

ALL BOARDS LAWS AS OF THE 2019 LEGISLATIVE SESSION

TITLE 37, CHAPTER 1 GENERAL PROVISIONS

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CHAPTER 1 GENERAL PROVISIONS

Part 1 Duties and Authority of Department, Director, and Boards

Part Cross-References

Contested cases, Title 2, ch. 4, part 6.
Appointment and qualifications of department heads — duties, 2-15-111, 2-15-112.
Allocation for administrative purposes only, 2-15-121.
Department and boards created, Title 2, ch. 15, part 18.
Department's duties for Board of Horseracing, 23-4-103.
Grounds for disciplinary action as grounds for license denial — conditions to new licenses, 37-1-137.

Part Administrative Rules

Title 24, chapter 1, ARM Organizational rule of Department of Labor and Industry.
Title 24, chapter 2, ARM Overall Department of Labor and Industry rules.

Part Law Review Articles

Learning Disability and Professional Licensing Examinations: What Accommodations Are Reasonable Under the ADA, Ballard & Elwork, 31 J. Psychiatry & L. 43 (2003).
The "Watchman for Truth": Professional Licensing and the First Amendment, Kry, 23 Seattle U.L. Rev. 885 (2000).
License Suspensions, Revocations and the Support Enforcement Legislation, Handschu, 214 N.Y.L.J. 1 (1995).
The Americans With Disabilities Act and Professional Licensing, Vales & Katz, 17 Mental & Physical Disability L. Rep. 55 (1993).
Representing a Professional Licensee in a Regulatory Board Investigation, Denman, 21 Colo. Law. 1397 (1992).
Minimizing Unnecessary Racial Differences in Occupational Licensing, Shapiro, Slutsky, & Watt, 23 Val. U.L. Rev. 213 (1989).

Part Collateral References

Licensed to Bill: How Licensing Boards Function With Government Endorsement, Mont. Leg. Serv. Div. (2015).
Fee-Financed Government: Issues Raised by Licensing Boards and Other Agencies Before the 2013-2014 Economic Affairs Interim Committee, Mont. Leg. Serv. Div. (2014).

37-1-101. Duties of department. In addition to the provisions of 2-15-121, the department shall:
(1) establish and provide all the administrative, legal, and clerical services needed by the boards within the department, including corresponding, receiving and processing routine applications for licenses as defined by a board, issuing and renewing routine licenses as defined by a board, disciplining licensees, setting administrative fees, preparing agendas and meeting notices, conducting mailings, taking minutes of board meetings and hearings, and filing. In issuing routine licenses for a board, the department shall issue a license within 45 days from the time of receiving a completed application or, within 10 calendar days, provide notice and response timelines to the applicant of deficiencies in the application or provide information as to any exigent circumstances that may delay issuing a license. For nonroutine licenses, the department shall confer with the board to which the licensure application is made

and provide an expected timeline to an applicant for issuing a license, including notifying the applicant from that time forward of any deviations from the expected timeline.

(2) standardize policies and procedures and keep in Helena all official records of the boards;

(3) make arrangements and provide facilities in Helena for all meetings, hearings, and examinations of each board or elsewhere in the state if requested by the board;

(4) contract for or administer and grade examinations required by each board;

(5) investigate complaints received by the department of illegal or unethical conduct of a member of the profession or occupation under the jurisdiction of a board or a program within the department;

(6) assess the costs of the department to the boards and programs on an equitable basis as determined by the department;

(7) adopt rules setting administrative fees and expiration, renewal, and termination dates for licenses;

(8) issue a notice to and pursue an action against a licensed individual, as a party, before the licensed individual's board after a finding of reasonable cause by a screening panel of the board pursuant to 37-1-307(1)(d);

(9) (a) provide notice to the board and to the appropriate legislative interim committee when a board cannot operate in a cost-effective manner;

(b) suspend all duties under this title related to the board except for services related to renewal of licenses;

(c) review the need for a board and make recommendations to the legislative interim committee with monitoring responsibility for the boards for legislation revising the board's operations to achieve fiscal solvency; and

(d) notwithstanding 2-15-121, recover the costs by one-time charges against all licensees of the board after providing notice and meeting the requirements under the Montana Administrative Procedure Act;

(10) monitor a board's cash balances to ensure that the balances do not exceed two times the board's annual appropriation level and adjust fees through administrative rules when necessary. [This subsection does not apply to the board of public accountants, except that the department may monitor the board's cash balances.]

(11) establish policies and procedures to set fees for administrative services, as provided in 37-1-134, commensurate with the cost of the services provided. Late penalty fees may be set without being commensurate with the cost of services provided.

(12) adopt uniform rules for all boards and department programs to comply with the public notice requirements of 37-1-311 and 37-1-405. The rules may require the posting of only the licensee's name and the fact that a hearing is being held when the information is being posted on a publicly available website prior to a decision leading to a suspension or revocation of a license or other final decision of a board or the department. (*Bracketed language terminates September 30, 2023—sec. 5, Ch. 50, L. 2019.*)

History: En. 82A-1603 by Sec. 1, Ch. 272, L. 1971; R.C.M. 1947, 82A-1603; amd. Sec. 1, Ch. 293, L. 1981; amd. Sec. 3, Ch. 274, L. 1981; amd. Sec. 1, Ch. 390, L. 1983; amd. Sec. 1, Ch. 307, L. 1985; amd. Sec. 42, Ch. 83, L. 1989; amd. Sec. 6, Ch. 413, L. 1989; amd. Sec. 21, Ch. 429, L. 1995; amd. Sec. 106, Ch. 483, L. 2001; amd. Sec. 6, Ch. 467, L. 2005; amd. Sec. 17, Ch. 11, L. 2007; amd. Sec. 39, Ch. 44, L. 2007; amd. Sec. 1, Ch. 225, L. 2007; amd. Sec. 4, Ch. 427, L. 2015; amd. Sec. 1, Ch. 195, L. 2019.

Compiler's Comments

2019 Amendment: Chapter 195 in (1) inserted second sentence regarding timelines for issuance of routine licenses and inserted last sentence regarding issuance of nonroutine licenses; and made minor changes in style. Amendment effective October 1, 2019.

Extension of Termination Date: Section 5, Ch. 50, L. 2019, amended sec. 10, Ch. 427, L. 2015, by extending the termination date imposed by Ch. 427 to September 30, 2023. Effective July 1, 2019.

2015 Amendment: Chapter 427 in (10) inserted last sentence regarding board of public accountants. Amendment effective October 1, 2015, and terminates September 30, 2019.

2007 Amendments — Composite Section: Chapter 11 in (5) near end after "board" inserted "or a program"; in (9)(a) near beginning after "notice to the" inserted "board and to the"; inserted (9)(b) through (9)(d) outlining additional department duties regarding boards; and made minor changes in style. Amendment effective July 1, 2007.

Chapter 44 in introductory clause after "department" deleted "of labor and industry"; and in (8) at end substituted "37-1-307(1)(d)" for "37-1-307(1)(e)". Amendment effective October 1, 2007.

Chapter 225 in (8) substituted "37-1-307(1)(d)" for "37-1-307(1)(e)"; inserted (12) concerning uniform rules for public notice; and made minor changes in style. Amendment effective January 1, 2009.

Severability: Section 6, Ch. 225, L. 2007, was a severability clause.

2005 Amendment: Chapter 467 at end of introductory clause substituted "shall" for "may"; in (1) at beginning inserted "establish and", after "corresponding" substituted "receiving and processing routine" for "taking", after first "licenses" inserted "as defined by a board", after "issuing and" deleted "denying licenses granted by the boards", after "renewing" inserted "routine", after second "licenses" inserted "as defined by a board", and after "licensees" substituted "setting administrative fees, preparing agendas and meeting notices, conducting mailings" for "registering"; in (2) after "standardize" inserted "policies and procedures"; in (4) at beginning inserted "contract for" and at end after "board" deleted "or by law for licensing, unless the board determines that experts or professionals are necessary to administer or grade a particular examination"; in (6) after "boards" inserted "and programs"; in (7) after "setting" inserted "administrative fees and"; in (8) near middle after "individual's" deleted "licensing"; inserted (9) requiring notice to the appropriate legislative interim committee when a board cannot operate in a cost-effective manner; inserted (10) requiring monitoring of a board's cash balances; inserted (11) requiring the establishment of policies and procedures to set fees; and made minor changes in style. Amendment effective July 1, 2005.

2001 Amendment: Chapter 483 in introductory clause after "department of" substituted "labor and industry" for "commerce". Amendment effective July 1, 2001.

1995 Amendment: Chapter 429 at end of introductory clause substituted "may" for "shall"; in (1), after "administrative", inserted "legal", after "issuing" inserted "and denying", and before "registering" inserted "disciplining licensees"; at beginning of (5), before "investigate", deleted "at the request of a board"; in (7), after "rules", substituted "setting expiration, renewal, and termination dates for licenses" for "establishing expiration dates of licenses for barbers, barbershops, professional engineers, professional land surveyors, nursing home administrators, optometrists, plumbers, social workers, speech-language pathologists, audiologists, and radiologic technologists"; and inserted (8) authorizing Department to issue notice and pursue action against licensed individual before licensing board pursuant to 37-1-307(1)(e). Amendment of 37-1-101(7) effective April 13, 1995, for the purpose of drafting rules that will be adopted on or after October 1, 1995.

Severability: Section 131, Ch. 429, L. 1995, was a severability clause.

Saving Clause: Section 132, Ch. 429, L. 1995, was a saving clause.

Applicability: Section 133, Ch. 429, L. 1995, provided: "[This act] applies to licenses applied for, complaints submitted, and proceedings begun after [the effective date of this section]." Effective October 1, 1995.

1989 Amendments: Chapter 83, in (7) inserted "professional" before "land surveyors".

Chapter 413, changed reference to speech pathologist to reference to speech-language pathologist.

1985 Amendment: In (7) after "plumbers", inserted "social workers, speech pathologists, audiologists".

1985 Statement of Intent: The statement of intent attached to Ch. 307, L. 1985, provided: "A statement of intent is required for this bill because it authorizes the department of commerce to adopt rules establishing uniform expiration dates for licenses for social workers, speech pathologists, and audiologists. It is the intent of the legislature that, in establishing a standard expiration date, the rules take into account any credit a person may have in what would have been his licensure period. The rules should also take into account the expiration dates of other licenses in order to spread the workload more evenly over the year."

1983 Amendment: Inserted (7) requiring Department to adopt rules establishing license expiration dates.

1983 Statement of Intent: The statement of intent attached to Ch. 390, L. 1983, provided: "A statement of intent is required with House Bill 633 because it provides that the department of commerce may establish renewal dates for certain licenses by rule."

It is the intention of the legislature that in the promulgation of such rules, the department will consult with the affected boards, and, where possible, the professions to be regulated. It is the intention of this legislature that in attempting to meet the needs of the department in maintaining efficient licensing procedures, the needs of the board and the professions regulated are given the closest scrutiny and consideration."

1981 Amendments: Chapter 274 substituted "department of commerce" for "department of professional and occupational licensing" in the introductory clause.

Chapter 293 deleted "a pro rata basis according to the number of man-days and the actual operating costs of the department for each board" in (6); added "an equitable basis as determined by the department" to (6).

Case Notes

Revocation of Real Estate Broker's License — No Denial of Rights at Administrative Hearing — Hearing Examiner and Board Attorney as Deputy Attorneys General: A hearing examiner recommended that Sorini's real estate broker's license be revoked for violations of 37-51-321. On appeal, Sorini argued that she was denied her rights at the administrative hearing because both the hearing examiner and the attorney for the Board of Realty Regulation were deputies in the Attorney General's office; however, she failed to submit any proof to support this allegation. The Supreme Court noted that 2-4-611 establishes the manner in which a party may file an affidavit for disqualification of a hearing examiner, holding that in the absence of an affidavit it was not proper to raise the issue on appeal. The court agreed that having a greater separation of prosecutorial and decisionmaking functions would eliminate an appearance of impropriety, but found nothing to warrant a reversal of the District Court. *In re Sorini*, 220 M 459, 717 P2d 7, 43 St. Rep. 526 (1986).

Attorney General's Opinions

Construction of Inconsistent Statutes: Statutes relating to the Board of Public Accountants, contained in Title 37, ch. 50, appear to have been amended by implication by the Executive Reorganization Act of 1971, now codified as part of Titles 2, 37, and 39, thereby transferring the duties specified in 37-1-101 and 37-1-121 from the Board of Public Accountants to the Department of Professional and Occupational Licensing (now Department of Labor and Industry) and the director thereof. Where two acts of the Legislature are inconsistent on the same subject, the prior statute is to be treated as repealed by the subsequent statute. 35 A.G. Op. 58 (1974).

37-1-102. Renumbered 37-1-121. Code Commissioner, 1981.

37-1-103. Renumbered 37-1-131. Code Commissioner, 1981.

37-1-104. Standardized forms. The department shall adopt standardized forms and processes to be used by the boards and department programs. The standardization is to streamline processes, expedite services, reduce costs and waste, and facilitate computerization.

History: En. Sec. 2, Ch. 293, L. 1981; amd. Sec. 7, Ch. 467, L. 2005.

Compiler's Comments

2005 Amendment: Chapter 467 at beginning of first sentence substituted "The department shall" for "It is the responsibility of the department whenever possible to", after "standardized" deleted "application, license, and other", and after "forms" inserted "and processes to be" and in second sentence after "is to" inserted "streamline processes, expedite services" and near end after "waste, and" deleted "the use of out-of-date forms and" and after "facilitate" deleted "automated printing and"; and made minor changes in style. Amendment effective July 1, 2005.

37-1-105. Reporting disciplinary actions against licensees. The department has the authority and shall require that all boards and department programs require each applicant for licensure or renewal to report any legal or disciplinary action against the applicant that relates to the propriety of the applicant's practice of or fitness to practice the profession or occupation for which the applicant seeks licensure. Failure to furnish the required information, except pursuant to 37-1-138, or the filing of false information is grounds for denial or revocation of a license.

History: En. Sec. 3, Ch. 293, L. 1981; amd. Sec. 5, Ch. 271, L. 2003; amd. Sec. 8, Ch. 467, L. 2005.

Compiler's Comments

2005 Amendment: Chapter 467 in first sentence near beginning after "all" deleted "licensing" and after "boards" substituted "and department programs" for "within the department"; and made minor changes in style. Amendment effective July 1, 2005.

2003 Amendment: Chapter 271 near middle of second sentence after "information" inserted "except pursuant to 37-1-138"; and made minor changes in style. Amendment effective April 9, 2003.

Retroactive Applicability: Section 63, Ch. 271, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after December 31, 2002."

37-1-106. Biennial report. The department, in cooperation with each licensing board, shall prepare a biennial report. The biennial report of the department shall contain for each board a summary of the board's activities, the board's goals and objectives, a detailed breakdown of board revenues and expenditures, statistics illustrating board activities concerning licensing, summary of complaints received and their disposition, number of licenses revoked or suspended, legislative or court action affecting the board, and any other information the department or board considers relevant. The department shall submit the report to the office of budget and program planning as a part of the information required by 17-7-111.

History: En. Sec. 4, Ch. 293, L. 1981; amd. Sec. 10, Ch. 125, L. 1983; amd. Sec. 32, Ch. 112, L. 1991; amd. Sec. 30, Ch. 349, L. 1993.

Compiler's Comments

1993 Amendment: Chapter 349 in last sentence, after "shall", substituted "submit the report to the office of budget and program planning as a part of the information required by 17-7-111" for "provide a copy of the report to the governor and, as provided in 5-11-210, to the legislature".

1991 Amendment: Inserted last sentence requiring Department to provide a copy of the report to the Governor and Legislature. Amendment effective March 20, 1991.

1983 Amendment: Near middle of section, before "The biennial report" deleted "In addition to the information prescribed by the governor under 2-7-102".

37-1-107. Joint meetings — department duties. (1) The department shall convene a joint meeting once every 2 years of two or more boards that:

(a) have licensees with dual licensure in related professions or occupations;
(b) have licensees licensed by another board in a related profession or with similar scopes of practice, including but not limited to:

- (i) health care boards;
- (ii) mental health care boards;
- (iii) design boards;
- (iv) therapeutic boards; or
- (v) technical boards; or

(c) have issues of joint concern or related jurisdiction with each other.

(2) A quorum is not required for the joint meeting. However, one member from each board shall attend.

(3) The department shall report to the interim committee responsible for monitoring boards with regard to attendance and issues of concern addressed by the boards.

History: En. Sec. 1, Ch. 11, L. 2007.

Compiler's Comments

Effective Date: Section 26, Ch. 11, L. 2007, provided: "[This act] is effective July 1, 2007."

37-1-108. (Temporary) Rules governing active supervision. The department may adopt rules necessary to carry out active supervision of board actions as provided for in 37-1-121 and 37-1-122. (*Terminates July 1, 2021—sec. 8, Ch. 322, L. 2017.*)

History: En. Sec. 5, Ch. 322, L. 2017.

Compiler's Comments

Effective Date: Section 7, Ch. 322, L. 2017, provided: "[This act] is effective on passage and approval." Approved May 4, 2017.

