83-90.

26. R.C.M. 1947, § 82-4219 (Supp. 1975).

27. R.C.M. 1947, § 82-4218 (Supp. 1975).

28. R.C.M. 1947, § 82-4220 (Supp. 1975).

29. R.C.M. 1947, § 82-4221 (Supp. 1975).

30. MONT. CONST., art. II, § 8.

31. Laws of Montana (1973), ch. 239, § 1 (amended by Laws of Montana (1974), ch. 236, § 1) (current version at R.C.M. 1947, § 82-4203.1 (Supp. 1975)).

32. R.C.M. 1947, § 82-4203.1(2) (Supp. 1975).

33. R.C.M. 1947, §§ 82-4203.1(3)-(4) (Supp. 1975).

34. R.C.M. 1947, §§ 82-4203.2-.5 (Supp. 1975).

1977] ADMINISTRATIVE PROCEDURE 9

four from each house of the legislature,<sup>35</sup> and is authorized to meet as often as necessary during and between legislative sessions.<sup>36</sup>

The Committee is directed to review all rules proposed for adoption under the act, and it may:

- (1) prepare recommendations for the adoption, amendment, or rejection of a rule for submission to the agency that has proposed it, and
- (2) request that an agency hold a rule-making hearing.<sup>37</sup>

The Committee may also make recommendations to the legislature regarding amendments to MAPA and for the repeal, amendment, or adoption of a rule.

### *B. Public Participation in Agency Decision-Making*

MAPA has, since its adoption, contained specific procedures for agency rule-making which require notice of intended action and an opportunity for interested persons to submit data, views, or arguments.<sup>38</sup> In 1972, prior to the effective date of the act, the electors ratified the state's new constitution. Article II, Section 8, of the 1972 Constitution provides: "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." To implement this constitutional right, the 1975 Legislature added certain sections to MAPA,<sup>39</sup> requiring that governmental agencies provide for public participation in the agency decision-making process.

For the purpose of this right of public participation, "agency" is defined as ". . . any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules . . ."<sup>40</sup> Two aspects of this definition are noteworthy. First, it covers agencies of both state and local government. The definition of "agency" in the MAPA is limited to agencies of state government.<sup>41</sup> Second, the definition applies only to governmental bodies authorized by law to make rules. No mention is made of

35. R.C.M. 1947, § 82-4203.2 (Supp. 1975).

36. R.C.M. 1947, § 82-4203.3 (Supp. 1975).

37. R.C.M. 1947, § 82-4203.5 (Supp. 1975). An oral rule-making hearing is not required under MAPA unless requested pursuant to R.C.M. 1947, § 82-4204(b) (Supp. 1975). Presumably, the reference to "a rule-making hearing" in § 82-4203.5(c) is intended to mean an oral hearing. It should be noted, however, that the use of the word "hearing" does not necessarily imply an oral hearing. *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973).

38. R.C.M. 1947, § 82-4204 (Supp. 1975).

39. *Laws of Montana* (1975), ch. 491, §§ 1-4 (codified at R.C.M. 1947, §§ 82-4226 to 4229 (Supp. 1975)).

40. R.C.M. 1947, § 82-4227(1) (Supp. 1975).

41. R.C.M. 1947, § 82-4202(1) (Supp. 1975).

agencies having adjudication (contested case) functions. The basic requirements of the 1975 enactment are the following:

Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures shall assure adequate notice and assist public participation before a final decision is made on the adoption of a rule or policy, awarding a contract, granting or denying a permit, license or change of rate that is of significant interest to the public.<sup>42</sup>

This provision is somewhat at odds with the definition of agency, at least insofar as state agencies are concerned. Rate-making, price-fixing, and licensing are regarded as contested case proceedings, rather than rule-making proceedings, under MAPA.<sup>43</sup> Thus, the foregoing requirements are intended to reach functions which are not covered by the definition of agency. The Administrative Code Committee has drafted proposed amendments to correct the foregoing discrepancies.<sup>44</sup>

#### IV. DECISIONS OF THE MONTANA SUPREME COURT RELATING TO ADMINISTRATIVE PROCEDURES

During the four years since the effective date of MAPA, the Montana Supreme Court has decided a number of cases relating to administrative procedures. Not all of these cases have involved interpretations of MAPA. Some are concerned with agencies of local government. The following is a summary of significant decisions, organized according to the issues and subject matter presented or discussed by the court.

