47 Op. Att'y Gen. No. 22

ADMINISTRATIVE LAW AND PROCEDURE - Responsibility of administrative board to adopt rules mandated by legislature;
COMMERCE, DEPARTMENT OF - Responsibility of administrative board to adopt rules mandated by legislature;
OUTFITTERS, BOARD OF - Adequacy of Net Client Hunting Use Rules;
STATUTORY CONSTRUCTION - Delegation of rule-making authority;
ADMINISTRATIVE RULES OF MONTANA - Section 8.39.804;
MONTANA CODE ANNOTATED - Sections 37-47-201, -201(5)(d);
MONTANA LAWS OF 1995 - Chapter 328;
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 68 (1982).

HELD:

The Montana Board of Outfitters' decision initially to forego the adoption of rules pertaining to undue conflict, choosing instead to determine undue conflict on a case-by-case basis, was not a proper implementation of Mont. Code Ann. § 37-47-201(5)(d).

December 30, 1998

Mr. Robin Cunningham, Chair
Montana Board of Outfitters
Department of Commerce
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Dear Mr. Cunningham:

You have asked my opinion on a question which I have rephrased as follows:

Did the Montana Board of Outfitters' decision initially to forego the adoption of rules pertaining to undue conflict, choosing instead to determine undue conflict on a case-by-case basis, constitute proper implementation of Mont. Code Ann. § 37-47-201(5)(d)?

As a preliminary matter, the constitutionality of a statute is presumed. A statute will be upheld unless proven unconstitutional beyond a reasonable doubt. T & W Chevrolet v. Darvial, 196 Mont. 287, 292, 641 P.2d 1368, 1370 (1982). You have not challenged the constitutionality of Mont. Code Ann. § 37-47-201(5)(d), and that issue is not a proper subject for an Attorney General's Opinion.

Section 37-47-201(5)(d) was adopted by the Montana legislature as part of the 1995 Montana Laws, chapter 328. Chapter 328, introduced as House Bill 196, was enacted to generally revise the law relating to outfitters and guides. The revisions required, among other things, that outfitters submit operations plans to the Board of Outfitters (hereinafter referred to as the Board) for review and approval, and that the Board establish a system for review of the submitted plans.

Section 37-47-201 states:

37-47-201. Powers and duties of board relating to outfitters, guides, and professional guides. The board shall:

. . . .
(5) adopt:
. . . .

(d) rules specifying standards for review and approval of proposed new operations plans involving hunting use or the proposed expansion of net client hunting use under an outfitter's existing operations plan in order to determine if the proposal will cause an undue conflict with existing hunting use of the area, constituting a threat to the public health, safety, or welfare. The board may not approve a new operations plan or the proposed expansion of net client hunting use under the existing operations plan if it finds that the proposal will cause an undue conflict with existing hunting use of the area. Approval is not required when part or all of an existing operations plan is transferred from one licensed outfitter to another licensed outfitter. Rules adopted pursuant to this section must provide for solicitation and consideration of comments from hunters and sportspersons in the area to be affected by the proposal who do not make use of outfitter services.

Following the adoption of chapter 328, the Board of Outfitters engaged in an extended administrative rule-making process. Mont. Admin. Reg. Notice No. 8-39-11, Issue No. 17 at 1761-66 (Sept. 14, 1995). The end result of that process was the amendment of Mont. Admin. R. 8.39.518 (1995) and the adoption of Mont. Admin. R. 8.39.801 - .804 (1996). See Mont. Admin. Reg. Vol. 21 at 2388-96 (Nov. 9,1995); Mont. Admin. Reg. Vol. 24 at 2797 (Dec. 21, 1995); and Mont. Admin. Reg. Vol. 1 at 145-50 (Jan. 11, 1996).

The Notice of Proposed Adoption contained the following standards to be used by the Board when reviewing any new or expanded operations plans involving hunting use:

(a) any documentation of prior hunting use by non-outfitted parties;

(b) any documentation of prior conflicts or other altercations between outfitted and non-outfitted parties in the area;

(c) any documentation of prior hunting use by outfitted parties;

(d) any documentation of prior conflicts or other altercations between clients of one outfitter with the clients of another outfitter in the area; and

(e) any data available from the department of fish, wildlife & parks or other agency as to the availability of game animals in the area . . . and the potential effect on such availability.

