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VOLUME NO. 46

OPINION NO. 3

COUNTIES - County boards of health;
HEALTH AND ENVIRONMENTAL SCIENCES, DEPARTMENT OF - Inspection of
food establishments;
HEALTH BOARDS AND DISTRICTS - Inspection of food establishments;
STATUTORY CONSTRUCTION - Conflicting statutes;
MONTANA CODE ANNOTATED - Sections 50-2-104 to -107, -116, -118,
50-50-104, -106 to -108, -205, -301, -305;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 22 (1985).

HELD: Local boards of health are required to inspect food
establishments and to participate in enforcing state laws
governing those establishments.

March 3, 1995

Mr. Robert J. Robinson, Director
Department of Health and Environmental Sciences
Cogswell Building, Room C108
P.O. Box 200901
Helena, MT 59620-0901

Dear Mr. Robinson:

The Department of Health and Environmental Sciences has requested
my opinion on the following question:

Are local boards of health required to inspect food
establishments and to participate in enforcing state laws
governing those establishments and, if so, what are the
mandatory requirements to which a local board of health
must adhere?

Your inquiry arises from Carbon County's notification to the
department that the county's sanitarian will no longer assist the
department in the inspection of food service establishments.
Apparently, Carbon County's position is that the county health
officer has no statutory duty to inspect such establishments.

Both the state department of health and local boards of health have
statutory powers and duties regarding the inspection of food

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establishments and enforcement of provisions regarding food establishments.

Regarding the general powers and duties of local health boards, Mont. Code Ann. §§ 50-2-104 to -107 require the creation of a county board of health or other "local board" in each county. See 41 Op. Att'y Gen. No. 22 (1985). A local board is defined as a county, city-county or district board of health. Mont. Code Ann. § 50-2-101(3). Mont. Code Ann. § 50-2-116 prescribes the powers and duties of local boards of health. It provides, inter alia, that local boards shall appoint a local health officer and shall supervise inspections of public establishments for sanitary conditions. Mont. Code Ann. § 50-2-116(1)(a) and (h). Local health officers must comply with Mont. Code Ann. § 50-2-118, which sets out the officers' powers and duties. 41 Op. Att'y Gen. No. 22 (1985). Those duties include provisions that local health officers shall make inspections for sanitary conditions. Mont. Code Ann. § 50-2-118(1)(a). Further, the statutes pertaining to food establishments expressly provide that the state and local health officers "shall make investigations and inspections of establishments and make reports to the department as required under rules adopted by the department." Mont. Code Ann. § 50-50-301 (emphasis added).

Additional code sections support a conclusion that the legislature intended the department and the local health boards to share the responsibility for inspecting food establishments and for enforcing provisions regarding such facilities. Mont. Code Ann. § 50-50-104 authorizes the state department of health and local health boards to enter into cooperative agreements to carry out the provisions regarding food establishments. Actions to enjoin continued violations of chapter 50 may be brought by either the department or the local health officer. Mont. Code Ann. § 50-50-106. The county attorney is required to prosecute violations of chapter 50 when the department presents such evidence to him or her. Mont. Code Ann. § 50-50-107. Food establishments must provide both state and local health officers free access in order to conduct investigations and inspections. Mont. Code Ann. § 50-50-302.

Despite the above provisions which appear to confer mandatory duties upon the department and the local health boards to conduct inspections of food establishments, Carbon County has apparently relied upon the language of Mont. Code Ann. § 50-50-305 to determine that the inspection of food establishments by local health boards is optional.

Under Mont. Code Ann. § 50-50-205, 85 percent of license fees collected by the department are deposited into the local board

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inspection fund created by Mont. Code Ann. § 50-2-108 in order to at least partially reimburse the local health boards for inspection of food establishments. Under Mont. Code Ann. § 50-50-305, each year the department must pay to the local health board an amount from the local board inspection fund which is to be used only for inspecting licensed food establishments and enforcing the provisions of chapter 50, if the local board meets certain conditions. Included in the conditions are the requirements that there be a functioning local board of health, that the local board in fact conduct such inspections and enforce the provisions of chapter 50, and that the board, its officers and sanitarians meet minimum program performance standards established by department rules. Funds that a local board is not qualified to receive are retained by the department to be used to enforce the provisions of chapter 50. Apparently, Carbon County believes that the language of the statute gives it the discretion to decide not to assist the department in the inspections with the result that the department simply will retain the funds so that it may conduct the inspections. Thus, it appears that there may be a conflict between the various statutory provisions which impose a mandatory duty upon local boards to conduct inspections of food establishments and enforce provisions of chapter 50, and Mont. Code Ann. § 50-50-305, which arguably implies that the local boards' inspection and enforcement duties are discretionary.

"Legislative intent must be ascertained from an examination of all of the statutes on one subject matter as a whole, not just the wording of one particular section." Vita-Rich Dairy, Inc. v. Department of Business Regulation, 170 Mont. 341, 553 P.2d 980, 984 (1976). Statutes dealing with the same subject matter are to be construed together and harmonized if possible. Crist v. Segna, 191 Mont. 210, 622 P.2d 1028, 1029 (1981).

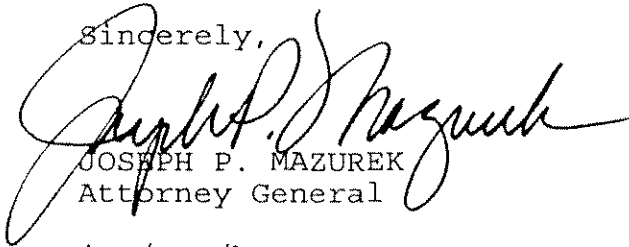
The above statutes can be harmonized by construing Mont. Code Ann. § 50-50-305 to allow the inspection program to be more accountable by permitting the department to restrict funds going to the local health board if it is not a functioning board or is not conducting inspections and enforcing chapter provisions in a satisfactory manner. In such cases, the department may use the funds which would otherwise go to the local health board to implement the chapter provisions on a temporary basis to protect the health and safety of the public until the local board is functioning properly. In light of the clear statutory provisions, discussed above, which place a mandatory duty upon the local health board and its officer to participate in inspections and enforcement of chapter 50 provisions, Mont. Code Ann. § 50-50-305 cannot be interpreted to abrogate, by implication, those mandatory duties.

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THEREFORE, IT IS MY OPINION:

Local boards of health are required to inspect food establishments and to participate in enforcing state laws governing those establishments.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/ppc/kaa