##### A. Agencies Covered by MAPA

In *Miskovich v. City of Helena*<sup>45</sup> the court held that MAPA is not applicable to the administrative functions of metropolitan police commissions. This decision is clearly required by the express statutory language of MAPA. Agencies of local government are administrative agencies.<sup>46</sup> However, agencies subject to the requirements of MAPA are defined as "any board, bureau, commission, department, authority or officer of the state government authorized by law to make rules and to determine contested cases."<sup>47</sup>

42. R.C.M. 1947, § 82-4228(1) (Supp. 1975).

43. R.C.M. 1947, § 82-4202(3) (Supp. 1975).

44. See Proposed Amendments to MAPA prepared by the Administrative Code Committee and identified as Proposed Bill "A".

45. \_\_\_ Mont. \_\_\_, 551 P.2d 995 (1976).

46. *Plath v. Hi-Ball Contractors, Inc.*, 139 Mont. 263, 270, 362 P.2d 1021, 1024 (1961).

47. R.C.M. 1947, § 82-4202(1) (Supp. 1975).

### B. Agency Use of MAPA Emergency Rule-Making Procedures

The procedures which state agencies normally must follow in adopting substantive and interpretive rules are time consuming. An agency must give written notice of intended rule-making action, which is published statewide in the Montana Administrative Register, and permit interested parties an opportunity to submit data, views or argument orally or in writing.<sup>48</sup> Instances occur where a demonstrated public need for speedy action warrants that emergency rules be temporarily effective without observing normal rule-making procedures and safeguards.<sup>49</sup> To meet this need, MAPA contains the following emergency rule-making provision:

If an agency finds that an imminent peril to the public health, safety or welfare requires adoption of a rule upon fewer than twenty (20) days' notice and states in writing its reasons for that finding, it may proceed, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period not longer than one hundred and twenty (120) days, but the adoption of an identical rule under subsections (1)(a) and (1)(b) of this section is not precluded. The sufficiency of the reasons for a finding of imminent peril to the public health, safety or welfare shall be subject to judicial review.<sup>50</sup>

The Administrative Code Committee has expressed concern that state agencies are using emergency procedures when there is not imminent peril to public health, safety, or welfare.<sup>51</sup>

In *State ex rel. Dept. of Social & Rehabilitation Services v.*

The following explanatory comment regarding the coverage of MAPA is contained in the 1970 STUDY Findings at 100:

Like the Revised Model Act, the MAPA exempts from coverage agencies of local government. While these agencies in many instances possess functions which are covered by the act, it is felt that at this time the MAPA should be confined to state agencies. After there has been experience with the MAPA the legislature may well consider a broadened application of the act.

See COOPER, *supra* note 1, at 97-98, for an explanation of the definition of agency under the REVISED MODEL STATE ACT.

48. R.C.M. 1947, § 82-4204(1)(b) (Supp. 1975).

49. COOPER, *supra* note 1, at 200.

50. R.C.M. 1947, § 82-4204(2) (Supp. 1975). This language is patterned after the emergency rule-making provision in the REVISED MODEL STATE ACT. The following explanatory comment is contained in the 1970 STUDY, Part II, at 14:

Section 202(b) [enacted as § 82-4204 (2)] provides for the adoption of emergency rules without notice or with abbreviated notice. It follows the wording of section 3(b) of the Revised Model Act, except a final sentence is added to make it clear that an agency's emergency findings will be subject to court review. There is no provision for renewal of emergency rules, because it is felt that the 120 day effective period is ample for completion of conventional rule-making procedures.

51. Minutes of the Administrative Code Committee for meetings held on August 5, 1975, and September 5, 1975.

*Cole*,<sup>52</sup> the court reviewed a department's resort to emergency rule-making. Although the court stated that it was "favored with voluminous briefs and exhaustive arguments as to what is 'an imminent peril to the public health, safety, and welfare,'"<sup>53</sup> it summarily concluded that the agency acted properly without detailing facts or reasons to support the conclusion. The only justifying circumstance noted in the opinion was that the 1975 legislature had reduced the amount of money requested by the Department and that it was necessary for the Department to make adjustments to live within its budget.<sup>54</sup>

There are two statutory conditions precedent to the adoption of emergency rules: the rule must be necessary to preserve the public health, safety, and welfare, and there must exist an imminent or immediate threat which necessitates prompt action.<sup>55</sup> The agency must state, in writing, its reasons for resorting to emergency rule-making, and the sufficiency of its reasons is subject to judicial review.

An agency has the burden of justifying its resort to emergency rule-making. A court measuring agency actions should employ traditional concepts of judicial review. In a recent case, a California court of appeals had little difficulty in applying these standards to invalidate an emergency rule adopted by the trustees of the California State college system.<sup>56</sup> The court observed that:

Courts are not conclusively bound by an agency's determination that an emergency exists, although it is recognized that what constitutes an emergency is primarily a matter for the agency's discretion. There may be abuse of the emergency power when the enacting agency repeatedly and habitually resorts to it without a credible statement of genuine emergency. The finding of and statement of facts constituting an emergency must be more than mere "statements of the motivation" for the enactment and provide an adequate basis for judicial review. The recitals in the resolution in question may be a sound declaration of policy but do not reflect a crisis situation, emergent or actual, unless the possibility of favorable action by the review committee whose appointment was required by the pendency of appellant's appeal to the Chancellor would be so deemed. Nothing in the resolution compels or justifies the view that such action would seriously affect public peace, health and safety or general welfare.<sup>57</sup>

52. \_\_\_ Mont. \_\_\_, 538 P.2d 1031 (1975).