See proposed new rule IV(7), Mont. Admin. Reg. Notice No. 8-39-11 at 1764. According to the Board, the above standards were included in the proposed rules because House Bill 196 "mandates" adoption of standards for review of proposed operations plans.

The Board wanted the rules in place as close as possible to the effective date of the statute "in order to evaluate applications submitted on or after that date." See "Reason," Mont. Admin. Reg. Notice No. 8-39-11 at 1765. However, when the rules were finally adopted, the above-listed standards were eliminated and, contrary to Mont. Code Ann. § 2-4-305(2), replaced with language identical to that in Mont. Code Ann. § 37-47-201(5)(d). The adopted rule prohibited approval of the proposed plan if the Board "finds that the proposal will cause an undue conflict with existing hunting uses of the area, constituting a threat to the public health, safety or welfare." Mont. Admin. R. 8.39.804 (1996). Nothing in the rule addressed standards for determining undue conflict.

The Board's summary of comments regarding the proposed standards, and its reasons for not adopting those standards, are instructive. The comments fail to indicate any public support for a case-by-case determination of undue conflict, and indicate that a very limited number of comments were received. The comments provide, in part:

COMMENT 7: One person commented that the data on availability of game was an unreliable source for the board to use as criteria for determining undue conflict. Another comment suggested that a private landowner's desire to lease his or her property to an outfitter for hunting use be added to the criteria considered by the board in its review of proposed new use.

RESPONSE: In response to the comments, the Board has deleted the criteria as unnecessarily limiting to what it could consider as evidence of undue conflict and perhaps too suggestive in terms of framing comments submitted.

. . . .

COMMENT 11: One comment suggested that the rule state that the board "shall approve" the proposal unless it finds that the proposed use presents a threat to the public health, safety, and welfare, contending there is no safeguard against arbitrary disapproval of expansion plans.

RESPONSE: The Board accepts the comment and has amended the rule accordingly.

Mont. Admin. Reg. Vol. 1 at 149-50 (Jan. 11, 1996).

Additionally, a review of the transcript of the hearing indicates that requests for case-by-case determinations were directed toward the issue of which years would be used for determining client numbers, not the issue of undue conflict. Public comment favoring case-by-case determinations concerning undue conflict would not outweigh a clear mandate from the legislature to adopt rules.

Following the Board's decision not to adopt rules regarding undue conflict, applications for proposed new and expanded operations plans were reviewed and decided by the Board on a case-by-case basis. The applications were apparently granted unless evidence was introduced that the application would threaten the public health, safety, and welfare.

According to the Board's attorney, prior to August 1997, the Board received at most one comment from the public concerning the proposed use applications brought before it. Thus, the Board's reviews of the applications were conducted at the Board's regularly scheduled meetings. The reviews were based primarily on the outfitter's application and, if the application affected state lands, a letter from the Montana Department of Natural Resources and Conservation. "The Board determined that it was unnecessary to proceed with findings and conclusions when there was absolutely no controversy demonstrated with respect to an application." Rather, "it would be appropriate to issue an order simply stating that, based upon the application (and letter when appropriate), there was no issue relative to public health, safety and welfare." Board of Outfitters' Reply at 6-7 (Sept. 2, 1998). The "orders" were issued in letter format.

This rather informal process continued at least until August 1997, when comments from the public resulted in the Board's conducting public hearings on two proposed operations plans. Orders issued by the Board following those hearings included findings of fact and conclusions of law. The applications were either granted or denied, based on the impact on hunters already hunting in the area. One application was denied because "granting the additional client numbers . . . will result in increased hunting pressure on lands already heavily utilized by hunters in the region and around the state and increase the competition between outfitters and members of the hunting public for the reservation of private lands." In re Application for Net Client Hunting Use Expansion of Rocky Niles, Outfitter License Number 425 at 3 (Nov. 25, 1997). The other application was granted because "[t]he propose[d] expansion will not cause an undue conflict with existing hunting use as the area . . . has not had a history of public hunting use, and therefore, would not create a conflict." In re Application for Net Client Hunting Use Expansion of Herb Weiss, Outfitter License Number 442 at 3 (Nov. 25, 1997). Neither order mentions the impact of the proposed operations plans on the public health, safety, or welfare.