Termination: Section 8, Ch. 322, L. 2017, provided: "[This act] terminates July 1, 2021."

Preamble: The preamble attached to Ch. 322, L. 2017, provided: "WHEREAS, in 2015 the U.S. Supreme Court held in *North Carolina State Board of Dental Examiners v. the Federal Trade Commission* that members of state licensing boards on which a controlling number of decisionmakers are active market participants in the regulated profession are immune from federal antitrust liability for anticompetitive conduct as state actors only if the challenged restraint is clearly articulated and expressed as state policy and the state has and exercises active supervision over those types of board actions; and

WHEREAS, Montana's professional and occupational licensing board members include active market participants, and the Legislature intends to ensure that Montana law provides for the active supervision of boards as required by the U.S. Supreme Court decision for purposes of state action antitrust immunity; and

WHEREAS, this legislation seeks to continue to rely on the expertise provided by practicing members of the profession to regulate the profession and affirmatively chooses to afford a state action defense and thereby avoid personal legal liability for licensing board members."

37-1-109 through 37-1-120 reserved.

37-1-121. (Temporary) Duties of commissioner — definitions. (1) In addition to the powers and duties under 2-15-112 and 2-15-121, the commissioner of labor and industry shall:

(a) at the request of a party, appoint an impartial hearings examiner to conduct hearings whenever any board or department program holds a contested case hearing. The hearings examiner shall conduct hearings in a proper and legal manner.

(b) establish the qualifications of and hire all personnel to perform the administrative, legal, and clerical functions of the department for the boards. Boards within the department do not have authority to establish the qualifications of, hire, or terminate personnel. The department shall consult with the boards regarding recommendations for qualifications for executive or executive director positions.

(c) approve all contracts and expenditures by boards within the department. A board within the department may not enter into a contract or expend funds without the approval of the commissioner.

(d) provide oversight and supervision of the duties and authority exercised by boards regulated under Title 37, other than chapters 42, 43, and 61, by exercising active supervision authority to approve or disapprove any board action identified by the department as restraining or potentially restraining competition in trade or commerce. Subject to the provisions of 37-1-122(6), the commissioner shall determine if the board action is made or taken pursuant to a clearly articulated state policy and if the restraint or potential restraint of trade or commerce is reasonable and necessary to protect the public health, safety, or welfare. Any approval or disapproval under this subsection (1)(d) must be in writing, comply with the provisions in 37-1-122, and set forth the particular reasons supporting the determination. A disapproval determination may include the commissioner's recommended modifications, if any, for the board's consideration. The commissioner may assign duties, as necessary, but may not assign final approval or disapproval.

(2) If the department disapproves or modifies any board action under subsection (1)(d), the department and not the board may be liable for claims resulting from the disapproval or modification.

(3) As used in this chapter, the following definitions apply:

(a) "Board action" means a policy, rule, or other action taken by a board subject to subsection (1)(d).

(b) "Commissioner" means the commissioner of labor and industry unless otherwise specified. (*Terminates July 1, 2021—sec. 8, Ch. 322, L. 2017.*)

37-1-121. (Effective July 2, 2021) Duties of commissioner. In addition to the powers and duties under 2-15-112 and 2-15-121, the commissioner of labor and industry shall:

(1) at the request of a party, appoint an impartial hearings examiner to conduct hearings whenever any board or department program holds a contested case hearing. The hearings examiner shall conduct hearings in a proper and legal manner.

(2) establish the qualifications of and hire all personnel to perform the administrative, legal, and clerical functions of the department for the boards. Boards within the department do not have authority to

establish the qualifications of, hire, or terminate personnel. The department shall consult with the boards regarding recommendations for qualifications for executive or executive director positions.

(3) approve all contracts and expenditures by boards within the department. A board within the department may not enter into a contract or expend funds without the approval of the commissioner.

History: En. 82A-1604 by Sec. 1, Ch. 272, L. 1971; amd. Sec. 14, Ch. 533, L. 1977; R.C.M. 1947, 82A-1604; amd. Sec. 3, Ch. 274, L. 1981; Sec. 37-1-102, MCA 1979; reds. 37-1-121 by Code Commissioner, 1981; amd. Sec. 1, Ch. 165, L. 1985; amd. Sec. 22, Ch. 429, L. 1995; amd. Sec. 107, Ch. 483, L. 2001; amd. Sec. 9, Ch. 467, L. 2005; amd. Sec. 2, Ch. 322, L. 2017.

Compiler's Comments

2017 Amendment: Chapter 322 inserted (1)(d) concerning oversight and supervision of board duties and authority; inserted (2) concerning liability for claims resulting from department disapproval or modification; inserted (3) providing definitions; and made minor changes in style. Amendment effective May 4, 2017, and terminates July 1, 2021.

Preamble: The preamble attached to Ch. 322, L. 2017, provided: "WHEREAS, in 2015 the U.S. Supreme Court held in North Carolina State Board of Dental Examiners v. the Federal Trade Commission that members of state licensing boards on which a controlling number of decisionmakers are active market participants in the regulated profession are immune from federal antitrust liability for anticompetitive conduct as state actors only if the challenged restraint is clearly articulated and expressed as state policy and the state has and exercises active supervision over those types of board actions; and

WHEREAS, Montana's professional and occupational licensing board members include active market participants, and the Legislature intends to ensure that Montana law provides for the active supervision of boards as required by the U.S. Supreme Court decision for purposes of state action antitrust immunity; and

WHEREAS, this legislation seeks to continue to rely on the expertise provided by practicing members of the profession to regulate the profession and affirmatively chooses to afford a state action defense and thereby avoid personal legal liability for licensing board members."

2005 Amendment: Chapter 467 in (1) in first sentence after "hearings" deleted "before each board within the department" and after "board" inserted "or department program"; in (2) at beginning of first sentence inserted "establish the qualifications of and", in second sentence after "authority to" inserted "establish the qualifications of" and after "hire" inserted "or terminate", and inserted third sentence requiring the department to consult with the boards regarding recommendations for qualifications for executive or executive director positions; and made minor changes in style. Amendment effective July 1, 2005.

2001 Amendment: Chapter 483 in introductory clause substituted "commissioner of labor and industry" for "director of commerce"; at end of (3) substituted "commissioner" for "director"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 429 in (1), in first sentence after "impartial", substituted "hearing examiner" for "legal counsel" and in second sentence substituted "The hearing examiner shall conduct hearings" for "The legal counsel appointed shall see that hearings are conducted"; deleted former (2) that read: "(2) whenever the department conducts an investigation of a complaint of illegal or unethical conduct of a member of a particular profession or occupation as prescribed in 37-1-101(5) and if requested by the appropriate board, appoint an impartial member of that profession or occupation to assist the department in its investigation. The member so appointed may not be a member of the board having jurisdiction over the particular profession or occupation"; in (2), after "administrative", inserted "legal"; and made minor changes in style.

Severability: Section 131, Ch. 429, L. 1995, was a severability clause.

Saving Clause: Section 132, Ch. 429, L. 1995, was a saving clause.

Applicability: Section 133, Ch. 429, L. 1995, provided: "[This act] applies to licenses applied for, complaints submitted, and proceedings begun after [the effective date of this section]." Effective October 1, 1995.

1985 Amendment: At beginning of (1) inserted "at the request of a party" and near end of first sentence of (1), before "hearing", inserted "contested case".

1981 Amendment: Substituted "director of commerce" for "director of professional and occupational licensing" in the introductory clause.

Case Notes

No Error by District Court in Affirming Final Agency Decision: The petitioner sought licensure as a clinical psychologist and was denied by the Board of Psychologists because he did not meet the

educational requirements. The petitioner challenged the board's decision and requested a hearing. The hearing officer found in the petitioner's favor and recommended licensure. The board rejected the hearing officer's findings and again denied licensure. The petitioner sought judicial review of the board's decision and the District Court held in the board's favor. The Supreme Court affirmed and determined that the hearing officer's finding was based on a misinterpretation of the board's rules and was not supported by substantial competent evidence. *Mayer v. Bd. of Psychologists et. al.*, 2014 MT 85, 374 Mont. 364, 321 P.3d 819.

Attorney General's Opinions

Construction of Inconsistent Statutes: Statutes relating to the Board of Public Accountants, contained in Title 37, ch. 50, appear to have been amended by implication by the Executive Reorganization Act of 1971, now codified as part of Titles 2, 37, and 39, thereby transferring the duties specified in 37-1-101 and 37-1-121 from the Board of Public Accountants to the Department of Professional and Occupational Licensing (now Department of Labor and Industry) and the director thereof. Where two acts of the Legislature are inconsistent on the same subject, the prior statute is to be treated as repealed by the subsequent statute. 35 A.G. Op. 58 (1974).

37-1-122. (Temporary) Active supervision — rebuttable presumption — reconsideration. (1) (a) Before making a determination approving or disapproving a board action subject to active supervision as provided in 37-1-121(1)(d), the commissioner of labor and industry shall:

(i) notify the affected board and the economic affairs interim committee in writing of the particular action identified for commissioner review;

(ii) give the board a timeframe of at least 30 days in which to provide the commissioner with written comments and materials justifying the proposed action; and

(iii) meet with the board or its representatives regarding the board action.

(b) The commissioner may require that the board provide the commissioner with other relevant information, including but not limited to comments, documents, or other material submitted to the board regarding the board action.

(c) The commissioner may approve a board action subject to active supervision under 37-1-121(1)(d) without the notice and opportunity for board comment required under subsection (1)(a) if the commissioner has sufficient information to act.

(2) (a) There is a rebuttable presumption that if a board has not received a written notice as provided in 37-1-121(1)(d) regarding a board action within 30 days, that the board action is presumed to be approved by the commissioner because the department has determined the board action will not unreasonably restrain or potentially unreasonably restrain competition in trade or commerce.

(b) At any time a board may request that the department or commissioner confirm in writing that a board action is not subject to active supervision under 37-1-121(1)(d) because the commissioner has determined that the board action will not unreasonably restrain or potentially unreasonably restrain competition in trade or commerce.

(3) If the commissioner determines that a board action is subject to active supervision procedures under 37-1-121(1)(d) and this section, the commissioner shall issue a written determination within 30 days after meeting with the board or its representatives as provided in subsection (1).

(4) (a) The board may request that the commissioner reconsider the determination. A request under this subsection (4) must be in writing, provide any additional supporting materials or arguments, and be received by the commissioner within 10 days after issuance of the commissioner's written determination.

(b) The commissioner may meet with the board or representatives of the board as part of the reconsideration process.

(c) The commissioner shall issue a written reconsideration decision within 10 days of receiving the written request for a reconsideration or within 10 days after meeting with the board or its representatives regarding the redetermination.

(5) This section may not be construed to mean that the commissioner's determination under 37-1-121(1)(d) or the process described in this section is a contested case proceeding as defined in 2-4-102.

(6) (a) After the economic affairs interim committee is notified of the commissioner's decision to issue a written determination or redetermination, the committee shall notify the commissioner if the

committee plans to provide an opportunity for public comment on the commissioner's action at the next committee meeting.

(b) The commissioner shall notify the economic affairs interim committee of a final determination under this section. The committee shall follow the procedures in Title 2, chapter 4, if the committee decides to conduct a review. A final determination of the commissioner may be suspended as provided in 2-4-305(9) whether the determination is for a rule or for another board action. (*Terminates July 1, 2021—sec. 8, Ch. 322, L. 2017.*)

History: En. Sec. 4, Ch. 322, L. 2017.

Compiler's Comments

Effective Date: Section 7, Ch. 322, L. 2017, provided: "[This act] is effective on passage and approval." Approved May 4, 2017.

Termination: Section 8, Ch. 322, L. 2017, provided: "[This act] terminates July 1, 2021."

Preamble: The preamble attached to Ch. 322, L. 2017, provided: "WHEREAS, in 2015 the U.S. Supreme Court held in *North Carolina State Board of Dental Examiners v. the Federal Trade Commission* that members of state licensing boards on which a controlling number of decisionmakers are active market participants in the regulated profession are immune from federal antitrust liability for anticompetitive conduct as state actors only if the challenged restraint is clearly articulated and expressed as state policy and the state has and exercises active supervision over those types of board actions; and

WHEREAS, Montana's professional and occupational licensing board members include active market participants, and the Legislature intends to ensure that Montana law provides for the active supervision of boards as required by the U.S. Supreme Court decision for purposes of state action antitrust immunity; and

WHEREAS, this legislation seeks to continue to rely on the expertise provided by practicing members of the profession to regulate the profession and affirmatively chooses to afford a state action defense and thereby avoid personal legal liability for licensing board members."

37-1-123 through 37-1-129 reserved.

37-1-130. Definitions. As used in this part, the following definitions apply:

(1) "Administrative fee" means a fee established by the department to cover the cost of administrative services as provided for in 37-1-134.

(2) "Board" means a licensing board created under Title 2, chapter 15, that regulates a profession or occupation and that is administratively attached to the department as provided in 2-15-121.

(3) "Board fee" means:

(a) a fee established by the board to cover program area costs as provided in 37-1-134; and

(b) any other legislatively prescribed fees specific to boards and department programs.

(4) "Department" means the department of labor and industry established in 2-15-1701.

(5) "Department program" means a program administered by the department pursuant to this title and not affiliated with a board.

(6) "Expired license" means a license that is not reactivated within the period of 46 days to 2 years after the renewal date for the license.

(7) "Lapsed license" means a license that is not renewed by the renewal date and that may be reactivated within the first 45-day period after the renewal date for the license.

(8) "License" means permission granted under a chapter of this title to engage in or practice at a specific level in a profession or occupation, regardless of the specific term used for the permission, including permit, certificate, recognition, or registration.

(9) "Terminated license" means a license that is not renewed or reactivated within 2 years of the license lapsing.

History: En. Sec. 5, Ch. 274, L. 1981; amd. Sec. 108, Ch. 483, L. 2001; amd. Sec. 10, Ch. 467, L. 2005; amd. Sec. 7, Ch. 502, L. 2007.

Compiler's Comments

2007 Amendment: Chapter 502 in definition of expired license after "period of" increased 45 days to 46 days; in definition of license at end after "occupation" inserted "regardless of the specific term used

for the permission, including permit, certificate, recognition, or registration"; and made minor changes in style. Amendment effective October 1, 2007.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

2005 Amendment: Chapter 467 in introductory clause after "part" substituted "the following definitions apply" for ""board" means each board in this title"; inserted definition of administrative fee; in definition of board at beginning inserted ""Board" means a licensing board created under Title 2, chapter 15", after "that is" substituted "administratively attached" for "allocated", and after "department" substituted "as provided in 2-15-121" for "of labor and industry"; and inserted definitions of board fee, department, department program, expired license, lapsed license, license, and terminated license. Amendment effective July 1, 2005.

2001 Amendment: Chapter 483 at end after "department of" substituted "labor and industry" for "commerce". Amendment effective July 1, 2001.

37-1-131. (Temporary) Duties of boards — quorum required. (1) Under the active supervision of the state as described in 37-1-121(1)(d), a quorum of each board within the department shall:

(a) (i) set and enforce standards and adopt and enforce rules governing the licensing, certification, registration, and conduct of the members of the particular profession or occupation within the board's jurisdiction; and

(ii) apply the standards and rules referred to in subsection (1)(a)(i) in a manner that does not discriminate against any person licensed by the board with regard to how the standards and rules are applied to other persons licensed by the board and that does not restrain trade or competition unless necessary to protect public health and safety;

(b) except as provided in 37-1-321, sit in judgment in hearings for the suspension, revocation, or denial of a license of an actual or potential member of the particular profession or occupation within the board's jurisdiction. The hearings must be conducted by a hearings examiner when required under 37-1-121.

(c) suspend, revoke, or deny a license of a person who the board determines, after a hearing as provided in subsection (1)(b), is guilty of knowingly defrauding, abusing, or aiding in the defrauding or abusing of the workers' compensation system in violation of the provisions of Title 39, chapter 71;

(d) take disciplinary action against the license of a person in a medical assistance program under chapter 3, 4, 7, or 8 if, in the period under contract, the licensee has on three separate occasions returned to the use of a prohibited or proscribed substance. The requirements of this subsection (1)(d) may not be construed as affecting the rights of an employer to evaluate, discipline, or discharge an employee.

(e) pay to the department the board's pro rata share of the assessed costs of the department under 37-1-101(6);

(f) consult with the department before the board initiates a program expansion, under existing legislation, to determine if the board has adequate money and appropriation authority to fully pay all costs associated with the proposed program expansion. The board may not expand a program if the board does not have adequate money and appropriation authority available.

(2) A board, board panel, or subcommittee convened to conduct board business must have a majority of its members, which constitutes a quorum, present to conduct business.

(3) A board that requires continuing education or continued state, regional, or national certification for licensees shall require licensees reactivating an expired license to submit proof of meeting the requirements of this subsection for the renewal cycle.