53. *Id.* at \_\_\_, 538 P.2d at 1032.

54. *Id.* at \_\_\_, 538 P.2d at 1031.

55. COOPER, *supra* note 1, at 201.

56. Poschman v. Dumke, 31 Cal. App. 3d 927, 107 Cal. Rptr. 596 (1973).

57. *Id.* at 941, 107 Cal. Rptr. at 602. [Citations omitted].

Emergency rule-making need not necessarily entail the elimination of prior notice and opportunity for participation by interested persons. An agency "may proceed, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable."<sup>58</sup> In view of the strong policy in MAPA favoring public participation in rule-making, which has been fortified by Article II, Section 8 of the 1972 Constitution, a reviewing court ought to consider whether an agency has acted reasonably if it eliminates completely prior notice or opportunity for public participation. In many situations an agency will have time to give an abbreviated notice which will permit interested persons to have some input in the rule-making process.<sup>59</sup>

### C. Requirement of an Administrative Contested Case Hearing

Does the Montana Department of Labor and Industry have the duty to hold an administrative hearing when it decides not to pursue a wage claim filed under Montana's Wage Payment Act?<sup>60</sup> This issue was before the court in *Burgess v. Softich*.<sup>61</sup>

Under the Wage Payment Act, the Commissioner of Labor has the duty to "inquire diligently for any violations of the Act."<sup>62</sup> The Department refused the claimant's request for a hearing, stating that lack of resources required the agency to be selective in its case load and that it was discretionary with the agency whether or not to hold an administrative hearing.<sup>63</sup> The supreme court, with two members dissenting, disagreed and affirmed the lower court's grant of a writ of mandamus requiring the agency to hold a hearing. The majority concluded that "in cases wherein the department's preliminary inquiry is against the wage claimant there is a clear, legal duty, upon request, to grant a hearing."<sup>64</sup> In reaching that conclusion, the majority noted that the agency's procedural rules, which were voluntarily adopted,<sup>65</sup> required such a hearing.<sup>66</sup>

58. R.C.M. 1947, § 82-4204(2) (Supp. 1975).

59. R.C.M. 1947, § 82-4204(1)(a) requires that agencies mail to persons who have made timely requests advance notice of rule-making proceedings. This provision should insure participation by interested persons even in situations where notice is necessarily shortened.

60. R.C.M. 1947, §§ 41-1301 to 1325 (Supp. 1975).

61. \_\_\_ Mont. \_\_\_, 535 P.2d 178 (1975).

62. R.C.M. 1947, § 41-1302 (Supp. 1975).

63. *Burgess v. Softich*, \_\_\_ Mont. \_\_\_, 535 P.2d 178, 179 (1975).

64. *Id.* at \_\_\_, 535 P.2d at 182.

65. The Department had adopted the model procedural rules proposed by the Attorney General pursuant to § 82-4203 of MAPA. *Id.* at \_\_\_, 535 P.2d at 181.

66. *Id.* at \_\_\_, 535 P.2d at 182.

D. *Agency Discretion in Determining the Scope of A Hearing and Public Participation in Agency Decision-Making*

In 1974 a public utility filed an application with the Montana Public Service Commission (PSC) for permission to institute an automatic rate adjustment system to pass on to customers the increased costs of purchasing gas from its suppliers. No request was made to increase the return on the utility's investment. The Montana Consumer Counsel opposed the application and a hearing was held before the agency. The PSC refused to permit inquiry into the utility's entire rate structure and confined the hearing to the propriety of adding the automatic adjustment factor to the rate structure. The supreme court approved the PSC's limitation of the scope of the hearing in *Montana Consumer Counsel v. Public Service Commission*.<sup>67</sup>

There are two significant aspects to this decision. First, the court deferred to the agency's exercise of discretion with respect to the scope of the hearing. It noted that the PSC has the statutory power to determine the method and means for exercising the functions within the scope of its delegated authority and that a full-scale hearing was not required because the utility's rate of return was not germane to the application.<sup>68</sup> Second, the court held that the PSC did not violate Article II, Section 8 of the 1972 Montana Constitution, relating to public participation in agency decision-making, by limiting the scope of the hearing. It refused to construe the constitution "as prohibiting that Commission from confining the hearing to issues before it."<sup>69</sup>

E. *Disqualification of an Agency Decision-Maker*

In *Miskovich v. City of Helena*,<sup>70</sup> the chairman of a municipal police commission became ill during the course of a disciplinary hearing. As a result, he was absent during a portion of the hearing and missed the testimony of several witnesses, including a portion of the direct examination of the police officer whose case was being heard. The court held:

We agree with the position that a member of an administrative tribunal who was absent from a portion of the adjudicative proceedings before that tribunal should not be allowed to participate in its final decision. This would be particularly important as it pertains to a police commission. Here, there was a transcript re-

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67. \_\_\_ Mont. \_\_\_, 541 P.2d 770 (1975).