Subsequent contested applications have resulted in orders containing findings of fact and conclusions of law. The outfitter's application has generally been granted. See In re Proposed Expansion in Net Client Hunting Use for Charles Gary Duffy, Harold Gilchrist, Dwane K. Kiehl and Ed Schaffer, all dated May 12, 1998. The orders address various factors, including alleged hunting capacity of the existing land being used (Duffy and Kiehl), the lack of other outfitters using the area (Duffy), alleged transfers between outfitters (Schaffer), additional land obtained to support proposed expansions (Gilchrist), the exclusivity of affected leases and use permits (Gilchrist and Kiehl), and the financial viability of the existing outfitting business (Kiehl).

Responding to comments from the Montana Administrative Code Committee, and after it had submitted this opinion request, the Board, on June 11, 1998, again noticed its intent to adopt standards or criteria by which it would identify undue conflict as that term is defined in Mont. Code Ann. § 37-47-201(5)(d). Following a public hearing and comment, the Board amended Mont. Admin. R. 8.39.804(8) (1998) to include five criteria to consider when identifying undue conflict:

(a) sufficiency of land for personal safety of the hunters and sufficient wildlife to support the proposed net client hunting use;

(b) restriction of public access points to public lands utilized for public hunting use;

(c) pending disciplinary actions or current license restrictions;

(d) veracity of statements made in application; and

(e) existing hunting uses of the area.

Mont. Admin. R. 8.39.804(8)(a) to (e) (1998). Despite the adoption of this rule, the issue you have raised is not moot as many applications were granted or denied prior to the recent adoption of criteria by which to determine whether undue conflict exists. The effect of my ruling on those applications is not a subject of this opinion. Neither the Board nor any other entity with standing has asked what effect this decision has on existing permits. Furthermore, such an opinion would require a factual analysis of permitting process, an exercise beyond the scope of an Opinion of the Attorney General.

You have asked whether the Board's decision initially to forego the adoption of rules pertaining to undue conflict, choosing instead to determine undue conflict on a case-by-case basis, constitutes proper implementation of Mont. Code Ann. § 37-47-201(5)(d). I find that the Board did not properly implement § 37-47-201(5)(d), and that rules for determining undue conflict should have been adopted prior to case-by-case determinations being made.

Section 37-47-201(5) provides that the Board *shall* adopt rules in several areas related to outfitters, guides and professional guides (emphasis supplied). The term "shall adopt rules" has consistently been interpreted to mandate the adoption of rules. Orozco v. Day, 281 Mont. 341, 353-54, 934 P.2d 1009, 1016, (1997); Common Cause of Montana v. Argenbright, 276 Mont. 382, 390, 917 P.2d 425, 430, (1996); Cash v. Otis Elevator Co., 210 Mont. 319, 326, 684 P.2d 1041, 1044-45 (1984).

Having determined that Mont. Code Ann. § 37-47-201(5) mandates the adoption of rules by the Board, I must next ascertain exactly what rules are required by § 37-47-201(5)(d). Statements of intent were still required when 1995 Mont. Laws, ch. 328 was adopted. See Mont. Code Ann. § 5-4-404 (repealed 1997 Mont. Laws, ch. 11, § 4). Statements of intent "provide guidance to an agency in adopting administrative rules under authority delegated by the Legislature." 39 Op. Att'y Gen. No. 68 at 259 (Mont. 1982), citing ch. 11, Joint Rules, Rules of the Montana Legislature, 47th Leg. (1981). The statement of intent accompanying chapter 328 provides in pertinent part: "The legislature intends that rules on operations plans be directed toward a reduction in new hunting uses of areas by outfitters when the new uses will cause undue conflict with existing hunting uses of the areas." II Mont. Session Laws 1995, at 1027 (1995).

The statement of intent affirms the clear language of Mont. Code Ann. § 37-47-201(5)(d). That subsection provides for the adoption of rules "specifying standards for review and approval of proposed new operations plans . . . in order to determine if the proposal will cause an undue conflict with existing hunting use of the area, constituting a threat to the public health, safety, or welfare." None of the standards for review and approval initially adopted by the Board address when the approval of an operations plan will create undue conflict. Therefore, the initial rules adopted by the Board in 1996 fall short of addressing an issue which the legislature clearly intended to be addressed through rules.