(4) The board under the active supervision of the state as described in 37-1-121(1)(d) or the department program may:

(a) establish the qualifications of applicants to take the licensure examination;

(b) determine the standards, content, type, and method of examination required for licensure or reinstatement of a license, the acceptable level of performance for each examination, and the standards and limitations for reexamination if an applicant fails an examination;

(c) examine applicants for licensure at reasonable places and times as determined by the board or enter into contracts with third-party testing agencies to administer examinations; and

(d) request that the applicant make a personal appearance before the board for nonroutine license applications as defined by the board.

(5) A board shall adopt rules governing the provision of public notice as required by 37-1-311. (Terminates July 1, 2021—sec. 8, Ch. 322, L. 2017.)

37-1-131. (Effective July 2, 2021) Duties of boards — quorum required. (1) A quorum of each board within the department shall:

(a) (i) set and enforce standards and adopt and enforce rules governing the licensing, certification, registration, and conduct of the members of the particular profession or occupation within the board's jurisdiction; and

(ii) apply the standards and rules referred to in subsection (1)(a)(i) in a manner that does not discriminate against any person licensed by the board with regard to how the standards and rules are applied to other persons licensed by the board and that does not restrain trade or competition unless necessary to protect public health and safety;

(b) except as provided in 37-1-321, sit in judgment in hearings for the suspension, revocation, or denial of a license of an actual or potential member of the particular profession or occupation within the board's jurisdiction. The hearings must be conducted by a hearings examiner when required under 37-1-121.

(c) suspend, revoke, or deny a license of a person who the board determines, after a hearing as provided in subsection (1)(b), is guilty of knowingly defrauding, abusing, or aiding in the defrauding or abusing of the workers' compensation system in violation of the provisions of Title 39, chapter 71;

(d) take disciplinary action against the license of a person in a medical assistance program under chapter 3, 4, 7, or 8 if, in the period under contract, the licensee has on three separate occasions returned to the use of a prohibited or proscribed substance. The requirements of this subsection (1)(d) may not be construed as affecting the rights of an employer to evaluate, discipline, or discharge an employee.

(e) pay to the department the board's pro rata share of the assessed costs of the department under 37-1-101(6);

(f) consult with the department before the board initiates a program expansion, under existing legislation, to determine if the board has adequate money and appropriation authority to fully pay all costs associated with the proposed program expansion. The board may not expand a program if the board does not have adequate money and appropriation authority available.

(2) A board, board panel, or subcommittee convened to conduct board business must have a majority of its members, which constitutes a quorum, present to conduct business.

(3) A board that requires continuing education or continued state, regional, or national certification for licensees shall require licensees reactivating an expired license to submit proof of meeting the requirements of this subsection for the renewal cycle.

(4) The board or the department program may:

(a) establish the qualifications of applicants to take the licensure examination;

(b) determine the standards, content, type, and method of examination required for licensure or reinstatement of a license, the acceptable level of performance for each examination, and the standards and limitations for reexamination if an applicant fails an examination; and

(c) examine applicants for licensure at reasonable places and times as determined by the board or enter into contracts with third-party testing agencies to administer examinations.

(5) A board may, at the board's discretion, request the applicant to make a personal appearance before the board for nonroutine license applications as defined by the board.

(6) A board shall adopt rules governing the provision of public notice as required by 37-1-311.

History: En. 82A-1605 by Sec. 1, Ch. 272, L. 1971; amd. Sec. 11, Ch. 250, L. 1973; R.C.M. 1947, 82A-1605(1) thru (3); amd. Sec. 3, Ch. 274, L. 1981; Sec. 37-1-103, MCA 1979; redes. 37-1-131 by Code Commissioner, 1981; amd. Sec. 2, Ch. 165, L. 1985; amd. Sec. 1, Ch. 90, L. 1991; amd. Sec. 10, Ch. 619, L. 1993; amd. Sec. 23, Ch. 429, L. 1995; amd. Sec. 6, Ch. 492, L. 2001; amd. Sec. 8, Ch. 416, L. 2005; amd. Sec. 11, Ch. 467, L. 2005; amd. Sec. 2, Ch. 225, L. 2007; amd. Sec. 8, Ch. 502, L. 2007; amd. Sec. 1, Ch. 51, L. 2011; amd. Sec. 3, Ch. 122, L. 2011; amd. Sec. 2, Ch. 80, L. 2015; amd. Sec. 3, Ch. 322, L. 2017.

Compiler's Comments

2017 Amendment: Chapter 322 in (1) at beginning inserted introductory clause concerning active supervision of the state; in (4) inserted "under the active supervision of the state as described in 37-1-121(1)(d)"; in (4)(d) at beginning deleted "A board may, at the board's discretion"; and made minor changes in style. Amendment effective May 4, 2017, and terminates July 1, 2021.

Preamble: The preamble attached to Ch. 322, L. 2017, provided: "WHEREAS, in 2015 the U.S. Supreme Court held in *North Carolina State Board of Dental Examiners v. the Federal Trade Commission*

that members of state licensing boards on which a controlling number of decisionmakers are active market participants in the regulated profession are immune from federal antitrust liability for anticompetitive conduct as state actors only if the challenged restraint is clearly articulated and expressed as state policy and the state has and exercises active supervision over those types of board actions; and

WHEREAS, Montana's professional and occupational licensing board members include active market participants, and the Legislature intends to ensure that Montana law provides for the active supervision of boards as required by the U.S. Supreme Court decision for purposes of state action antitrust immunity; and

WHEREAS, this legislation seeks to continue to rely on the expertise provided by practicing members of the profession to regulate the profession and affirmatively chooses to afford a state action defense and thereby avoid personal legal liability for licensing board members."

2015 Amendment: Chapter 80 in (1)(b) at beginning inserted exception clause; deleted former (4)(d) that read: "(d) require continuing education for licensure, as provided in 37-1-306, or require continued state, regional, or national certification for licensure. Except as provided in subsection (3), if the board or department requires continuing education or continued state, regional, or national certification for continued licensure, the board or department may not audit or require proof of continuing education or continued state, regional, or national certification requirements as a precondition for renewing the license, certification, or registration. The board or department may conduct random audits after the lapsed date of up to 50% of all licensees with renewed licenses for documentary verification of the continuing education requirement"; and made minor changes in style. Amendment effective July 1, 2015.

Saving Clause: Section 12, Ch. 80, L. 2015, was a saving clause.

Severability: Section 13, Ch. 80, L. 2015, was a severability clause.

2011 Amendments — Composite Section: Chapter 51 in (1)(a)(i) inserted "adopt and enforce"; inserted (1)(a)(ii) regarding application of standards and rules referred to in subsection (1)(a)(i); and made minor changes in style. Amendment effective October 1, 2011.

Chapter 122 inserted (1)(d) regarding disciplinary action of a person in a medical assistance program; and made minor changes in style. Amendment effective October 1, 2011.

2007 Amendments — Composite Section: Chapter 225 inserted (6) concerning public notice; and made minor changes in style. Amendment effective January 1, 2009.

Chapter 502 inserted (3) requiring licensees reactivating expired licenses to prove they have met continuing education or certification requirements; in (4)(d) in first sentence after "37-1-306" inserted "or require continued state, regional, or national certification for licensure", in second sentence in two places after "education" inserted "or continued state, regional, or national certification", at beginning inserted exception clause, and after "audit or" substituted "require proof of" for "verify", and in third sentence near middle after "audits" inserted "after the lapsed date" and at end after "requirement" deleted "after the renewal period closes"; and made minor changes in style. Amendment effective October 1, 2007.

Severability: Section 6, Ch. 225, L. 2007, was a severability clause.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

2005 Amendments — Composite Section: Chapter 416 in (3) at end after "chapter 71" deleted "or 72". Amendment effective July 1, 2005.

Chapter 467 at beginning of introductory clause inserted "A quorum of"; inserted (7) allowing the board or the department to establish applicant qualifications, determine license examination requirements, conduct examinations, and require continuing education; inserted (8) allowing the board in its discretion to request the applicant to make a personal appearance before the board for nonroutine license applications; and made minor changes in style. Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

2001 Amendment: Chapter 492 inserted (6) requiring quorum to conduct business. Amendment effective October 1, 2001.

1995 Amendment: Chapter 429 in second sentence in (2) substituted "a hearing examiner" for "legal counsel"; and made minor changes in style.

Severability: Section 131, Ch. 429, L. 1995, was a severability clause.

Saving Clause: Section 132, Ch. 429, L. 1995, was a saving clause.

Applicability: Section 133, Ch. 429, L. 1995, provided: "[This act] applies to licenses applied for, complaints submitted, and proceedings begun after [the effective date of this section]." Effective October 1, 1995.

1993 Amendment: Chapter 619 inserted (3) requiring board to suspend, revoke, or deny license for fraud or abuse of workers' compensation system. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

1991 Amendment: Inserted (4) requiring a professional and occupational licensing board to consult with Department prior to initiation of a program expansion.

1985 Amendment: Near end of (2) after "counsel", substituted "when required" for "appointed".

Case Notes

Claim Against Board of Dentistry Not Barred by Res Judicata: Res judicata precludes issues that were litigated or could have been litigated in a previous action. The plaintiff, a denturist association, challenged a rule of the Board of Dentistry that was previously litigated in *Wiser v. St.*, 2006 MT 20, 331 Mont. 28, 129 P.3d 133 (*Wiser I*), and *Wiser v. Mont. Bd. of Dentistry*, 2011 MT 56, 360 Mont. 1, 251 P.3d 675 (*Wiser II*). Applying res judicata, the District Court barred the claims previously litigated in *Wiser I* and *Wiser II*. On appeal, the Supreme Court affirmed the District Court's grant of summary judgment on those claims. However, the Supreme Court also reversed in part, holding that the District Court erred in its application of res judicata to the plaintiffs' claim of systemic discrimination under 37-1-131(1)(a)(ii) because the statute was not enacted at the time of the prior proceedings, and remanded this claim for further proceedings. *Denturist Ass'n of Mont. v. St.*, 2016 MT 119, 383 Mont. 391, 372 P.3d 466.

Board Increase in Penalty for Unprofessional Psychiatrist Conduct Affirmed: Following charges against a psychiatrist for unprofessional conduct, the Board of Medical Examiners considered the entire record and decided to exceed sanctions proposed by the hearings examiner by revoking the psychiatrist's license. The District Court affirmed the Board's action, and on appeal, the Supreme Court also affirmed. Having reviewed the complete record, the Board's increase in the proposed penalty was statutorily authorized and was not arbitrary or capricious. Thus, the Board did not commit an error of law by imposing the increase in penalty. *Munn v. Bd. of Medical Examiners*, 2005 MT 303, 329 M 401, 124 P3d 1123 (2005), distinguishing *St. v. Shodair Hosp.*, 273 M 155, 902 P2d 21 (1995).

Revocation of Real Estate Broker's License — No Denial of Rights at Administrative Hearing — Hearing Examiner and Board Attorney as Deputy Attorneys General: A hearing examiner recommended that Sorini's real estate broker's license be revoked for violations of 37-51-321. On appeal, Sorini argued that she was denied her rights at the administrative hearing because both the hearing examiner and the attorney for the Board of Realty Regulation were deputies in the Attorney General's office; however, she failed to submit any proof to support this allegation. The Supreme Court noted that 2-4-611 establishes the manner in which a party may file an affidavit for disqualification of a hearing examiner, holding that in the absence of an affidavit it was not proper to raise the issue on appeal. The court agreed that having a greater separation of prosecutorial and decisionmaking functions would eliminate an appearance of impropriety, but found nothing to warrant a reversal of the District Court. *In re Sorini*, 220 M 459, 717 P2d 7, 43 St. Rep. 526 (1986).

Attorney General's Opinions

Interpretation of Plumber Licensing Statutes by Board of Plumbers — Licensing Authority Restricted by Statute — Intention of Legislature — Penalty Statute Inapplicable: The Board of Plumbers has the legal authority to interpret Title 37, ch. 69, and the interpretation by the Board must be given deference unless it is incorrect. In interpreting the plumbing licensing statutes, the intent of the Legislature must be determined, and if that intent can be understood from a plain reading of the statutes, there is no need to look further. The statutes as well as the statutory history clearly indicated that a plumber's license is required only for a person who is: (1) working in the field of plumbing in an incorporated city or town; (2) working in the field of plumbing in an area served by a public water supply or sewer system; or (3) working in the field of plumbing and connects or disconnects plumbing to or from a public water supply or sewer system, unless an exemption is granted. There is no penalty applicable to an unlicensed person for whom a license is not required by statute. 47 A.G. Op. 21 (1998).

Board of Dentistry Not to Reconsider Licensing Decisions of Board of Dentistry: Administrative agencies enjoy only those powers specifically conferred upon them by statute. They possess no common-law powers, and implied powers are limited only to those necessary for the effective exercise and discharge of powers and duties expressly conferred. Therefore, when the Board of Dentistry had no

power to reconsider its licensing decisions, the Board of Dentistry, having succeeded to the functions of the Board of Dentistry, may not reconsider a prior decision of the Board of Dentistry to issue a dentist's license. 43 A.G. Op. 33 (1989).

Construction of Inconsistent Statutes: Statutes relating to the Board of Public Accountants, contained in Title 37, ch. 50, appear to have been amended by implication by the Executive Reorganization Act of 1971, now codified as part of Titles 2, 37, and 39, thereby transferring the duties specified in 37-1-101 and 37-1-121 from the Board of Public Accountants to the Department of Professional and Occupational Licensing (now Department of Labor and Industry) and the director thereof. Where two acts of the Legislature are inconsistent on the same subject, the prior statute is to be treated as repealed by the subsequent statute. 35 A.G. Op. 58 (1974).

37-1-132. Nominees for appointment to licensing and regulatory boards. Private associations and members of the public may submit to the governor lists of nominees for appointment to professional and occupational licensing and regulatory boards. The governor may consider nominees from the lists when making appointments to such boards.

History: En. Sec. 9, Ch. 244, L. 1981.

Compiler's Comments

Preamble: The preamble to SB 312 (Ch. 244, L. 1981) read: "WHEREAS, during the course of the Legislative Audit Committee's review of regulatory and licensing boards under the first two sunset cycles it was noted that appointments by the Governor to some boards must be made from lists submitted by private associations; and

WHEREAS, requirements tying board membership to private associations have been struck down by the courts in a number of states; and

WHEREAS, the opportunity for members of the public and private associations to submit nominees to the Governor for board appointments is in the public interest.

THEREFORE, it is the intent of this bill to delete requirements that appointments by the Governor to regulatory and licensing boards must be made from lists submitted by private associations and to provide that members of the public and private associations may submit nominees to the Governor for appointment to regulatory and licensing boards."

Cross-References

Appointing power, Art. VI, sec. 8, Mont. Const.

37-1-133. Board members' compensation and expenses. Unless otherwise provided by law, each member of a board allocated to the department is entitled to receive \$50 per day compensation and travel expenses, as provided for in 2-18-501 through 2-18-503, for each day spent on official board business. Board members who conduct official board business in their city of residence are entitled to receive a midday meal allowance, as provided for in 2-18-502. Ex officio board members may not receive compensation but shall receive travel expenses.

History: En. Sec. 1, Ch. 474, L. 1981; amd. Sec. 2, Ch. 123, L. 1983; amd. Sec. 4, Ch. 672, L. 1983.

Compiler's Comments

1983 Amendments: Chapter 123 substituted, at end of second sentence, "2-18-502" for "2-18-501, for each day in which 6 or more hours are spent on official board business".

Chapter 672 increased per diem from \$25 to \$50.

Preamble: The preamble to SB 463 (Ch. 474, L. 1981) read: "WHEREAS, during its sunset reviews of licensing and regulatory boards the Legislative Audit Committee noted that compensation and travel expenses for the boards vary considerably from board to board; and

WHEREAS, the various boards have very similar duties and responsibilities.

THEREFORE, it is the intent of this act to provide for the payment of uniform compensation and travel expenses for members of state licensing and regulatory boards."

37-1-134. Boards — costs. (1) Each board allocated to the department shall set board fees related to its program area that provide the amount of money usually needed for the operation of the board for services, including but not limited to licensing, reciprocity, renewals, applications, inspections, investigations, compliance, discipline, and audits. The amount needed for the operation of the board is based on the license renewal years as set by the board. In setting the fees, the board shall consider the revenues and expenses incurred in the prior 5 licensing renewal years, but a board's cash balances may not exceed two times the board's annual appropriation level. Unless otherwise provided by law, the department may establish standardized administrative fees. These fees may include but are not limited to fees for administrative services such as license verification, duplicate licenses, late penalty renewals, licensee lists, and other administrative service fees determined by the department as applicable to all boards and department programs. The department shall collect fees on behalf of each board or department program and deposit the fees in the state special revenue fund in the appropriate account for each board or department program. Administrative service costs not related to a specific board or program area may be equitably distributed to board or program areas as determined by the department. Each board and department program shall maintain records sufficient to support the fees charged for each program area.

(2) The department and the boards shall adopt rules regarding all fees.

History: En. Sec. 1, Ch. 345, L. 1981; amd. Sec. 12, Ch. 467, L. 2005; amd. Sec. 1, Ch. 187, L. 2015.