68. *Id.* at \_\_\_, 541 P.2d at 774.

69. *Id.* at \_\_\_, 541 P.2d at 776.

70. \_\_\_ Mont. \_\_\_, 551 P.2d 995 (1976).

cord of the proceedings before the commission but this may not always be true as the statute does not require that a record be kept.<sup>71</sup>

It may be conceded that basic fairness could be compromised when a decision-maker is absent during a significant portion of an adjudication hearing and there is no provision for maintaining some form of evidentiary record.<sup>72</sup> However, the blanket rule that a member of an administrative tribunal who is absent from a portion of an adjudication proceeding should not participate in the tribunal's final decision is unnecessarily rigid.<sup>73</sup>

Under MAPA, state agencies are permitted to delegate contested case hearings to hearing examiners.<sup>74</sup> The Act expressly permits agency decision-makers who have not heard a case to participate in the agency's final decision.

When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties may waive compliance with this section by written stipulation.<sup>75</sup>

Although MAPA does not apply to proceedings before municipal tribunals, the court could have considered it for guidance. The court did not explain its decision. An explanation would have been helpful in view of the fact that a transcript was available for the disqualified decision-maker to examine.<sup>76</sup> Recently a court of ap-

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71. *Id.* at —, 551 P.2d at 1001.

72. *Morgan v. United States*, 298 U.S. 468 (1936). The *Morgan* case and this problem in general are discussed in 2 COOPER, STATE ADMINISTRATIVE LAW 445-46 (1965).

73. For a general discussion of state court decisions regarding the requirement that any administrative decision-maker in an adjudication proceeding master the record, see 2 COOPER, *supra* note 70, at 445-65.

74. R.C.M. 1947, § 82-4212 (Supp. 1975).

75. R.C.M. 1947, § 82-4211 (Supp. 1975).

76. In its recitation of facts, the court stated:

The Helena Police Commission, a three man body, was officially chaired by Commissioner Pfeiffer, who became ill and left the hearing. At his departure it was apparently stipulated by all parties that Pfeiffer would be excused and would not participate further in the case. The parties agree there was a stipulation but the specific terms are in doubt. Pfeiffer missed the testimony of several witnesses, plus most of the direct examination of Miskovich. He returned to the hearing in the



peals for the State of Washington faced a similar issue and reached a contrary decision.<sup>77</sup> The court said:

Although a county board of adjustment is not a state agency and is not subject to its terms, we observe that the Washington Administrative Procedure Act contemplates that a *majority* of the agency officials making a decision in a contested case must have heard or read the evidence, and provides for an alternative procedure if they have not.

Even if a unanimous Board vote had been required, rather than a simple majority, an administrative decision will not be invalid because an officer who participated in the decision was absent during presentation of evidence, provided he subsequently familiarized himself with the evidence before voting. Plaintiff has not referred to anything in the record in support of the intimation that the new Board member may have voted without having reviewed pertinent documents or the transcripts of prior proceedings. The presumption is that the member discharged his public duty and considered the prior record before making his decision.<sup>78</sup>

#### F. Exclusive Agency Jurisdiction

Montana statutes declare outdoor advertising which does not conform to the requirements of Montana's Outdoor Advertising Act,<sup>79</sup> to be a public nuisance.<sup>80</sup> Under the Act, the legislature has delegated to the State Department of Highways the duty of regulating outdoor advertising and has specified a procedure and remedy for removal of nonconforming advertising.<sup>81</sup>

In *State ex rel. Jones v. Giles*<sup>82</sup> a county attorney brought an action in district court to abate as a public nuisance a sign which did not conform to the requirements of the Act. The supreme court held that the action could not be maintained in district court because the legislature intended that the remedial provisions of the Outdoor Advertising Act be the exclusive remedy for removal of nonconforming advertising.

In 1971, the legislature reenacted the Outdoor Advertising

course of Miskovich's direct examination, and proceeded to participate in the commission's findings and decision, signing as chairman of the police commission.

Miskovich v. City of Helena, \_\_\_ Mont. \_\_\_, 551 P.2d 996 (1976).