The Board relies on Ramage v. Department of Revenue, 236 Mont. 69, 768 P.2d 864 (1989), to support its decision to develop criteria relating to undue conflict on a case-by-case basis rather than through the

rule-making process. However, Ramage involved a statute which granted discretionary, as opposed to mandatory, rule-making authority to the Department of Revenue. See Mont. Code Ann. § 16-1-303, which provides that the department "may make rules not inconsistent with this code." Similarly, the primary case relied on by the Ramage court, NLRB v. Bell Aerospace Co., 416 U.S. 267, 293 (1974), involved a statute which required the adoption of "such rules and regulations as may be necessary to carry out the provisions of this chapter." 29 U.S.C. § 156. There was no requirement that the agency adopt rules regarding any particular area. Rather, in that case it was up to the agency to determine whether and what rules were necessary to carry out the intent of the statute.

Conversely, the language of Mont. Code Ann. § 37-47-201(5), as well as the accompanying statement of legislative intent, makes clear that the legislature intended the Board to adopt rules regarding undue conflict. Otherwise, neither an outfitter nor the public has knowledge or notice of what "standards for review and approval " are being considered by the Board.

Again relying on Ramage v. Department of Revenue, 236 Mont. 69, 768 P.2d 864, the Board further contends that the legislature's delegation of rule-making authority to the Board is so vague as to be impossible to carry out. The relevant statute in Ramage, Mont. Code Ann. § 16-4-203, requires the Department of Revenue to determine public convenience and necessity when asked to approve the issuance of a new liquor license or the transfer of an existing liquor license. The Montana Supreme Court, in approving the Department's decision to determine public convenience and necessity on a case-by-case basis, acknowledged the "difficulties inherent in defining the term" and held: "Because the determination of public convenience and necessity involves such a fact-intensive inquiry, it is not necessary that DOR adopt rigid rules defining the term." Ramage, 236 Mont. at 73, 768 P.2d at 866.

However, several factors distinguish that decision from the issue currently before me. First, as discussed above, the Department of Revenue's rule-making authority was discretionary, while Mont. Code Ann. § 37-47-201(5)(d) mandates the adoption of rules specifying standards for review and approval of operations plans with respect to whether the plan causes an "undue conflict with existing hunting uses." Second, Mont. Code Ann. § 16-4-203 specifically provides that the issue of public convenience and necessity should be determined at a hearing, while Mont. Code Ann. § 37-47-201(5)(d) specifically provides for the adoption of rules regarding undue conflict. Finally, and most importantly, the legislature's delegation of rule-making authority to the Board of Outfitters is neither vague nor arbitrary. Rather, the legislature provided specific direction to the Board to determine whether the proposal will cause an undue conflict with existing hunting use which constitutes a threat to the public's health, safety, or welfare. This direction is sufficient to constitute a valid delegation of power by the legislature to an administrative agency.

If the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity.

On the other hand a statute is complete and validly delegates administrative authority when nothing with respect to a determination of what is the law is left to the administrative agency, and its provisions are sufficiently clear, definite, and certain to enable the agency to know its rights and obligations.

Matter of Peila, 249 Mont. 272, 276-77, 815 P.2d 139, 142 (1991), citing Milk Control Board v. Rehberg, 141 Mont. 149, 161, 376 P.2d 508, 515 (1962); see Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960).

The legislature's directive to the Board differs from that in Ramage, in that the legislature did not instruct the Board to merely adopt rules regarding the approval of proposed operations plans. Rather, the legislature instructed the Board to determine whether the proposal unduly conflicts with existing hunting uses, keeping in mind the public's health, safety, and welfare. I find that this direction is "sufficiently clear, definite and certain" as to constitute sufficient guidance to the Board for the adoption of rules.

THEREFORE, IT IS MY OPINION:

The Montana Board of Outfitters' decision initially to forego the adoption of rules pertaining to undue conflict, choosing instead to determine undue conflict on a case-by-case basis, was not a proper implementation of Mont. Code Ann. § 37-47-201(5)(d).

Sincerely,

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Attorney General
jpm/mas/dm