Compiler's Comments

2015 Amendment: Chapter 187 in (1) substituted first three sentences regarding board fees, amount needed, consideration of prior revenues and expenses, and cap on cash balances for "Each board allocated to the department shall set board fees related to the respective program area that are commensurate with costs for licensing, including fees for initial licensing, reciprocity, renewals, applications, inspections, and audits. A board may set an examination fee that must be commensurate with costs. A board that issues endorsements and licenses specialties shall set respective fees commensurate with costs", in middle after "standardized" inserted "administrative", and after "shall collect" deleted "administrative"; inserted (2) regarding rules for fees; and made minor changes in style. Amendment effective July 1, 2015.

2005 Amendment: Chapter 467 in first sentence after "set" inserted "board", after "fees" deleted "reasonably", after "area" inserted "that are commensurate with", and after "costs" inserted "for licensing, including fees for initial licensing, reciprocity, renewals, applications, inspections, and audits. A board may set an examination fee that must be commensurate with costs. A board that issues endorsements and licenses specialties shall set respective fees commensurate with costs", in fourth sentence after "law" deleted "each board within", after "establish" inserted "standardized", and after "fees for" substituted "administrative services such as license verification, duplicate licenses, late penalty renewals, licensee lists, and other administrative service fees determined by the department as applicable to all boards and department programs. The department shall collect administrative fees on behalf of each board or department program and deposit the fees in the state special revenue fund in the appropriate account for each board or department program" for "program areas such as application, examination, renewal, reciprocity, late renewal, and continuing education", at beginning of sixth sentence substituted "Administrative service" for "Board", after "specific" inserted "board or", after "distributed to" inserted "board or", and at end after "determined by the" substituted "department" for "board", and at beginning of seventh sentence after "Each board" inserted "and department program"; and made minor changes in style. Amendment effective July 1, 2005.

Preamble: The preamble to Ch. 345, L. 1981, provided: "WHEREAS, most fees set by professional and occupational licensing boards are specified or limited in amount by law; and

WHEREAS, such limitations are not necessarily serving the purpose intended in that the fees are not related to costs incurred and board revenues are insufficient in some cases and excessive in others.

THEREFORE, it is the intent of this act to authorize and require such licensing boards to set fees reasonably related to the costs of administering the various programs under their jurisdiction."

Statement of Intent: The statement of intent attached to SB 412 (Ch. 345, L. 1981) provided: "A statement of intent is required for Senate Bill 412 because it grants licensing boards within the Department of Professional and Occupational Licensing the authority to set fees.

Presently fees charged by most licensing boards are set by law. Wherever changed circumstances require a change in fees legislation is required. Each session several bills are introduced to modify board fees. By allowing boards to set their own fees, flexibility is provided the boards to meet

changing circumstances. At the present time, fees set by law are not based upon actual costs incurred by licensing boards in carrying out their various functions.

It is the intent of the Legislature that fees set by licensing boards be reasonably related to the costs of the respective programs. "Programs" of the licensing boards are intended to be such areas of responsibility as applications, examinations, renewals, and reciprocity. "Reasonably related" is intended to mean that the department generally breaks down the costs associated with the various programs and sets each fee at a level to cover these costs and the costs of maintaining the ongoing operations of the board. "Reasonably related" does not mean the department is required to maintain an exact system of actual costs, but rather means the department should generally allocate costs of the program equitably among the various fee categories."

Administrative Rules

- ARM 24.101.403 Standardized fees.
- ARM 24.111.401 Alternative health care — fees.
- ARM 24.114.401 Architects — fee schedule.
- ARM 24.117.402 Athletics — fees.
- ARM 24.118.402 Athletic trainers — fee schedule.
- ARM 24.121.401 Barbers and cosmetologists — fees.
- ARM 24.126.401 Chiropractors — fee schedule.
- ARM 24.129.401 Clinical laboratory science practitioners — fees.
- ARM 24.138.3215 Anesthesia — fee schedule.
- ARM 24.141.405 Electricians — fee schedule.
- ARM 24.147.401 Funeral service — fee schedule.
- ARM 24.150.401 Hearing aid dispensers — fees.
- ARM 24.154.401 Licensed addiction counselors — fee schedule.
- ARM 24.155.401 Massage therapists — fee schedule.
- ARM 24.156.601 Physicians — fee schedule.
- ARM 24.156.1002 Podiatrists — fees.
- ARM 24.156.1302 Nutritionists — fees.
- ARM 24.156.1402 Acupuncturists — fees.
- ARM 24.159.401 Nurses — fees.
- ARM 24.162.420 Nursing home administrators — fee schedule.
- ARM 24.165.401 Occupational therapists — fees.
- ARM 24.168.401 Optometrists — fee schedule.
- ARM 24.171.401 Fees for outfitter, operations plan, and professional guide.
- ARM 24.174.401 Pharmacy — fee schedule.
- ARM 24.177.401 Physical therapy examiners — fees.
- ARM 24.180.401 Plumbers — fee schedule.
- ARM 24.181.402 Private alternative adolescent residential or outdoor programs — licensing fee schedule.
- ARM 24.181.403 Private alternative adolescent residential or outdoor programs — fee abatement.
- ARM 24.181.2101 Private alternative adolescent residential or outdoor programs — renewals.
- ARM 24.183.404 Professional engineers and land surveyors — fee schedule.
- ARM 24.189.401 Psychologists — fee schedule.
- ARM 24.201.410 Public accountants — fee schedule.
- ARM 24.204.401 Radiologic technologists — licensing — fee schedule.
- ARM 24.207.401 Real estate appraisers — fees.
- ARM 24.210.401 Realtors — fee schedule.
- ARM 24.213.401 Respiratory care practitioners — fee schedule.
- ARM 24.216.402 Sanitarians — fee schedule.
- ARM 24.219.401 Social workers — fee schedule.
- ARM 24.222.401 Speech-language pathologists — fees.
- ARM 24.225.401 Veterinarians — fee schedule.
- ARM 36.21.415 Water well contractors — fee schedule.

Collateral References

Licensed to Bill: How Licensing Boards Function With Government Endorsement, Mont. Leg. Serv. Div. (2015).

Fee-Financed Government: Issues Raised by Licensing Boards and Other Agencies Before the 2013-2014 Economic Affairs Interim Committee, Mont. Leg. Serv. Div. (2014).

37-1-135. Licensing investigation and review — record access. Any person, firm, corporation, or association that performs background reviews, complaint investigations, or peer reviews pursuant to an agreement or contract with a state professional or occupational licensing board shall make available to the board and the legislative auditor, upon request, any and all records or other information gathered or compiled during the course of the background review, complaint investigation, or peer review.

History: En. Sec. 1, Ch. 242, L. 1981.

Cross-References

Procurement of services, Title 18, ch. 8.

Administrative Rules

ARM 24.210.611 Application for license — realty salesperson and broker.

37-1-136. Disciplinary authority of boards — injunctions. (1) Subject to 37-1-138, each licensing board allocated to the department has the authority, in addition to any other penalty or disciplinary action provided by law, to adopt rules specifying grounds for disciplinary action and rules providing for:

- (a) revocation of a license;
- (b) suspension of its judgment of revocation on terms and conditions determined by the board;
- (c) suspension of the right to practice for a period not exceeding 1 year;
- (d) placing a licensee on probation;
- (e) reprimand or censure of a licensee; or
- (f) taking any other action in relation to disciplining a licensee as the board in its discretion considers proper.

(2) Any disciplinary action by a board shall be conducted as a contested case hearing under the provisions of the Montana Administrative Procedure Act.

(3) Notwithstanding any other provision of law, a board may maintain an action to enjoin a person from engaging in the practice of the occupation or profession regulated by the board until a license to practice is procured. A person who has been enjoined and who violates the injunction is punishable for contempt of court.

(4) An action may not be taken against a person who is in compliance with Title 50, chapter 46.

(5) Rules adopted under subsection (1) must provide for the provision of public notice as required by 37-1-311.

History: En. Sec. 1, Ch. 246, L. 1981; amd. Sec. 6, Ch. 271, L. 2003; amd. Sec. 10, I.M. No. 148, approved Nov. 2, 2004; amd. Sec. 3, Ch. 225, L. 2007.

Compiler's Comments

2007 Amendment: Chapter 225 inserted (5) concerning public notice. Amendment effective January 1, 2009.

Severability: Section 6, Ch. 225, L. 2007, was a severability clause.

2004 Amendment by Initiative: Initiative Measure No. 148, proposed by initiative petition and approved at the general election held November 2, 2004, inserted (4) prohibiting action against a person in compliance with Title 50, chapter 46. Amendment effective November 2, 2004.

Severability: Section 18, I.M. No. 148, was a severability clause.

2003 Amendment: Chapter 271 in (1) at beginning inserted "Subject to 37-1-138"; and made minor changes in style. Amendment effective April 9, 2003.

Retroactive Applicability: Section 63, Ch. 271, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after December 31, 2002."

1981 Preamble: The preamble to Ch. 246, L. 1981, provided: "WHEREAS, during its sunset review of licensing boards, the Legislative Audit Committee noted that disciplinary authority of some boards over licensees is not specified in the law and that consequently some boards are hesitant to take disciplinary action against licensees."

THEREFORE, it is the intent of this act to specify the disciplinary authority of the boards allocated to the Department of Professional and Occupational Licensing."

Statement of Intent: The statement of intent attached to SB 407 (Ch. 246, L. 1981) provided: "SB 407 requires a statement of intent because it grants each licensing board allocated to the Department of Professional and Occupational Licensing the authority to adopt specifying grounds for disciplinary action and the type of action that may be taken.

Each board adopting new substantive or procedural rules under SB 407 is to specify both the grounds upon which each type of disciplinary action may be taken, and the procedure to be used for each action. Each board using a disciplinary action not specified in subsections (1)(a) through (e) but considered proper under (1)(f) must also state in the rule the grounds upon which disciplinary action may be taken and the applicable procedure.

No rule shall specify disciplinary action for failure to renew any license or certificate, pay any fee or participate in any program of continuing education unless the renewal, fee or participation is required by statute.

Rules authorized by both SB 407 and by other provisions of law and previously adopted under such other provisions need not be readopted under SB 407."

Cross-References

Issuance of injunctions on nonjudicial days, 3-1-302, 3-5-302.

Contempts, Title 3, ch. 1, part 5.

Affidavits, Title 26, ch. 1, part 10.

Injunctions, Title 27, ch. 19.

Administrative Rules

ARM 24.138.515 Dentistry — consideration of reapplication for license after previous denial or revocation.

ARM 24.138.2301 Unprofessional conduct for dentists and dental hygienists.

ARM 24.138.2302 Unprofessional conduct for denturists.

ARM 24.159.1052 Licensed practical nurses — probation or reprimand of licensee.

ARM 24.159.1252 Registered nurses — probation or reprimand of licensee.

ARM 24.177.2301 Physical therapy examiners — unprofessional conduct.

ARM 24.201.2401 Public accountants — anonymous complaints.

ARM 24.225.2401 Veterinarians — complaint procedure.

Case Notes

Board Action in Seeking Injunction — No Intentional Interference With Business: The Board of Dentistry received a complaint from a dentist who claimed Kandarian was practicing dentistry without a license by performing temporomandibular joint disfunction evaluations. The Board discussed the complaint in an open meeting, releasing the contents of the complaint to the press at the same time, and subsequently filed for an injunction seeking to enjoin Kandarian from the practice. The Board's action was not tortious but rather was authorized by statute. Thus, Kandarian's claim that the Board negligently released the contents of its complaint, negligently filed suit, and intentionally interfered with his business was properly dismissed by summary judgment. *St. v. Kandarian*, 268 M 408, 886 P2d 954, 51 St. Rep. 1381 (1994).

Revocation of Real Estate Broker's License — No Denial of Rights at Administrative Hearing — Hearing Examiner and Board Attorney as Deputy Attorneys General: A hearing examiner recommended that Sorini's real estate broker's license be revoked for violations of 37-51-321. On appeal, Sorini argued that she was denied her rights at the administrative hearing because both the hearing examiner and the attorney for the Board of Realty Regulation were deputies in the Attorney General's office; however, she failed to submit any proof to support this allegation. The Supreme Court noted that 2-4-611 establishes the manner in which a party may file an affidavit for disqualification of a hearing examiner, holding that in the absence of an affidavit it was not proper to raise the issue on appeal. The court agreed that having a greater separation of prosecutorial and decisionmaking functions would eliminate an appearance of impropriety, but found nothing to warrant a reversal of the District Court. *In re Sorini*, 220 M 459, 717 P2d 7, 43 St. Rep. 526 (1986).

Law Review Articles

Negotiation and Settlement of Professional Licensing Board Cases, Burlage, 21 Colo. Law. 675 (1992).

Full Adjudicatory Hearings for Licensees: Section 558(c) of the Administrative Procedure Act: This article discusses whether and when the procedural safeguards of the federal Administrative Procedure Act are required for licensees. Indick, 37 Admin. L. Rev. 183 (1985).

37-1-137. Grounds for disciplinary action as grounds for license denial — conditions to new licenses. (1) Unless otherwise provided by law, grounds for disciplinary action by a board allocated to the department of labor and industry against a holder of an occupational or professional license may be, under appropriate circumstances, grounds for either issuance of a probationary license for a period not to exceed 1 year or denial of a license to an applicant.

(2) The denial of a license or the issuance of a probationary license under subsection (1) must be conducted as a contested case hearing under the provisions of the Montana Administrative Procedure Act.

History: En. Sec. 1, Ch. 273, L. 1985; amd. Sec. 109, Ch. 483, L. 2001.

Compiler's Comments

2001 Amendment: Chapter 483 in (1) near middle after "department of" substituted "labor and industry" for "commerce". Amendment effective July 1, 2001.

Administrative Rules

ARM 24.138.519 Denturistry — grounds for denial of license.

37-1-138. Protection of professional licenses for activated military reservists — rulemaking authority — definitions. (1) For purposes of this section, the following definitions apply:

(a) "Activated reservist" means a member of a reserve component who has received federal military orders to report for federal active duty for at least 90 consecutive days.

(b) "License" has the meaning provided in 37-1-302.

(c) "Reserve component" means the Montana national guard or the military reserves of the United States armed forces.

(2) An activated reservist who holds an occupational or professional license may report the reservist's activation to the appropriate professional licensing board or to the department of labor and industry if the licensing requirements are administered by the department. The report must, at a minimum, include a copy of the reservist's orders to federal active duty. The report may request that the reservist's professional license revert to an inactive status.

(3) If an activated reservist has requested that the reservist's license revert to inactive status pursuant to subsection (2), then for the duration of the reservist's active duty service under the orders submitted, the department or licensing board may not:

(a) require the collection of professional licensing fees or continuing education fees from the activated reservist;

(b) require that the activated reservist take continuing education classes or file a report of continuing education classes completed; or

(c) revoke or suspend the activated reservist's professional license, require the license to be forfeited, or allow the license to lapse for failure to pay licensing fees or continuing education fees or for failure to take or report continuing education classes.

(4) (a) Upon release from federal active duty service, the reservist shall send a copy of the reservist's discharge documents to the appropriate professional licensing board or to the department.

(b) The board or department shall evaluate the discharge documents, consider the military position held by the reservist and the duties performed by the reservist during the active duty, and compare the position and duties to the licensing requirements for the profession. The board or department shall also consider the reservist's length of time on federal active duty.

(c) Based on the considerations pursuant to subsection (4)(b) and subject to subsection (5):

(i) the license must be fully restored;

(ii) conditions must be attached to the reservist's continued retention of the license; or

(iii) the license must be suspended or revoked.

(5) (a) A licensing board or the department may adopt rules concerning what conditions may be attached to a reservist's professional license pursuant to subsection (4)(c)(ii).

(b) If conditions are attached pursuant to subsection (4)(c)(ii) or the license is suspended or revoked pursuant to subsection (4)(c)(iii), the affected reservist may, within 90 days of the decision to take the action, request a hearing by writing a letter to the board or department. The board or department shall conduct a requested hearing within 30 days of receiving the written request.

History: En. Sec. 2, Ch. 271, L. 2003.

Compiler's Comments

Effective Date: Section 62, Ch. 271, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 9, 2003.

Retroactive Applicability: Section 63, Ch. 271, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after December 31, 2002."

37-1-139 and 37-1-140 reserved.

37-1-141. License renewal — lapse — expiration — termination. (1) The renewal date for a license must be set by department rule. The department shall provide notice prior to the renewal date.

(2) To renew a license, a licensee shall submit a completed renewal form, comply with all certification and continuing education requirements as provided by 37-1-306 or 37-1-420, and remit renewal fees before the end of the renewal period.

(3) A licensee may reactivate a lapsed license within 45 days after the renewal date by following the process in subsection (5) and complying with all certification and educational requirements.

(4) A licensee may reactivate an expired license within 2 years after the renewal date by following the process in subsection (5) and complying with all certification and education requirements that have accrued since the license was last granted or renewed as prescribed by board or department rule.

(5) To reactivate a lapsed license or an expired license, in addition to the respective requirements in subsections (3) and (4), a licensee shall:

(a) submit the completed renewal form;

(b) pay the late penalty fee provided for in subsection (7); and

(c) pay the current renewal fee as prescribed by the department or the board.