The stipulation referred to was not mentioned as a reason for disqualifying Pfeiffer.

77. Johnston v. Grays Harbor County Bd. of Adjustment, 14 Wash. App. 348, 541 P.2d 1237 (1975) (citations omitted).

78. *Id.* at 348, 541 P.2d at 1237 (citations omitted).

79. R.C.M. 1947, §§ 32-4715 to 4728 (Supp. 1975).

80. R.C.M. 1947, § 32-4728 (Supp. 1975).

81. R.C.M. 1947, § 32-4722 (Supp. 1975).

82. \_\_\_ Mont. \_\_\_, 541 P.2d 355 (1975).

Act.<sup>82.5</sup> In so doing, it repealed a statute that had given the Department of Highways authority to enforce the act “through the remedy of injunction or other appropriate legal proceedings”<sup>83</sup> and replaced it with a specific administrative hearing procedure and remedy.<sup>84</sup> The court found this legislative history to be a persuasive factor in reaching its decision. The court was also influenced by the comprehensive delegation given to the Department of Highways, which included authority to promulgate rules and regulations and to provide remedies for enforcement of the Act.<sup>85</sup> In view of the foregoing factors, it declined to place “undue importance” on the words “public nuisance” so as to permit a judicial remedy which would circumvent the administrative remedy.<sup>86</sup>

### G. Standing to Seek Judicial Review

The court was faced with an unusual standing issue in *McTaggart v. Public Service Commission*.<sup>87</sup> The PSC issued a rate order with one member dissenting. The dissenter sought judicial review in district court claiming to be “a party in interest” dissatisfied with the order.<sup>88</sup> The case was dismissed for lack of standing, with the following explanation:

McTaggart, as a member of the Public Service Commission, has no standing to sue because he was a part of the decision-making process; was not a party in interest dissatisfied with the action of the Commission within the meaning of the statute; and should not be permitted to appear on antagonistic and opposite sides of the same case.

Here the Commission was named as a party defendant.

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82.5. Laws of Montana (1971), ch. 2-2d Ex., §§ 1-16 (current version at R.C.M. 1947, §§ 32-4715 to 4728).

83. Laws of Montana (1967), ch. 287, § 11 (repealed 1971).

84. *State ex rel. Jones v. Giles*, \_\_\_ Mont. \_\_\_, 541 P.2d 355, 357 (1975). The court stated:

Section 32-4722 establishes a specific administrative remedy for the removal of nonconforming outdoor advertising. Advertising erected after June 24, 1971, contrary to the Outdoor Advertising Act is unlawful. The Department of Highways is granted authority to enter upon private lands to determine whether outdoor advertising complies with the Act. If it is determined that the advertising is unlawful the Department is instructed to notify the owner of the land and advertising structure of its intention to remove the illegal advertising. The owner then has forty-five days to request a hearing before the Highway Commission to show cause why the structure should not be removed. If no hearing is requested or if there is no appeal from the Commission's decision at the hearing, or if the Commission's decision is affirmed on appeal, the Department has authority to remove the objectionable advertising.

85. *Id.* at \_\_\_, 541 P.2d at 357-58.

86. *Id.* at \_\_\_, 541 P.2d at 358.

87. \_\_\_ Mont. \_\_\_, 541 P.2d 778 (1975).

88. Review was sought under R.C.M. 1947, § 70-128.

McTaggart was a member of the Commission and was no less so by failing to name himself individually along with the other two Commissioners. McTaggart is also the plaintiff in the case. Chaos would result if any dissenting member of a state board or agency had standing to appeal from any board or agency decision.

We hold that unless the statute expressly provides otherwise, a "party in interest being dissatisfied with an order of the commission" means a party outside the decision-making process and does not include a Commissioner who exercised legislative and quasi-judicial powers in arriving at the decision itself. Such Commissioner is not rehabilitated and qualified to sue simply because he wears a "second hat", that is because he is a natural gas consumer and customer of the Montana Power Company.<sup>89</sup>

An Ohio court of appeals explained the rule in the following manner:

The right of a member of a board exercising quasi-judicial powers to appeal the decision of the Board rendered in the exercise of such power to the Court of Common Pleas is non-existent. If a member of the Board attempts to exercise the right of appeal as an interested party or as a person aggrieved, then he should not be a trier of the facts in a case in which he is interested. One who has an interest in the outcome of litigation has no right to act as the trier of the facts in such litigation presented in a judicial or quasi-judicial proceeding.<sup>90</sup>

In another case, the Montana Supreme Court held that a resident contractor, who had been denied a statutory preference in bidding for a public works contract, had standing to seek judicial review.<sup>91</sup> The petitioner claimed that the successful bidder was improperly given resident contractor status. The court said:

We recognize the broad proposition that an unsuccessful bidder has no standing in mandamus or otherwise to control the discretion of the city council in awarding a contract to the lowest responsible bidder. The relief granted in the instant case does not do this. On the contrary, this Court's judgment of November 21 simply annulled the certificate of residency the Department of Revenue granted Acton, leaving the parties free to proceed in accordance

89. *McTaggart v. Public Service Comm'n.*, \_\_\_ Mont. \_\_\_, 541 P.2d 778, 780 (1975).

90. *State ex rel. Basista v. Melcher*, 118 Ohio App. 37, 188 N.E.2d 293 (1963).

It has also been held that an administrative official whose decision is reversed on administrative appeal does not have standing to seek judicial review. *Mortensen v. Pyramid Savings and Loan Ass'n of Milwaukee*, 53 Wis.2d 81, 191 N.W.2d 730 (1971); *State ex rel. Rouveyrol v. Donnelly*, 365 Mo. 686, 285 S.W.2d 669 (1956). For a discussion of this matter, see *Davis, Standing of a Public Official to Challenge Agency Decisions: A Unique Problem of State Administrative Law*, 16 Ad. L. Rev. 163 (1963-64).

91. *Sletten Constr. Co. v. City of Great Falls*, 163 Mont. 307, 516 P.2d 1149 (1973).

with law. A resident contractor such as Sletten who, in effect, had been denied its statutory preference is an aggrieved party entitled to judicial review.<sup>92</sup>

### H. Venue for Judicial Review of Contested Cases

The MAPA has a specific provision relating to venue for judicial review of contested cases. "Except as otherwise provided by statute," the petitions for review must 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.<sup>93</sup>

In *State ex rel. Hendrickson v. Gallatin County*,<sup>94</sup> the petitioner, a public assistance claimant, sought judicial review in the district court for Yellowstone County of an adverse determination of the State Board of Social and Rehabilitation Appeals. When the petition was filed, he was a resident of Yellowstone County. At issue in the proceeding was Gallatin County's obligation to make public assistance payments to the petitioner. Gallatin County moved for a change in venue, relying upon the following statute:

An action against a county may be commenced and tried in such county, unless such action is brought by a county, in which case it may be commenced and tried in any county not a party thereto.<sup>95</sup>

It was claimed that this section brought the proceeding within the exception to the MAPA, thereby requiring review in Gallatin County. The court disagreed:

This case before us now is an action brought to review the administrative proceedings before the Board of Social and Rehabilitation Appeals; it is not an action brought against the county and does not come within the purview of section 93-2903, R.C.M. 1947. Section 82-4216(2), R.C.M. 1947, is the statute which properly determines the venue in this case. Yellowstone County is the county in which Hendrickson may file his appeal. We therefore affirm the district court's denial of the motion for a change of venue.<sup>96</sup>

### I. Exhaustion of Administrative Remedies

The court mentioned the doctrine of exhaustion of administrative remedies<sup>97</sup> in two cases previously discussed in this article. In

92. *Id.* at 310-11, 516 P.2d at 1150-51.

93. R.C.M. 1947, § 82-4216(2) (Supp. 1975).

94. 165 Mont. 135, 526 P.2d 354 (1974).

95. R.C.M. 1947, § 93-2903.

96. *State ex rel. Hendrickson v. Gallatin County*, 165 Mont. 135, 139, 526 P.2d 354, 357 (1974).

97. R.C.M. 1947, § 82-4216(1), a section of MAPA, provides that: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a

*State ex rel. Jones v. Giles*, the court stated:

In our view, the fact that nonconforming signs are defined as public nuisances does not per se authorize circumvention of administrative remedies within the Department of Highways. Section 32-4722, R.C.M. 1947, provides an administrative remedy for removal of nonconforming signs and judicial relief may not be sought until administrative remedies have first been exhausted. It is a 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.<sup>98</sup>

The court refused to apply the doctrine in *State ex rel. Sletten Const. Co. v. City of Great Falls* because the person seeking judicial review "was not a party to the administrative proceedings, . . . had no notice thereof, and could hardly be said to have an administrative remedy under such circumstances."<sup>99</sup>

### J. Scope of Judicial Review

In a recent case, *Vita-Rich Dairy, Inc. v. Department of Business Regulation*,<sup>100</sup> the court made the following observation regarding the process of judicial review in general and the MAPA in particular:

A court reviewing an administrative decision must consider three basic principles in determining what the scope of that review should be:

First. The Court recognizes that limited judicial review strengthens the administrative process. Limited review encourages the full and complete presentation of evidence to the agency by the participants in the administrative process by penalizing those who attempt to add new evidence or new lines of argument at the judicial review level. A de novo review encourages the participants to save their evidence until it really counts and present it first to the reviewing court rather than to the agency which has the knowledge and experience in the field it regulates. The result is that the agency which has the knowledge and experience in its substantive field does not hear all the evidence, making it difficult to make a proper decision. It also results in the decision being made by a reviewing court which does not have the specialized knowledge or experience in the area.