(6) (a) A licensee who practices with a lapsed license is not considered to be practicing without a license.

(b) A licensee who practices after a license has expired is considered to be practicing without a license.

(7) The department may assess a late penalty fee for each renewal period in which a license is not renewed. The late penalty fee need not be commensurate with the costs of assessing the fee.

(8) Unless otherwise provided by statute or rule, an occupational or professional license that is not renewed within 2 years of the most recent renewal date automatically terminates. The terminated license may not be reactivated, and a new original license must be obtained.

(9) The department or board responsible for licensing a licensee retains jurisdiction for disciplinary purposes over the licensee for a period of 2 years after the date on which the license lapsed.

(10) This section may not be interpreted to conflict with 37-1-138.

History: En. Sec. 1, Ch. 272, L. 1985; amd. Sec. 13, Ch. 467, L. 2005; amd. Sec. 3, Ch. 80, L. 2015.

Compiler's Comments

2015 Amendment: Chapter 80 in (2) inserted "as provided by 37-1-306 and 37-1-420". Amendment effective July 1, 2015.

Saving Clause: Section 12, Ch. 80, L. 2015, was a saving clause.

Severability: Section 13, Ch. 80, L. 2015, was a severability clause.

2005 Amendment: Chapter 467 inserted (1) through (7) regarding license renewals; in (8) near beginning of first sentence after "rule" substituted "an" for "a lapsed" and after "within" substituted "2" for "3" and in second sentence after "not be" substituted "reactivated" for "reinstated" and at end after "obtained" deleted "by passing a qualifying examination and paying the appropriate fee"; inserted (9) granting the licensing entity jurisdiction for disciplinary purposes over the licensee for a period of 2 years

after the date on which a license lapsed; inserted (10) providing that this section may not be interpreted to conflict with 37-1-138; and made minor changes in style. Amendment effective July 1, 2005.

Administrative Rules

ARM 24.101.413 Renewal dates and requirements.

ARM 24.114.401 Fee schedule.

ARM 24.121.2101 Continuing education — instructors/inactive instructors.

ARM 24.126.2105 Chiropractors — approved continuing education.

ARM 24.225.401 Fee schedule.

Case Notes

Jurisdiction Over Lapsed License: In 1987, Gilpin was convicted on two counts of sexual assault. In 1990, Gilpin's nursing license lapsed for failure to renew. In 1990, the Board of Nursing sought to revoke Gilpin's nursing license. The parties submitted an agreed statement of facts to a hearing examiner who submitted findings, conclusions, and a recommendation to the Board. The Board heard Gilpin's objections orally and in writing, adopted the hearing examiner's recommendations, and revoked the license. Gilpin then appealed to the District Court, which heard the parties' arguments and issued an order affirming the revocation of the license. The Supreme Court held that because the Board has power to reinstate a nursing license 3 years after it lapses (see 2005 amendment), the Board retains jurisdiction over a license 3 years after it lapses (see 2005 amendment). Thus, the Board did not lose jurisdiction over Gilpin's license and had jurisdiction to revoke the license. The Supreme Court also held that the stipulation of facts was a sufficient factual basis to revoke the license and that Gilpin was not entitled to any hearings in addition to those that he was given. *Gilpin v. Bd. of Nursing*, 254 M 308, 837 P2d 1342, 49 St. Rep. 831 (1992).

37-1-142. Terminated. Sec. 1, Ch. 36, L. 2013.

History: En. Sec. 1, Ch. 330, L. 2011.

37-1-143 and 37-1-144 reserved.

37-1-145. Military training or experience to satisfy licensing or certification requirements — rulemaking. (1) Each licensing board or the department on behalf of a program shall by July 1, 2014, adopt rules that provide that certification or licensure requirements established by that board or program may be met by relevant military training, service, or education completed by an individual as a member of the armed forces or reserves of the United States, the national guard of a state, or the military reserves.

(2) (a) An applicant for certification or licensure shall provide to the board or, if applying for licensure by a program, to the department satisfactory evidence, as specified in rule, of receiving military training, service, or education that is equivalent to relevant certification or licensure requirements.

(b) The department and each licensing board shall, upon presentation of satisfactory evidence by an applicant for certification or licensure, accept education, training, or service completed by an individual as a member of the armed forces or reserves of the United States, the national guard of a state, or the military reserves toward the qualifications to receive the license or certification.

(3) The department shall report to the interim committee responsible for monitoring licensing boards by January 1, 2014, on the progress and actions taken under this section by each licensing board or program.

History: En. Sec. 1, Ch. 310, L. 2013, and Sec. 1, Ch. 320, L. 2013.

Compiler's Comments

Effective Date: Section 4, Ch. 310, L. 2013, and sec. 3, Ch. 320, L. 2013, provided: "[This act] is effective on passage and approval." Approved April 26, 2013.

Administrative Rules

ARM 24.114.411 Board of architects and landscape architects — military training or experience.

ARM 24.126.502 Board of chiropractors — military training or experience.

ARM 24.141.507 State electrical board — military training or experience.

ARM 24.154.403 Licensed addiction counselors program — military training or experience.

ARM 24.162.502 Board of nursing home administrators — military training or experience.
ARM 24.165.406 Board of occupational therapy practice — military training or experience.
ARM 24.168.406 Board of optometry — military training or experience.
ARM 24.180.502 Board of plumbers — military training or experience.
ARM 24.207.408 Board of real estate appraisers — military training or experience.
ARM 24.216.508 Board of sanitarians — military training or experience.

Part 2

Licensure of Criminal Offenders

Part Cross-References

Criminal justice policy — rights of convicted, Art. II, sec. 28, Mont. Const.
Gambling — qualifications for licensure, 23-5-176.
Building and loan agent's license revocable for violation of criminal statutes, 32-2-409.
No outfitter's license issued to criminal offender, 37-47-302.
Effect of conviction, 46-18-801.
Supervision of probationers and parolees, Title 46, ch. 23, part 10.

Part Law Review Articles

The Professional License: An Ex-Offender's Illusion?, Davidenas, 7 Crim. Just. J. 61 (1983).

37-1-201. Purpose. It is the public policy of the legislature of the state of Montana to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the assumption of the responsibilities of citizenship. The legislature finds that the public is best protected when offenders are given the opportunity to secure employment or to engage in a meaningful occupation, while licensure must be conferred with prudence to protect the interests of the public. The legislature finds that the process of licensure will be strengthened by instituting an effective mechanism for obtaining accurate public information regarding a license applicant's criminal background.

History: En. 66-4001 by Sec. 1, Ch. 490, L. 1975; R.C.M. 1947, 66-4001; amd. Sec. 1, Ch. 389, L. 2007.

Compiler's Comments

2007 Amendment: Chapter 389 inserted third sentence regarding an applicant's criminal background; and made minor changes in style. Amendment effective October 1, 2007.

Applicability: Section 3, Ch. 389, L. 2007, provided: "[This act] applies to applications for licensure submitted on or after [the effective date of this act]." Effective October 1, 2007.

37-1-202. Intent and policy. It is the intent of the legislature and the declared policy of the state that occupational licensure be granted or revoked as a police power of the state in its protection of the public health, safety, and welfare.

History: En. 66-4002 by Sec. 2, Ch. 490, L. 1975; R.C.M. 1947, 66-4002.

37-1-203. Conviction not a sole basis for denial. Criminal convictions shall not operate as an automatic bar to being licensed to enter any occupation in the state of Montana. No licensing authority shall refuse to license a person solely on the basis of a previous criminal conviction; provided, however, where a license applicant has been convicted of a criminal offense and such criminal offense relates to the public health, welfare, and safety as it applies to the occupation for which the license is sought, the licensing agency may, after investigation, find that the applicant so convicted has not been sufficiently rehabilitated as to warrant the public trust and deny the issuance of a license.

History: En. 66-4003 by Sec. 3, Ch. 490, L. 1975; R.C.M. 1947, 66-4003.

Case Notes

Criminal Conviction Not Conclusive Evidence of Unprofessional Conduct Sufficient to Warrant Revocation of Mortician's License: A criminal conviction is not conclusive evidence of unprofessional conduct and does not constitute sufficient grounds for revocation of a mortician's license. Because this

section was cross-referenced in the license revocation statute, 37-19-311 (now repealed), before revoking a mortician's license, the Board of Funeral Service was required to determine whether a mortician's criminal conviction related to and affected the public health, safety, and welfare as it applied to the practice of mortuary science and whether the mortician had been sufficiently rehabilitated. *Ulrich v. State ex rel. Bd. of Funeral Service*, 1998 MT 196, 289 M 407, 961 P2d 126, 55 St. Rep. 822 (1998), distinguishing *Erickson v. State ex rel. Bd. of Medical Examiners*, 282 M 367, 938 P2d 625 (1997).

Petition for Reinstatement of License Conditioned Upon Completion of Court-Imposed Sentence Unlawful: Ulrich petitioned for reinstatement of his mortician's license, which was revoked by the Board of Funeral Service on grounds of unprofessional conduct following Ulrich's conviction of criminal charges based on his conduct as a real estate agent. The Board ordered that Ulrich could not petition for reinstatement until all terms of his court-imposed criminal sentence, including full restitution, had been completed. The Board argued that under 37-1-205, the order was lawful because completion of the sentence was evidence of restitution. However, completion of a sentence is not the only method by which an applicant is entitled to demonstrate sufficient rehabilitation. On appeal, the Supreme Court held that an applicant whose license is denied or revoked because of a criminal conviction pursuant to 37-19-311 (now repealed) is entitled to apply for reinstatement and a full hearing pursuant to this section. The order denying a petition for reinstatement until all conditions of a criminal sentence are met was unlawful. *Ulrich v. State ex rel. Bd. of Funeral Service*, 1998 MT 196, 289 M 407, 961 P2d 126, 55 St. Rep. 822 (1998).

Rejection of Hearings Examiner's Findings and Revocation of License — Abuse of Discretion: Ulrich sought reinstatement of his mortician's license, which was revoked by the Board of Funeral Service on grounds of unprofessional conduct following Ulrich's conviction of criminal charges based on his conduct as a real estate agent. The Board rejected the findings of a hearings examiner, who recommended reinstatement, on grounds that licensing Ulrich would affect the public's health, safety, and welfare. However, the hearings examiner's conclusions were supported by competent, substantial evidence of Ulrich's remorse, attempts to provide ongoing restitution payments, and rehabilitation. It was an abuse of discretion in violation of 2-4-621(3) for the Board to reject the hearings examiner's findings and revoke Ulrich's license to practice mortuary science. *Ulrich v. State ex rel. Bd. of Funeral Service*, 1998 MT 196, 289 M 407, 961 P2d 126, 55 St. Rep. 822 (1998).

What Section Applicable to License Revocation: Erickson asserted that the Montana State Board of Medical Examiners, pursuant to this section, needed to ascertain whether Erickson's conviction of Medicaid fraud related to the public health, welfare, or safety before considering whether to revoke Erickson's medical license. The Supreme Court held that 37-3-323 sets out the procedure to be applied when the Board revokes or suspends a medical license. A person who has had a license revoked under 37-3-323 as a result of a criminal conviction is entitled to consideration under this section when seeking a new license following rehabilitation. This section does not apply to the revocation of a license. *Erickson v. St.*, 282 M 367, 938 P2d 625, 54 St. Rep. 395 (1997), overruling *Mills v. Comm'r of Ins.*, 226 M 387, 736 P2d 102 (1987), and *Gilpin v. Bd. of Nursing*, 254 M 308, 837 P2d 1342 (1992).

Crime of Sexual Assault as Unprofessional Conduct and Crime Relating to Public Health, Welfare, and Safety — Lack of Rehabilitation: Gilpin was convicted of two counts of sexual assault. After his nursing license was revoked, Gilpin appealed, claiming that there was insufficient connection between the reason for his criminal conviction and the practice of nursing to warrant revocation of the license. The Supreme Court affirmed the hearing examiner's finding that the sexual assaults related to the public health, welfare, and safety and that Gilpin was guilty of unprofessional conduct. *Gilpin v. Bd. of Nursing*, 254 M 308, 837 P2d 1342, 49 St. Rep. 831 (1992), overruled in *Erickson v. St.*, 282 M 367, 938 P2d 625, 54 St. Rep. 395 (1997).

License Revocation for Felony Theft: Plaintiff's occupational license as a life insurance agent was revoked solely because she was convicted of felony theft. No effort was made to determine whether the conviction related to the public health, welfare, and safety as it applied to the practice of her occupation. The Supreme Court held that the mere finding that a licensee was convicted of a felony involving moral turpitude is not a sufficient basis upon which to hold that the conviction is related to the public health, welfare, or safety as it relates to the licensed occupation. *Mills v. Comm'r of Ins.*, 226 M 387, 736 P2d 102, 44 St. Rep. 743 (1987), overruled in *Erickson v. St.*, 282 M 367, 938 P2d 625, 54 St. Rep. 395 (1997).

37-1-204. Statement of reasons for denial. When a licensing agency prohibits an applicant from being licensed wholly or partially on the basis of a criminal conviction, the agency shall state explicitly in writing the reasons for the decision.

History: En. 66-4004 by Sec. 4, Ch. 490, L. 1975; R.C.M. 1947, 66-4004.

Cross-References

Findings of fact required, 2-4-623.

Application of contested case procedure to licensing, 2-4-631.

Case Notes

License Revocation for Felony Theft: Plaintiff's occupational license as a life insurance agent was revoked solely because she was convicted of felony theft. No effort was made to determine whether the conviction related to the public health, welfare, and safety as it applied to the practice of her occupation. The Supreme Court held that the mere finding that a licensee was convicted of a felony involving moral turpitude is not a sufficient basis upon which to hold that the conviction is related to the public health, welfare, or safety as it relates to the licensed occupation. *Mills v. Comm'r of Ins.*, 226 M 387, 736 P2d 102, 44 St. Rep. 743 (1987), overruled in *Erickson v. St.*, 282 M 367, 938 P2d 625, 54 St. Rep. 395 (1997).

37-1-205. Licensure on completion of supervision. Completion of probation or parole supervision without any subsequent criminal conviction is evidence of rehabilitation. However, the facts surrounding the situation that led to the probation or parole supervision may be considered as they relate to the occupation for which a license is sought, and this chapter may not be construed to prohibit licensure of a person while the person is under state supervision if the licensing agency finds insufficient evidence to preclude licensure.

History: En. 66-4005 by Sec. 5, Ch. 490, L. 1975; R.C.M. 1947, 66-4005; amd. Sec. 1349, Ch. 56, L. 2009.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Petition for Reinstatement of License Conditioned Upon Completion of Court-Imposed Sentence Unlawful: Ulrich petitioned for reinstatement of his mortician's license, which was revoked by the Board of Funeral Service on grounds of unprofessional conduct following Ulrich's conviction of criminal charges based on his conduct as a real estate agent. The Board ordered that Ulrich could not petition for reinstatement until all terms of his court-imposed criminal sentence, including full restitution, had been completed. The Board argued that under this section, the order was lawful because completion of the sentence was evidence of restitution. However, completion of a sentence is not the only method by which an applicant is entitled to demonstrate sufficient rehabilitation. On appeal, the Supreme Court held that an applicant whose license is denied or revoked because of a criminal conviction pursuant to 37-19-311 (now repealed) is entitled to apply for reinstatement and a full hearing pursuant to 37-1-203. The order denying a petition for reinstatement until all conditions of a criminal sentence are met was unlawful. *Ulrich v. State ex rel. Bd. of Funeral Service*, 1998 MT 196, 289 M 407, 961 P2d 126, 55 St. Rep. 822 (1998).

Part 3

Uniform Professional Licensing and Regulation Procedures

Part Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 429, L. 1995, provided: "A statement of intent is necessary for this bill because, although the bill deletes numerous grants of rulemaking authority in numerous sections of Title 37, the bill contains a single section allowing professional and occupational licensing boards to adopt rules. The purpose of replacing the numerous rulemaking authority grants with a single grant, as is the purpose with the rest of the bill, is to standardize

the law in an attempt to reduce the number of rules and reduce variations in the rules from occupation to occupation.

The legislature takes note of the large number of bills proposed by and affecting professional and occupational licensing boards in Montana. A uniform licensing and disciplinary process needs to be established to permit the department of commerce [now department of labor and industry] and administratively attached licensing boards to administer the professional and occupational regulatory programs in a manner that is responsive to the public's needs. The public interest will be served by establishing uniform administrative provisions for these regulated professions and occupations that are designed to reduce the number of statutes and rules and variations in statutes and rules between professions or occupations and to promote public awareness of and access to the regulation of professions and occupations. It is the intent of the legislature to strengthen and consolidate disciplinary and licensure procedures for the licensed professions and occupations by providing a uniform disciplinary, licensing, and regulatory act, with standardized procedures for regulation, the purpose of which is to assure the public of the adequacy of competence and conduct in the regulated professions and occupations.

The rules must provide for adequate due process for licensed persons involved in disciplinary proceedings."

Severability: Section 131, Ch. 429, L. 1995, was a severability clause.

Saving Clause: Section 132, Ch. 429, L. 1995, was a saving clause.

Part Law Review Articles

The "Watchman for Truth": Professional Licensing and the First Amendment, Kry, 23 Seattle U. L. Rev. 885 (2000).

Professional Licensing and the ADA, Nisen, 6 Nev. Law. 18 (1998).

Discovery in Professional Licensing Disciplinary Proceedings, Benton, 62 Fla. B.J. 65 (1988).

Part Collateral References

Licensed to Bill: How Licensing Boards Function With Government Endorsement, Mont. Leg. Serv. Div. (2015).

Fee-Financed Government: Issues Raised by Licensing Boards and Other Agencies Before the 2013-2014 Economic Affairs Interim Committee, Mont. Leg. Serv. Div. (2014).

37-1-301. Purpose. The purpose of this part is to establish uniform guidelines for the licensing and regulation of professions and occupations under the jurisdiction of professional and occupational licensing boards governed by this part.

History: En. Sec. 1, Ch. 429, L. 1995.

37-1-302. Definitions. As used in this part, the following definitions apply:

(1) "Board" means a licensing board created under Title 2, chapter 15, that regulates a profession or occupation and that is administratively attached to the department as provided in 2-15-121.

(2) "Complaint" means a written allegation filed with a board that, if true, warrants an injunction, disciplinary action against a licensee, or denial of an application submitted by a license applicant.

(3) "Department" means the department of labor and industry.

(4) "Inspection" means the periodic examination of premises, equipment, or procedures or of a practitioner by the department to determine whether the practitioner's profession or occupation is being conducted in a manner consistent with the public health, safety, and welfare.

(5) "Investigation" means the inquiry, analysis, audit, or other pursuit of information by the department, with respect to a written complaint or other information before a board, that is carried out for the purpose of determining:

(a) whether a person has violated a provision of law justifying discipline against the person;

(b) the status of compliance with a stipulation or order of the board;

(c) whether a license should be granted, denied, or conditionally issued; or

(d) whether a board should seek an injunction.

(6) "License" means permission granted under a chapter of this title to engage in or practice at a specific level in a profession or occupation, regardless of the specific term used for the permission, including permit, certificate, recognition, or registration.

(7) "Profession" or "occupation" means a profession or occupation regulated by a board.

History: En. Sec. 2, Ch. 429, L. 1995; amd. Sec. 110, Ch. 483, L. 2001; amd. Sec. 14, Ch. 467, L. 2005; amd. Sec. 9, Ch. 502, L. 2007.

Compiler's Comments

2007 Amendment: Chapter 502 in definition of license at end after "occupation" inserted "regardless of the specific term used for the permission, including permit, certificate, recognition, or registration"; and made minor changes in style. Amendment effective October 1, 2007.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

2005 Amendment: Chapter 467 in definition of license at end after "occupation" deleted "regardless of the specific term, such as permit, certificate, recognition, or registration, used for the permission"; and made minor changes in style. Amendment effective July 1, 2005.

2001 Amendment: Chapter 483 in definition of department after "department of" substituted "labor and industry" for "commerce". Amendment effective July 1, 2001.

37-1-303. Scope. This part governs the licensure, the practice and unauthorized practice, and the discipline of professions and occupations governed by this title unless otherwise provided by statutes relating to a specific board and the profession or occupation it regulates. The provisions of this chapter must be construed to supplement the statutes relating to a specific board and the profession it regulates. The method for initiating and judging a disciplinary proceeding, specified in 37-1-307(1)(d), must be used by a board in all disciplinary proceedings involving licensed professionals.

History: En. Sec. 3, Ch. 429, L. 1995; amd. Sec. 40, Ch. 44, L. 2007.

Compiler's Comments

2007 Amendment: Chapter 44 in third sentence after "specified in" substituted "37-1-307(1)(d)" for "37-1-307(1)(e)". Amendment effective October 1, 2007.

Case Notes

Administrative, Not Criminal, Sanctions Properly Imposed by Board of Outfitters Against Outfitter Who Hired Unlicensed Guide: Crismore hired an unlicensed guide. Pursuant to 37-1-312, the Board of Outfitters fined Crismore \$1,000, placed him on probation for 18 months, and ordered him to complete remedial education. Crismore contended that the Board should have applied 37-47-344, which is the misdemeanor criminal statute that specifically applies to outfitters and guides and provides a maximum fine of \$500. The Supreme Court found that Crismore's argument had no basis in law. The Board of Outfitters has no authority to conduct a criminal proceeding that may lead to a misdemeanor sentence under 37-47-344. That authority is vested in courts of limited jurisdiction. Rather, the Board has authority to enforce license regulations and conduct administrative contested case hearings pursuant to this section and therefore properly exercised its authority to sanction Crismore pursuant to 37-1-312. *Crismore v. Bd. of Outfitters*, 2005 MT 109, 327 M 71, 111 P3d 681 (2005).

37-1-304. Licensure of out-of-state applicants — reciprocity. (1) A board shall issue a license to practice without examination to a person licensed in another state if the board determines that:

(a) the other state's license standards at the time of application to this state are substantially equivalent to or greater than the standards in this state; and

(b) there is no reason to deny the license under the laws of this state governing the profession or occupation.

(2) The license may be issued if the applicant affirms or states in the application that the applicant has requested verification from the state or states in which the person is licensed that the person is currently licensed and is not subject to pending charges or final disciplinary action for unprofessional conduct or impairment. If the board or its screening panel finds reasonable cause to believe that the applicant falsely affirmed or stated that the applicant has requested verification from another state, the board may summarily suspend the license pending further action to discipline or revoke the license.

(3) This section does not prevent a board from entering into a reciprocity agreement with the licensing authority of another state or jurisdiction. The agreement may not permit out-of-state licensees to obtain a license by reciprocity within this state if the license applicant has not met standards that are

substantially equivalent to or greater than the standards required in this state as determined by the board on a case-by-case basis.

History: En. Sec. 4, Ch. 429, L. 1995; amd. Sec. 1, Ch. 210, L. 1997; amd. Sec. 1, Ch. 100, L. 2011; amd. Sec. 1, Ch. 83, L. 2019.

Compiler's Comments

2019 Amendment: Chapter 83 in (1) near beginning substituted "shall" for "may"; and in (2) near end substituted "another state" for "the other state or states". Amendment effective March 20, 2019.

2011 Amendment: Chapter 100 in (2) in first sentence at beginning before "verification" substituted current text for "The license may not be issued until the board receives" and inserted second sentence regarding suspension of license. Amendment effective October 1, 2011.

1997 Amendment: Chapter 210 in (1)(a), after "equivalent to", inserted "or greater than"; inserted (3) regarding reciprocity agreements with other states; and made minor changes in style.

Administrative Rules

ARM 24.114.1404 Landscape architect licensure by endorsement.

ARM 24.121.603 Out-of-state applicants.

ARM 24.225.401 Fee schedule.

37-1-305. Temporary practice permits. (1) (a) A board may issue a temporary practice permit to a person licensed in another state that has licensing standards substantially equivalent to those of this state if the board determines that there is no reason to deny the license under the laws of this state governing the profession or occupation.

(b) The board shall issue a temporary practice permit as provided in this section within 45 calendar days of receiving a completed application. The board shall notify an applicant within 10 days of receiving an application under this section of deficiencies in the application or provide information as to any exigent circumstances that may delay issuing a temporary practice permit.

(c) The person may practice under the permit until a license is granted or until a notice of proposal to deny a license is issued.

(d) The permit may be issued in the board's discretion if the applicant verifies or states in the application that the applicant has requested verification from the state or states in which the person is licensed that the person is currently licensed and is not subject to pending charges or final disciplinary action for unprofessional conduct or impairment. If the board or its screening panel finds reasonable cause to believe that the applicant falsely affirmed or stated that the applicant has requested verification from the other state or states, the board may summarily suspend the permit pending further action to discipline or revoke the permit.

(2) A board may issue a temporary practice permit to a person seeking licensure in this state who has met all licensure requirements other than passage of the licensing examination. Except as provided in 37-68-311 and 37-69-306, a permit is valid until the person either fails the first license examination for which the person is eligible following issuance of the permit or passes the examination and is granted a license. Determination regarding whether the applicant has met all licensure requirements except passage of the licensing examination must occur within 45 calendar days on a routine, complete application.

History: En. Sec. 5, Ch. 429, L. 1995; amd. Sec. 1, Ch. 203, L. 1999; amd. Sec. 2, Ch. 100, L. 2011; amd. Sec. 2, Ch. 195, L. 2019.

Compiler's Comments

2019 Amendment: Chapter 195 inserted (1)(b) concerning issuance of a temporary practice permit or issuance of a notice of defective application; in (1)(d) near end in two places substituted "permit" for "license"; in (2) inserted last sentence regarding the timeline for determination of meeting requirements; and made minor changes in style. Amendment effective October 1, 2019.

2011 Amendment: Chapter 100 in (1) in third sentence before "verification" substituted current text for "The permit may not be issued until the board receives" and inserted fourth sentence regarding suspension of license. Amendment effective October 1, 2011.

1999 Amendment: Chapter 203 in (2) at beginning of second sentence inserted exception clause; and made minor changes in style. Amendment effective October 1, 1999.

37-1-306. Continuing education — certification — other qualifications for continued licensure — audit. (1) A board may require licensees to participate in flexible, cost-efficient, effective, and geographically accessible continuing education or continued state, regional, or national certification for licensure.

(2) A board that requires continuing education or state, regional, or national certification may not audit or require proof of continuing education or certification as a precondition for license renewal. However, a licensee who reactivates a license after the license has expired, as provided in 37-1-141, is subject to a mandatory continuing education audit.

(3) Except as provided in 37-50-305, after the lapsed date provided for in 37-1-141, the board or department may conduct a random audit of up to 50% of all licensees who have renewed their licenses to determine compliance with board or program continuing education requirements.

(4) The board or department may audit licensees for compliance with state, regional, or national certification or other board or department requirements.

(5) The board or department shall provide a licensee not in compliance with continuing education or certification requirements with an opportunity to cure the noncompliance as provided in 37-1-321.

History: En. Sec. 6, Ch. 429, L. 1995; amd. Sec. 15, Ch. 467, L. 2005; amd. Sec. 4, Ch. 80, L. 2015; amd. Sec. 1, Ch. 50, L. 2019.

Compiler's Comments

2019 Amendment: Chapter 50 in (3) at beginning inserted exception clause; and made minor changes in style. Amendment effective July 1, 2019.

2015 Amendment: Chapter 80 in (1) after "board" deleted "or, for programs without a board, the department" and at end inserted "or continued state, regional, or national certification for licensure"; inserted (2), (3), and (4) regarding audit of licensees; inserted (5) regarding opportunity to cure noncompliance; and made minor changes in style. Amendment effective July 1, 2015.

Saving Clause: Section 12, Ch. 80, L. 2015, was a saving clause.

Severability: Section 13, Ch. 80, L. 2015, was a severability clause.

2005 Amendment: Chapter 467 at beginning after "board" inserted "or, for programs without a board, the department". Amendment effective July 1, 2005.

Administrative Rules

ARM 24.121.2101 Continuing education — instructors/inactive instructors.

ARM 24.126.2105 Chiropractors — approved continuing education.

37-1-307. Board authority. (1) A board may:

- (a) hold hearings as provided in this part;
- (b) issue subpoenas requiring the attendance of witnesses or the production of documents and administer oaths in connection with investigations and disciplinary proceedings under this part. Subpoenas must be relevant to the complaint and must be signed by a member of the board. Subpoenas may be enforced as provided in 2-4-104.
- (c) authorize depositions and other discovery procedures under the Montana Rules of Civil Procedure in connection with an investigation, hearing, or proceeding held under this part;
- (d) establish a screening panel to determine whether there is reasonable cause to believe that a licensee has violated a particular statute, rule, or standard justifying disciplinary proceedings. A screening panel is an agency for purposes of summary suspensions under 2-4-631. A screening panel shall specify in writing the particular statute, rule, or standard that the panel believes may have been violated. The screening panel shall also state in writing the reasonable grounds that support the panel's finding that a violation may have occurred. The assigned board members may not subsequently participate in a hearing of the case. The final decision on the case must be made by a majority of the board members who did not serve on the screening panel for the case.
- (e) grant or deny a license within 45 calendar days of receiving a complete application, including the confidential criminal justice information report, and notify an applicant within 10 days of receiving an application of any deficiencies for an incomplete application or provide information as to any exigent circumstances that may delay issuing a license in the 45 days; and
- (f) upon a finding of unprofessional conduct by an applicant or license holder, impose a sanction provided by this chapter.

(2) Each board is designated as a criminal justice agency within the meaning of 44-5-103 for the purpose of obtaining confidential criminal justice information, as defined in 44-5-103, regarding the board's licensees and license applicants and regarding possible unlicensed practice, but the board may not record or retain any confidential criminal justice information without complying with the provisions of the Montana Criminal Justice Information Act of 1979, Title 44, chapter 5.

(3) A board may contact and request information from the department of justice, which is designated as a criminal justice agency within the meaning of 44-5-103, for the purpose of obtaining criminal history record information regarding the board's licensees and license applicants and regarding possible unlicensed practice.

(4) (a) A board that is statutorily authorized to obtain a criminal record background report as a prerequisite to the issuance of a license shall require the applicant to submit a full set of fingerprints for the purpose of fingerprint checks by the Montana department of justice and the federal bureau of investigation.

(b) The applicant shall sign a release of information to the board and is responsible to the department of justice for the payment of all fees associated with the criminal record background report.

(c) Upon completion of the criminal record background check, the department of justice shall forward all criminal history record information, as defined in 44-5-103, in any jurisdiction to the board as authorized in 44-5-303.

(d) At the conclusion of any background check required by this section, the board must receive the criminal record background report but may not receive the fingerprint card of the applicant. Upon receipt of the criminal record background report, the department of justice shall promptly destroy the fingerprint card of the applicant.

[(5) Each board shall require a license applicant to provide the applicant's social security number as a part of the application. Each board shall keep the social security number from this source confidential, except that a board may provide the number to the department of public health and human services for use in administering Title IV-D of the Social Security Act.](*Bracketed language terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.*)

History: En. Sec. 7, Ch. 429, L. 1995; amd. Sec. 22, Ch. 552, L. 1997; amd. Sec. 2, Ch. 230, L. 1999; amd. Sec. 8, Ch. 492, L. 2001; amd. Sec. 16, Ch. 467, L. 2005; amd. Sec. 2, Ch. 389, L. 2007; amd. Sec. 3, Ch. 100, L. 2011; amd. Sec. 3, Ch. 195, L. 2019; amd. Sec. 1, Ch. 287, L. 2019.

Compiler's Comments

2019 Amendments — Composite Section: Chapter 195 in (1)(e) after "license" inserted clause regarding timelines for granting or denying a license; and made minor changes in style. Amendment effective October 1, 2019.

Chapter 287 in (4)(a), (4)(b), and (4)(d) in two places, substituted "criminal record background report" for "criminal background check"; in (4)(a) in middle before "fingerprints" inserted "a full set of"; and in (4)(c) near beginning substituted "criminal record background check" for "criminal background check". Amendment effective May 3, 2019.

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 95] [61-5-107];
(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].
(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

2011 Amendment: Chapter 100 in (1)(d) inserted second sentence regarding summary suspensions. Amendment effective October 1, 2011.

2007 Amendment: Chapter 389 in (2) near middle after "information" inserted "as defined in 44-5-103" and at end after "practice" inserted "but the board may not record or retain any confidential criminal justice information without complying with the provisions of the Montana Criminal Justice Information Act of 1979, Title 44, chapter 5"; inserted (3) allowing a board to obtain criminal history record information; inserted (4) regarding fingerprinting, background check information, and payment of fees; and made minor changes in style. Amendment effective October 1, 2007.

Applicability: Section 3, Ch. 389, L. 2007, provided: "[This act] applies to applications for licensure submitted on or after [the effective date of this act]." Effective October 1, 2007.

2005 Amendment: Chapter 467 in (1)(b) at beginning of first sentence after "subpoenas" inserted "requiring the attendance of witnesses or the production of documents" and in second sentence after "complaint" substituted "and must be signed by a member" for "issued by a majority vote of board members not serving on the screening panel described in subsection (1)(e), and signed by the presiding officer"; deleted former (1)(d) that read: "(d) compel attendance of witnesses and the production of documents. Subpoenas may be enforced as provided in 2-4-104"; and made minor changes in style. Amendment effective July 1, 2005.

2001 Amendment: Chapter 492 in (1)(e) in first sentence after "a licensee has violated" substituted "a particular statute, rule, or standard" for "a statute or rule" and inserted second and third sentences regarding screening panel; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 230 at end of (2) inserted "and regarding possible unlicensed practice". Amendment effective October 1, 1999.

1997 Amendment: Chapter 552 inserted (3) requiring each board to require a license applicant to provide the applicant's Social Security number and requiring the board to keep the number confidential except for Title IV-D purposes. Amendment effective July 1, 1997.