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final decision in a contested case is entitled to judicial review under this act."

98. \_\_\_ Mont. \_\_\_, 541 P.2d 355, 357 (1975).

99. 163 Mont. 307, 311, 516 P.2d 1149, 1151 (1973).

100. \_\_\_ Mont. \_\_\_, 553 P.2d 980 (1976).

4 Davis Administrative Law, § 28.21 points out:

. . . Experience has now proved that judicial review impairs an administrative program only when the review involves undue substitution of judicial for administrative judgement on problems within the agency's special competence.

Second. Judicial economy requires that the various functions involved in the administrative process must be divided on the basis of comparative abilities and qualifications of each body. Courts are specialists in constitutional issues, statutory interpretation, the requirements of a fair hearing, and the determination that a finding is supported by substantial evidence. The agency is a specialist in the substantive matter that the legislature delegated to it to regulate.

Third. The agency's actions need a balancing check. In the absence of a body within the agency which is separated from the actual decision and in which all parties have confidence, a limited judicial inquiry to see (a) that a fair procedure was used, (b) that questions of law were properly decided and, (c) that the decision is supported by substantial evidence, is necessary.

It is these principles which underlie the Montana Administrative Procedure Act, Section 82-4216, R.C.M. 1947, providing for judicial review of contested cases. However, this section did not narrow the scope of review if the original enacting statute which created the agency provided for broader review.

Section 82-4216(1) provides in pertinent part:

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 provided by statute.<sup>101</sup>

This lengthy quotation is a helpful and instructive expression of the supreme court's views regarding the function of a court in reviewing an administrative decision. It also points out that the method and scope of judicial review specified in MAPA is not exclusive.<sup>102</sup> However, the court's reference to "substantial evidence" may be misleading with respect to the scope of review under MAPA.

The "clearly erroneous" test applies to judicial review of findings of fact under MAPA.<sup>103</sup> There appears to be general agreement

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101. *Id.* at \_\_\_\_, 553 P.2d at 982-83.

102. *Id.* at \_\_\_\_, 553 P.2d at 983. In *Vita-Rich*, review was under the provisions of the statute that created the agency. The statute in question, R.C.M. 1947, § 27-428, was repealed before the supreme court issued its decision.

103. R.C.M. 1947, § 82-4216(7)(e) (Supp. 1975). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 365 (1948).

that a court has broader review authority under this test than under the substantial evidence test.<sup>104</sup> For example, in 1967, the legislature for the State of Washington changed the scope of review under the state's administrative procedure act from "substantial evidence" to "clearly erroneous." The Washington Supreme Court concluded that "the legislature clearly intended a broader review of all the evidence."<sup>105</sup>

In the *Miskovich* case,<sup>106</sup> the Montana Supreme Court held that the "substantial evidence" test applies to judicial review of decisions of municipal police commissions, which are not covered by MAPA. The statutory language providing for review states that "such decision or order shall be subject to review by the district court on all questions of fact and all questions of law."<sup>107</sup>

## V. CONCLUSION

MAPA has served an important function. It has made agency rule-making visible and accessible to interested persons who wish to participate, and has provided needed guidance with respect to agency adjudication. It is also an important tool for implementing the constitutional mandate for citizen access to and participation in government. The need for a state administrative procedure act was reaffirmed by the legislature when it established a procedure for legislative review of agency rules and created the Administrative Code Committee to act as "watch-dog" over agency rule-making and to make recommendations for revisions of MAPA.

The Administrative Code Committee has a vital function to perform. During the past year, it has actively examined the need for revision in state administrative procedures. The Committee has devoted considerable attention to giving hearing examiners a more

104. See B. SCHWARTZ, *supra* note 2, at 599-600.

105. *Ancheta v. Daly*, 77 Wash.2d 255, 461 P.2d 531 (1969).

106. *Miskovich v. City of Helena*, \_\_\_ Mont. \_\_\_, 551 P.2d 995 (1976).