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

- (a) [section 9] [40-5-922];
- (b) [section 11] [40-5-924];

- (c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
 - (d) [section 93] [50-15-403];
 - (e) [section 95] [61-5-107];
 - (f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].
- (4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:
- (a) [section 9] [40-5-922];
 - (b) [section 11] [40-5-924];
 - (c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
 - (d) [section 93] [50-15-403, certification filed April 24, 1998];
 - (e) [section 95] [61-5-107];
 - (f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].
- (5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).
- (b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]
- (6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.
- (7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

37-1-308. Unprofessional conduct — complaint — investigation — immunity — exceptions. (1) Except as provided in subsections (4) and (5), a person, government, or private entity may submit a written complaint to the department charging a licensee or license applicant with a violation of this part and specifying the grounds for the complaint.

(2) If the department receives a written complaint or otherwise obtains information that a licensee or license applicant may have committed a violation of this part, the department may, with the concurrence of a member of the screening panel established in 37-1-307, investigate to determine whether there is reasonable cause to believe that the licensee or license applicant has committed the violation.

(3) A person or private entity, but not a government entity, filing a complaint under this section in good faith is immune from suit in a civil action related to the filing or contents of the complaint.

(4) A person under legal custody of a county detention center or incarcerated under legal custody of the department of corrections may not file a complaint under subsection (1) against a licensed or certified provider of health care or rehabilitative services for services that were provided to the person while detained or confined in a county detention center or incarcerated under legal custody of the department of corrections unless the complaint is first reviewed by a correctional health care review team provided for in 37-1-331.

(5) A board member may file a complaint with the board on which the member serves or otherwise act in concert with a complainant in developing, authoring, or initiating a complaint to be filed with the board if the board member determines that there are reasonable grounds to believe that a particular statute, rule, or standard has been violated.

History: En. Sec. 8, Ch. 429, L. 1995; amd. Sec. 4, Ch. 475, L. 1997; amd. Sec. 1, Ch. 375, L. 1999; amd. Sec. 9, Ch. 492, L. 2001.

Compiler's Comments

2001 Amendment: Chapter 492 in (1) in exception clause after "provided in" substituted "subsections (4) and (5)" for "subsection (3)"; inserted (5) regarding board member who believes statute, rule, or standard to have been violated; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 375 substituted present (3) precluding certain complaints by incarcerated persons for former (3) that read: "(3) A person may not file a complaint under subsection (1) against a licensed or certified provider of health care or rehabilitative services for services that were provided to the person while incarcerated under the legal custody of the department of corrections. If the department of corrections has reason to believe that there has been a violation of this part arising out of health care or rehabilitative services provided to a person incarcerated under the legal custody of the department of corrections, the department of corrections shall report the possible violation to the department for appropriate action under subsection (2)". Amendment effective July 1, 1999.

1997 Amendment: Chapter 475 at beginning of (1) inserted exception clause; inserted (3) prohibiting person incarcerated from filing complaint against licensed or certified health care provider; and made minor changes in style. Amendment effective May 1, 1997.

Severability: Section 6, Ch. 475, L. 1997, was a severability clause.

Case Notes

Privileged Communication Precluding Defamation Claim — Summary Judgment Proper: Plaintiff contended that a Department of Transportation real estate appraiser defamed plaintiff by filing two written complaints with the Department of Labor and Industry alleging that plaintiff failed to comply with uniform standards when preparing appraisals on two condemned properties. The District Court summarily dismissed plaintiff's claim on grounds that the complaints were privileged communications. Plaintiff appealed, but the Supreme Court affirmed. The appraiser's complaints were made in an official proceeding authorized by law and were made to the proper authorities responsible for the interest being expressed and were thus, as a matter of law, privileged communications that were not subject to a claim of libel or slander. No genuine issue of material fact existed, so summary judgment for defendant was proper. *McLeod v. St.*, 2009 MT 130, 350 M 285, 206 P3d 956 (2009), following *Skinner v. Pistoria*, 194 M 257, 633 P2d 672 (1981).

37-1-309. Notice — request for hearing. (1) If a reasonable cause determination is made pursuant to 37-1-307 that a violation of this part has occurred and the provisions of 37-1-321 do not apply, a notice must be prepared by department legal staff and served on the alleged violator. The notice may be served by certified mail to the current address on file with the board or by other means authorized by the Montana Rules of Civil Procedure. The notice may not allege a violation of a particular statute, rule, or standard unless the board or the board's screening panel, if one has been established, has made a written determination that there are reasonable grounds to believe that the particular statute, rule, or standard has been violated.

(2) A licensee or license applicant shall give the board the licensee's or applicant's current address and any change of address within 30 days of the change.

(3) The notice must state that the licensee or license applicant may request a hearing to contest the charge or charges. A request for a hearing must be in writing and received in the offices of the department within 20 days after the licensee's receipt of the notice. Failure to request a hearing constitutes a default on the charge or charges, and the board may enter a decision on the basis of the facts available to it.

History: En. Sec. 9, Ch. 429, L. 1995; amd. Sec. 10, Ch. 492, L. 2001; amd. Sec. 6, Ch. 80, L. 2015.

Compiler's Comments

2015 Amendment: Chapter 80 in (1) in middle of first sentence inserted "and the provisions of 37-1-321 do not apply". Amendment effective July 1, 2015.

Saving Clause: Section 12, Ch. 80, L. 2015, was a saving clause.

Severability: Section 13, Ch. 80, L. 2015, was a severability clause.

2001 Amendment: Chapter 492 in (1) inserted third sentence regarding prerequisite for notice alleging violation. Amendment effective October 1, 2001.

37-1-310. Hearing — adjudicative procedures. The procedures in Title 2, chapter 4, governing adjudicative proceedings before agencies; the Montana Rules of Civil Procedure; and the Montana Rules of Evidence govern a hearing under this part. A board has all the powers and duties granted by Title 2, chapter 4.

History: En. Sec. 10, Ch. 429, L. 1995.

37-1-311. Findings of fact — order — report. (1) If the board decides by a preponderance of the evidence, following a hearing or on default, that a violation of this part occurred, the department shall prepare and serve the board's findings of fact and an order as provided in Title 2, chapter 4. If the licensee or license applicant is found not to have violated this part, the department shall prepare and serve the board's findings of fact and an order of dismissal of the charges.

(2) (a) The department shall within a reasonable amount of time report to the public the issuance of a summary suspension, a notice under 37-1-309, an accepted stipulation, a hearing examiner's proposed decision, and a final order.

(b) In addition to any other means of notice, the department shall post the required information on a publicly available website.

(c) This subsection (2) may not be construed to require a meeting to be open or records to be disseminated when the demands of individual privacy clearly exceed the merits of public disclosure.

History: En. Sec. 11, Ch. 429, L. 1995; amd. Sec. 4, Ch. 225, L. 2007.

Compiler's Comments

2007 Amendment: Chapter 225 substituted (2) concerning report of suspension for former text that read: "(2) The department may report the issuance of a notice and final order to:

(a) the person or entity who brought to the department's attention information that resulted in the initiation of the proceeding;

(b) appropriate public and private organizations that serve the profession or occupation; and

(c) the public." Amendment effective January 1, 2009.

Severability: Section 6, Ch. 225, L. 2007, was a severability clause.

Administrative Rules

ARM 24.101.404 Posting disciplinary orders on licensee lookup database.

37-1-312. Sanctions — stay — costs — stipulations. (1) Upon a decision that a licensee or license applicant has violated this part or is unable to practice with reasonable skill and safety due to a physical or mental condition or upon stipulation of the parties as provided in subsection (3), the board may issue an order providing for one or any combination of the following sanctions:

(a) revocation of the license;

(b) suspension of the license for a fixed or indefinite term;

(c) restriction or limitation of the practice;

(d) satisfactory completion of a specific program of remedial education or treatment;

(e) monitoring of the practice by a supervisor approved by the disciplining authority;

(f) censure or reprimand, either public or private;

(g) compliance with conditions of probation for a designated period of time;

(h) payment of a fine not to exceed \$1,000 for each violation. Fines must be deposited in the state general fund.

(i) denial of a license application;

(j) refund of costs and fees billed to and collected from a consumer.

(2) A sanction may be totally or partly stayed by the board. To determine which sanctions are appropriate, the board shall first consider the sanctions that are necessary to protect or compensate the public. Only after the determination has been made may the board consider and include in the order any requirements designed to rehabilitate the licensee or license applicant.

(3) The licensee or license applicant may enter into a stipulated agreement resolving potential or pending charges that includes one or more of the sanctions in this section. The stipulation is an informal disposition for the purposes of 2-4-603.

(4) A licensee shall surrender a suspended or revoked license to the board within 24 hours after receiving notification of the suspension or revocation by mailing it or delivering it personally to the board.

History: En. Sec. 12, Ch. 429, L. 1995.

Case Notes

Board Increase in Penalty for Unprofessional Psychiatrist Conduct Affirmed: Following charges against a psychiatrist for unprofessional conduct, the Board of Medical Examiners considered the entire record and decided to exceed sanctions proposed by the hearings examiner by revoking the psychiatrist's license. The District Court affirmed the Board's action, and on appeal, the Supreme Court also affirmed. Having reviewed the complete record, the Board's increase in the proposed penalty was statutorily authorized and was not arbitrary or capricious. Thus, the Board did not commit an error of law by imposing the increase in penalty. *Munn v. Bd. of Medical Examiners*, 2005 MT 303, 329 M 401, 124 P3d 1123 (2005), distinguishing *St. v. Shodair Hosp.*, 273 M 155, 902 P2d 21 (1995).

Administrative, Not Criminal, Sanctions Properly Imposed by Board of Outfitters Against Outfitter Who Hired Unlicensed Guide: Crismore hired an unlicensed guide. Pursuant to this section, the Board of Outfitters fined Crismore \$1,000, placed him on probation for 18 months, and ordered him to complete remedial education. Crismore contended that the Board should have applied 37-47-344, which is the misdemeanor criminal statute that specifically applies to outfitters and guides and provides a maximum fine of \$500. The Supreme Court found that Crismore's argument had no basis in law. The Board of Outfitters has no authority to conduct a criminal proceeding that may lead to a misdemeanor sentence under 37-47-344. That authority is vested in courts of limited jurisdiction. Rather, the Board has authority to enforce license regulations and conduct administrative contested case hearings pursuant to 37-1-303 and therefore properly exercised its authority to sanction Crismore pursuant to this section. *Crismore v. Bd. of Outfitters*, 2005 MT 109, 327 M 71, 111 P3d 681 (2005).

Outfitter's Obligation to Ensure Licensure of Guide — Board's Failure to Notify Outfitter of Unlicensed Guide Not Due Process Violation: Crismore hired an unlicensed guide and was sanctioned by the Board of Outfitters. Crismore appealed on grounds that he was denied due process because he was not informed until after the contested case hearing that the guide had applied for a license through a different outfitter but the application was returned for administrative reasons, denying Crismore of the opportunity to present a full and complete defense at the hearing. Although acknowledging that Crismore had a property interest in the outfitter's license that entitled him to due process protections, the Supreme Court nevertheless affirmed that Crismore was not denied due process. It is the responsibility of an outfitter to employ only licensed guides and to sign a guide's license when the guide is employed. It is not the responsibility of the Board to inform every licensed outfitter of the name of each person who unsuccessfully applies for a guide's license. Crismore was given a timely and meaningful opportunity to present his case to the Board as to why he hired an unlicensed guide. *Crismore v. Bd. of Outfitters*, 2005 MT 109, 327 M 71, 111 P3d 681 (2005).

37-1-313. Appeal. (1) A person who is disciplined by a board under 37-1-308 through 37-1-312 or denied a license may appeal the decision to the district court as provided in Title 2, chapter 4.

(2) A person who disputes the department's deficiency determination made pursuant to 37-1-321 may appeal the decision to the board. Consideration of the dispute is not an adversarial or a contested case hearing. The board's decision may be appealed as provided in subsection (1).

History: En. Sec. 13, Ch. 429, L. 1995; amd. Sec. 7, Ch. 80, L. 2015.

Compiler's Comments

2015 Amendment: Chapter 80 in (1) inserted "by a board under 37-1-308 through 37-1-312"; inserted (2) regarding appeal of deficiency determination; and made minor changes in style. Amendment effective July 1, 2015.

Saving Clause: Section 12, Ch. 80, L. 2015, was a saving clause.

Severability: Section 13, Ch. 80, L. 2015, was a severability clause.

37-1-314. Reinstatement. A licensee whose license has been suspended or revoked under this part may petition the board for reinstatement after an interval set by the board in the order. The board may hold a hearing on the petition and may deny the petition or order reinstatement and impose terms and conditions as provided in 37-1-312. The board may require the successful completion of an examination as a condition of reinstatement and may treat a licensee whose license has been revoked or suspended as a new applicant for purposes of establishing the requisite qualifications of licensure.

History: En. Sec. 14, Ch. 429, L. 1995.

37-1-315. Enforcement of fine. (1) If payment of a fine is included in an order and timely payment is not made as directed in the order, the board may enforce the order for payment in the district court of the first judicial district.

(2) In a proceeding for enforcement of an order of payment of a fine, the order is conclusive proof of the validity of the order of payment and the terms of payment.

History: En. Sec. 15, Ch. 429, L. 1995.

37-1-316. Unprofessional conduct. The following is unprofessional conduct for a licensee or license applicant governed by this part:

(1) conviction, including conviction following a plea of nolo contendere, of a crime relating to or committed during the course of the person's practice or involving violence, use or sale of drugs, fraud, deceit, or theft, whether or not an appeal is pending;

(2) permitting, aiding, abetting, or conspiring with a person to violate or circumvent a law relating to licensure or certification;

(3) fraud, misrepresentation, deception, or concealment of a material fact in applying for or assisting in securing a license or license renewal or in taking an examination required for licensure;

(4) signing or issuing, in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;

(5) a misleading, deceptive, false, or fraudulent advertisement or other representation in the conduct of the profession or occupation;

(6) offering, giving, or promising anything of value or benefit to a federal, state, or local government employee or official for the purpose of influencing the employee or official to circumvent a federal, state, or local law, rule, or ordinance governing the licensee's profession or occupation;

(7) denial, suspension, revocation, probation, fine, or other license restriction or discipline against a licensee by a state, province, territory, or Indian tribal government or the federal government if the action is not on appeal, under judicial review, or has been satisfied;

(8) failure to comply with a term, condition, or limitation of a license by final order of a board;

(9) revealing confidential information obtained as the result of a professional relationship without the prior consent of the recipient of services, except as authorized or required by law;

(10) use of alcohol, a habit-forming drug, or a controlled substance as defined in Title 50, chapter 32, to the extent that the use impairs the user physically or mentally in the performance of licensed professional duties;

(11) having a physical or mental disability that renders the licensee or license applicant unable to practice the profession or occupation with reasonable skill and safety;

(12) engaging in conduct in the course of one's practice while suffering from a contagious or infectious disease involving serious risk to public health or without taking adequate precautions, including but not limited to informed consent, protective gear, or cessation of practice;

(13) misappropriating property or funds from a client or workplace or failing to comply with a board rule regarding the accounting and distribution of a client's property or funds;

(14) interference with an investigation or disciplinary proceeding by willful misrepresentation of facts, by the use of threats or harassment against or inducement to a client or witness to prevent them from providing evidence in a disciplinary proceeding or other legal action, or by use of threats or harassment against or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal action from being filed, prosecuted, or completed;

(15) assisting in the unlicensed practice of a profession or occupation or allowing another person or organization to practice or offer to practice by use of the licensee's license;

(16) failing to report the institution of or final action on a malpractice action, including a final decision on appeal, against the licensee or of an action against the licensee by a:

(a) peer review committee;

(b) professional association; or

(c) local, state, federal, territorial, provincial, or Indian tribal government;

(17) failure of a health care provider, as defined in 27-6-103, to comply with a policy or practice implementing 28-10-103(3)(a);

(18) conduct that does not meet the generally accepted standards of practice. A certified copy of a malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards.

(19) the sole use of any electronic means, including teleconferencing, to obtain the information required for the written certification and accompanying statements used to apply for a registry identification card pursuant to Title 50, chapter 46, part 3.

History: En. Sec. 16, Ch. 429, L. 1995; amd. Sec. 12, Ch. 109, L. 2009; amd. Sec. 2, Ch. 158, L. 2009; amd. Sec. 24, Ch. 419, L. 2011.

Compiler's Comments

2011 Amendment: Chapter 419 inserted (19) relating to use of electronic means to obtain information relating to registry identification cards for medical use of marijuana. Amendment effective July 1, 2011.

Severability: Section 39, Ch. 419, L. 2011, was a severability clause.

2009 Amendments — Composite Section: Chapter 109 at end of introductory clause substituted "part" for "chapter"; deleted former (10) that read: "addiction to or dependency on a habit-forming drug or controlled substance as defined in Title 50, chapter 32, as a result of illegal use of the drug or controlled substance"; in (10) at beginning after "use of" inserted "alcohol" and at end after "mentally" inserted "in the performance of licensed professional duties"; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 158 inserted (17) to provide that failure of a health care provider to require that independent professional service providers are appropriately insured constitutes unprofessional conduct; and made minor changes in style. Amendment effective April 3, 2009.

Saving Clause: Section 53, Ch. 109, L. 2009, was a saving clause.