107. R.C.M. 1947, § 11-1806(7).

In *Miskovich* the district court reversed the decision of the police commission. The supreme court affirmed, stating: "Finding no abuse of discretion and sufficient substantial evidence to support the district court, we affirm the judgment to reinstate respondent police officer to sergeant's rank with retroactive pay and other benefits." This comment might be misleading. The appropriate inquiry under the "substantial evidence" rule is whether there is substantial evidence to support the agency's findings. *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474 (1951). The possibility of drawing two inconsistent conclusions from the same evidence does not prevent an agency's findings from being supported by substantial evidence. *Illinois Cent. R.R. v. Norfolk and W. Ry.*, 385 U.S. 57, 69 (1966). If the quoted sentence is interpreted to mean that the court affirmed because there is substantial evidence to support a conclusion contrary to that reached by the Commission, it would be a misapplication of the rule. *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 618-20 (1966).

significant role in agency decision-making<sup>108</sup> and providing for pre-hearing discovery in agency contested case proceedings. The matter of discovery is an especially important and difficult problem because of the need for discovery tools that can be tailored to the needs of differing agencies with differing agency functions.<sup>109</sup> The Administrative Code Committee provides the legislature with an effective mechanism for planning well reasoned administrative procedure reform.

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108. Recently Wisconsin revamped its administrative procedures act. Under the new act, the role of hearing examiners in contested cases has been strengthened. An agency may, by rule or order, make the examiner's decision the final agency decision. WIS. STAT. ANN. § 227.09(3) (West) (Supp. 1976).

109. In 1970, the Administrative Conference of the United States adopted a comprehensive recommendation for discovery in federal agency adjudication. This recommendation and the tools for discovery contained therein are discussed in F. Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89.

In revising the Wisconsin Administrative Procedure Act, the state legislature recognized that agency adjudication covers a broad range of functions, all of which do not require the same procedures. The new act has three categories of contested cases. WIS. STAT. ANN. § 227.01(2) (West) (Supp. 1976). The availability of discovery depends upon the category of contested cases that is involved. WIS. STAT. ANN., § 227.08(7) (West) (1976).



## APPENDIX

A JOINT RESOLUTION OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THAT THE LEGISLATIVE COUNCIL CONDUCT A STUDY OF THE FEASIBILITY AND DESIRABILITY OF AN ADMINISTRATIVE PROCEDURES ACT AND REPORT ITS FINDINGS TO THE FORTY-SECOND LEGISLATIVE ASSEMBLY.

WHEREAS, the grant of rule-making authority, which is quasi-legislative power, to administrative agencies in Montana has been broad in the past, and

WHEREAS, the grant of power to hold administrative hearings, which is quasi-judicial power, to administrative agencies in Montana has also been broad in the past, and

WHEREAS, the broad grants of quasi-legislative and quasi-judicial power to administrative agencies make it increasingly important that the rights of citizens affected by actions and decisions of administrative agencies be protected adequately, and

WHEREAS, at the present time there is wide disparity in Montana statutes granting rule-making authority and authority to hold hearings to administrative agencies, and this disparity has resulted in substantial differences in the procedures used by administrative agencies for adopting rules and holding hearings, and

WHEREAS, these differences make it extremely difficult for citizens to determine what procedures are used by a particular agency, and

WHEREAS, in some instances ambiguous language in the statutes, lack of legal counsel, or both, may have inhibited administrative agencies in taking action even though that action might have been desirable, and

WHEREAS, some administrative agencies have codified their rules and procedures, but often the codification available to citizens is obsolete thus making it extremely difficult to determine what rules and procedures are in effect at any particular time, and

WHEREAS, lacking any central filing, the only method by which current rules can be obtained is by contacting the appropriate agency of state government, and

WHEREAS, because there is no central filing of administrative rules, it is extremely difficult at any present time to determine whether or not duplication or conflicts may exist in rules adopted by different administrative agencies, and

WHEREAS, the national conference of commissioners on uniform state laws has recognized the need for standardization of administrative rule-making and hearing procedures and recommend a model act in this area and

**WHEREAS**, if such an act were adopted, it might be desirable to exclude certain agencies that have well defined rules and hearing procedures.

**NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:**

That the legislative council is requested to conduct a detailed study of the statutes granting quasi-legislative and quasi-judicial powers to administrative agencies of the state.

**BE IT FURTHER RESOLVED**, that the legislative council is requested to determine whether it would be feasible and desirable to adopt a uniform administrative procedure act like that recommended by the national conference of commissioners on uniform state laws.

**BE IT FURTHER RESOLVED**, that the legislative council consult with all state agencies which might be affected by an administrative procedure statute and, based upon the information obtained, consider the feasibility and desirability of excluding those agencies which have well defined rule-making and hearing procedures established.

**BE IT FURTHER RESOLVED**, that the legislative council may appoint advisory persons and groups as it deems necessary and advisable, and may also consider contracting with the University of Montana law school for the basic research necessary prior to the formulation of conclusions and recommendations.

**BE IT FURTHER RESOLVED**, that the legislative council is requested to prepare a written report, together with any necessary implementing legislation, for consideration by the forty-second legislative assembly.

**BE IT FURTHER RESOLVED**, that the secretary of state is directed to send copies of this resolution to the executive director of the legislative council and to all members of the Montana commission on uniform state laws.