Severability: Section 54, Ch. 109, L. 2009, was a severability clause.

Case Notes

Expert Opinions in Legal Malpractice Claim During Summary Judgment — Plaintiffs Not Required to Prove That Underlying Case Was Winner: An attorney missed a statute of limitations deadline in a medical malpractice case by failing to file an application with the Montana Medical Legal Panel before filing a complaint in District Court, as required under 27-6-301 and 27-6-701. After the medical malpractice claim was dismissed, the plaintiffs filed a legal malpractice case against the attorney, but the District Court dismissed the legal malpractice case during summary judgment by relying completely on the affidavit of the attorney's expert while disregarding the opinions of three of the plaintiffs' witnesses. On appeal, the Supreme Court determined that the plaintiffs' opinions from two doctors and one legal expert were sufficient to overcome summary judgment. The Supreme Court held further that at the summary judgment stage, the plaintiffs had to establish only that, but for the attorney's negligence, the plaintiffs would have been able to present sufficient evidence to withstand summary judgment for the underlying medical claim and reach the jury with the case. *Labair v. Carey*, 2012 MT 312, 367 Mont. 453, 291 P.3d 1160.

Arbitrated Reinstatement of Nurse Affirmed — Violation of Public Policy Exception Inapplicable: An arbitration panel found that a nursing home had wrongfully discharged a nurse and recommended that the nurse be reinstated with no loss of seniority, wages, or benefits. The nursing home appealed on grounds that reinstating the nurse would violate public policy regarding the licensing of nurses because the nurse's alleged impairment would present a threat to the health and safety of vulnerable patients. The Supreme Court concluded that the public policy exception to court enforcement of arbitrated decisions did not apply in this case. The fact that the subject of an inquiry by an arbitration panel may also involve a possible violation of public policy does not mean a court may do the arbitrator's task and determine that reinstatement is not appropriate. Simply because an employee has committed some act that violates a

law or public policy during the course of employment does not mean that reinstatement would violate that public policy, and only if the record clearly shows that the grievant is likely to engage in wrongful conduct in violation of public policy in the future could reinstatement be said to violate public policy. *Teamsters Union Local No. 2 v. C.N.H. Acquisitions, Inc.*, 2009 MT 92, 350 M 18, 204 P3d 733 (2009). See also *United Paperworkers Int'l Union v. Misco, Inc.*, 484 US 29 (1987), and *Stead Motors v. Automotive Machinists Lodge No. 1173*, 886 F2d 1200 (9th Cir. 1989).

Board Increase in Penalty for Unprofessional Psychiatrist Conduct Affirmed: Following charges against a psychiatrist for unprofessional conduct, the Board of Medical Examiners considered the entire record and decided to exceed sanctions proposed by the hearings examiner by revoking the psychiatrist's license. The District Court affirmed the Board's action, and on appeal, the Supreme Court also affirmed. Having reviewed the complete record, the Board's increase in the proposed penalty was statutorily authorized and was not arbitrary or capricious. Thus, the Board did not commit an error of law by imposing the increase in penalty. *Munn v. Bd. of Medical Examiners*, 2005 MT 303, 329 M 401, 124 P3d 1123 (2005), distinguishing *St. v. Shodair Hosp.*, 273 M 155, 902 P2d 21 (1995).

No Showing of Damages or That Client Would Have Prevailed on Lost Appeal of Marital Dissolution Case — Failure of Legal Malpractice Claim: Richards brought a malpractice claim against an attorney who negligently failed to appeal Richards' marriage dissolution proceeding prior to the deadline for appeal. The District Court dismissed the claim, ruling that the court, rather than a jury, should decide the consequences of the attorney's failure to file the appeal and that the lost appeal would not have succeeded. Richards appealed, but the Supreme Court affirmed. Even though the attorney admitted malpractice by allowing the claim to expire, the attorney contended that no damages occurred. When a malpractice claim changes to the question of whether an attorney perfected an appeal, the analysis shifts from one of fact to one of law, which is properly considered by the court rather than a jury. The question of the probable outcome of a lost appeal also presents a question of law for the trial court to decide based on the special expertise required to analyze the relevant law and rules of appellate procedure, and the review is limited to the transcript and record of the underlying action and arguments presented by counsel. Here, there was substantial credible evidence regarding primary parenting time, valuation of the marital estate, and child support payments showing that Richards' lost appeal would not have resulted in a successful or favorable outcome. Further, one element of a legal malpractice claim requires a showing that the attorney's conduct proximately caused damages suffered by the claimant. Because Richards failed to show that the lost appeal would have been successful, he also failed to show that the attorney's breach caused any damages, so the malpractice claim failed. *Richards v. Knuchel*, 2005 MT 133, 327 M 249, 115 P3d 189 (2005).

Outfitter's Obligation to Ensure Licensure of Guide — Board's Failure to Notify Outfitter of Unlicensed Guide Not Due Process Violation: Crismore hired an unlicensed guide and was sanctioned by the Board of Outfitters. Crismore appealed on grounds that he was denied due process because he was not informed until after the contested case hearing that the guide had applied for a license through a different outfitter but the application was returned for administrative reasons, denying Crismore of the opportunity to present a full and complete defense at the hearing. Although acknowledging that Crismore had a property interest in the outfitter's license that entitled him to due process protections, the Supreme Court nevertheless affirmed that Crismore was not denied due process. It is the responsibility of an outfitter to employ only licensed guides and to sign a guide's license when the guide is employed. It is not the responsibility of the Board to inform every licensed outfitter of the name of each person who unsuccessfully applies for a guide's license. Crismore was given a timely and meaningful opportunity to present his case to the Board as to why he hired an unlicensed guide. *Crismore v. Bd. of Outfitters*, 2005 MT 109, 327 M 71, 111 P3d 681 (2005).

37-1-317. Practice without license — investigation of complaint — injunction — penalties. (1)

The department shall investigate complaints or other information received concerning practice by an unlicensed person of a profession or occupation for which a license is required by this title.

(2) (a) Unless otherwise provided by statute, a board may file an action to enjoin a person from practicing, without a license, a profession or occupation for which a license is required by this title. In addition to the penalty provided for in 37-1-318, a person violating an injunction issued pursuant to this section may be held in contempt of court.

(b) A person subject to an injunction for practicing without a license may also be subject to criminal prosecution. In a complaint for an injunction or in an affidavit, information, or indictment alleging that a person has engaged in unlicensed practice, it is sufficient to charge that the person engaged in the unlicensed practice of a licensed profession or occupation on a certain day in a certain county without averring further or more particular facts concerning the violation.

(3) Unless otherwise provided by statute, a person practicing a licensed profession or occupation in this state without complying with the licensing provisions of this title is guilty of a misdemeanor punishable by a fine of not less than \$250 or more than \$1,000, imprisonment in the county jail for not less than 90 days or more than 1 year, or both. Each violation of the provisions of this chapter constitutes a separate offense.

(4) The department may issue a citation to and collect a fine, as provided in 37-68-316 and 37-69-310, from a person at a job site who is performing plumbing or electrical work and who fails to display a license or proof of licensure at the request of an employee of the department who bears responsibility for compliance with licensure requirements.

History: En. Sec. 17, Ch. 429, L. 1995; amd. Sec. 3, Ch. 230, L. 1999; amd. Sec. 1, Ch. 402, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 230 in middle of (1) after "complaints" inserted "or other information received"; at beginning of (2)(a) inserted "Unless otherwise provided by statute" and inserted second sentence allowing person violating injunction to be held in contempt of court in addition to penalty; inserted (2)(b) providing that person subject to injunction for practicing without license is subject to criminal prosecution; inserted (3) providing that person practicing licensed profession without license is guilty of misdemeanor, authorizing fines, imprisonment, or both, and providing that each violation constitutes separate offense; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 402 inserted (4) authorizing department to issue citation and collect fine; and made minor changes in style. Amendment effective July 1, 1999.

Case Notes

Person Engaged in Acts Constituting Practice of Pharmacy Subject to Board Regulation and Injunctive Order: The defendant argued that he was not subject to regulation by the board of pharmacy with respect to his business, which was engaged in obtaining out-of-state drugs from unlicensed drug companies for individuals in Montana. The Supreme Court denied the defendant's motion for summary judgment and upheld the lower court's summary judgment in favor of the board, stating that engaging in acts that constitute the practice of pharmacy makes one subject to the board's regulatory powers and subject to injunctive orders. *Bd. of Pharmacy v. Kennedy*, 2010 MT 227, 358 Mont. 57, 243 P.3d 415.

37-1-318. Violation of injunction — penalty. A person who violates an injunction issued under 37-1-317 shall pay a civil penalty, as determined by the court, of not more than \$5,000. Fifty percent of the penalty must be deposited in the general fund of the county in which the injunction is issued, and 50% must be deposited in the state general fund.

History: En. Sec. 18, Ch. 429, L. 1995.

37-1-319. Rules. A board may adopt rules:

(1) under the guidelines of 37-1-306, regarding continuing education and establishing the number of hours required each year, the methods of obtaining education, education topics, and carrying over hours to subsequent years;

(2) regarding practice limitations for temporary practice permits issued under 37-1-305 and designed to ensure adequate supervision of the practice until all qualifications for licensure are met and a license is granted;

(3) regarding qualifications for inactive license status that may require compliance with stated continuing education requirements and may limit the number of years a person may remain on inactive status without having to reestablish qualifications for licensure;

(4) regarding maintenance and safeguarding of client funds or property possessed by a licensee and requiring the funds or property to be maintained separately from the licensee's funds and property; and

(5) defining acts of unprofessional conduct, in addition to those contained in 37-1-316, that constitute a threat to public health, safety, or welfare and that are inappropriate to the practice of the profession or occupation.

History: En. Sec. 19, Ch. 429, L. 1995.

Compiler's Comments

Applicability: Section 133, Ch. 429, L. 1995, provided: "[This act] applies to licenses applied for, complaints submitted, and proceedings begun after [the effective date of this section]." Section 133 effective October 1, 1995.

Effective Date: Section 134, Ch. 429, L. 1995, provided in part that this section is effective on passage and approval for the purpose of drafting rules that will be adopted on or after October 1, 1995. Approved April 13, 1995.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

Administrative Rules

ARM 24.111.409 Alternative healthcare — inactive status.

37-1-320. Mental intent — unprofessional conduct. A licensee may be found to have violated a provision of 37-1-316 or a rule of professional conduct enacted by a governing board without proof that the licensee acted purposefully, knowingly, or negligently.

History: En. Sec. 7, Ch. 492, L. 2001.

Compiler's Comments

Effective Date: Section 77(2), Ch. 492, L. 2001, provided that this section is effective October 1, 2001.

37-1-321. Authority to administratively suspend license. (1) A board, the department if authorized by the board, or the department for programs without a board may administratively suspend a license when:

- (a) an audit of continuing education, certification, or other qualifications necessary for continued licensure demonstrates that the licensee is noncompliant with requirements established by the board or by the department for a program;
- (b) the licensee fails to respond to a board or department audit as provided in subsection (1)(a);
- (c) the department receives notice of insufficient funds in the account used by the licensee to pay for an administrative fee or a board fee or fine;
- (d) the department has reasonable grounds to believe the licensee did not possess the qualifications for initial issuance of the license; or
- (e) a licensee fails to comply with the terms of a final order imposed pursuant to 37-1-312 or 37-1-405.

(2) Upon identifying one or more of the deficiencies listed in subsection (1), the department shall inform the licensee in writing and provide the licensee 60 days from the date of the correspondence to cure the deficiency.

(3) If the licensee fails to cure the deficiency as provided in subsection (2), a board, the department if authorized by the board, or the department for programs without a board may administratively suspend the license without additional notice or opportunity for hearing.

(4) (a) The administrative suspension remains in effect until:

- (i) a board, the department if authorized by the board, or the department for programs without a board determines the licensee has cured the deficiency; or
- (ii) the license terminates as provided in 37-1-141.

(b) An administratively suspended license that is not renewed lapses, expires, or terminates as provided in 37-1-141.

(5) A licensee may not use a protected title or practice the licensed profession or occupation while the license is administratively suspended.

(6) To reinstate the administratively suspended license, a licensee must pay an administrative fee established by the department by rule and submit information necessary to cure the deficiencies as determined in the discretion of the department.

(7) Instead of an administrative suspension, the department may refer the deficiencies demonstrated in subsection (1) for disciplinary proceedings as provided in 37-1-309 or 37-1-403, as applicable. A board or the department may not proceed against a licensee for the same act or failure to act under both an administrative suspension as provided in this section and a disciplinary proceeding as provided in 37-1-309 or 37-1-403.

History: En. Sec. 1, Ch. 80, L. 2015.

Compiler's Comments

Saving Clause: Section 12, Ch. 80, L. 2015, was a saving clause.

Severability: Section 13, Ch. 80, L. 2015, was a severability clause.

Effective Date: Section 14, Ch. 80, L. 2015, provided: "[This act] is effective July 1, 2015."

Administrative Rules

ARM 24.101.402 Definitions.

ARM 24.101.403 Fees.

37-1-322 through 37-1-330 reserved.

37-1-331. Correctional health care review team. (1) There is a correctional health care review team process in the department. The purpose of a review team is to review complaints filed by an inmate against a licensed or certified provider of health care or rehabilitative services for services that were provided to the person while the person was detained or confined in a county detention center or incarcerated under legal custody of the department of corrections. The inmate may file a complaint directly with the correctional health care review team for review or, if a board receives a complaint that has not been reviewed, the board shall forward the complaint to the review team. If the review team has reason to believe that there has been a violation of this part arising out of health care or rehabilitative services provided to a person detained or confined in a county detention center, the review team shall report the possible violation to the department for appropriate action under 37-1-308.

(2) Each health care licensing board shall solicit and submit to the department a list of licensed or certified health care or rehabilitative service professionals who have correctional health care experience and who are interested in participating on a team. A current board member may not participate on a review team. The department shall solicit from the administrators of the county detention centers and from the department of corrections names of licensed or certified health care or rehabilitative service providers who have correctional health care or rehabilitative services experience and are interested in participating on a review team. Each member of a review team must have at least 2 years of experience in providing health care or rehabilitative services in a correctional facility or program.

(3) Each correctional health care review team is composed of three members who shall represent health care and rehabilitative service providers who have provided health care or rehabilitative services to incarcerated persons. Two members of the review team must be providers of the same discipline and scope of practice as the provider against whom a complaint was filed, and the third member may be a provider of any other health care or rehabilitative services discipline. The members must be willing to serve without compensation. If available, a correctional health care professional employed by the department of corrections and appointed by the director of the department of corrections may participate on the review team, except when the provider against whom the complaint was filed was employed by the department of corrections.

(4) The members of a review team are appointed by the department from the listing of health care and rehabilitative service providers with correctional experience who have been submitted by each respective board, a county detention center administrator, or the department of corrections as provided in subsection (2). A review team shall meet at least twice a year. Any travel, lodging, meal, or miscellaneous costs incurred by a review team may be recovered through a memorandum of understanding with the agencies who provide medical services to inmates or may be assessed to the licensing or certifying boards of health care and rehabilitative service providers.

(5) The review team shall review each complaint with regard to the health care or rehabilitative services provider's scope of practice. A decision on whether or not to forward the complaint must be made by the majority of the review team. The review team shall submit a written response regarding the decision to the inmate, the county detention center administrator or the department of corrections, and the health care or rehabilitative services provider. If the decision is to not forward the complaint for action under 37-1-308, a record of the complaint may not be forwarded to any licensing or certifying board, but must be retained by the department.

History: En. Sec. 2, Ch. 375, L. 1999.

Compiler's Comments

Effective Date: Section 4, Ch. 375, L. 1999, provided that this section is effective July 1, 1999.

37-1-332. Administrative proceedings to stop unlicensed practice — board of realty regulation — state electrical board — board of plumbers. (1) For purposes of this section, the term "board" means the board of realty regulation provided for in 2-15-1757, the state electrical board provided for in 2-15-1764, or the board of plumbers provided for in 2-15-1765.

(2) (a) After investigation under 37-1-317, the board may establish a screening panel to determine if there is reasonable cause to believe a person has engaged in or is engaging in any act or practice constituting unlicensed practice of a profession or occupation.

(b) If reasonable cause is found under subsection (2)(a), the board may initiate a contested case proceeding against the person pursuant to the Montana Administrative Procedure Act in Title 2, chapter 4, part 6.

(3) Following a contested case proceeding, the board may apply any of the following sanctions to a person found to have engaged in the unlicensed practice of a profession or occupation:

(a) impose a civil penalty not to exceed \$1,500 for each violation and not to exceed a total of \$5,000 for all related violations; and

(b) require the person to pay up to \$5,000 for the costs of the administrative proceedings, including but not limited to costs allowable under Title 25, chapter 10, but excluding the costs of investigation and the board's attorney fees.

(4) Judicial review of any contested case under this section must be filed with the first judicial district or the district where the violation occurred, pursuant to the Montana Administrative Procedure Act in Title 2, chapter 4, part 7.

(5) The remedies provided by this section are in addition to all other remedies or actions that may be taken, including those authorized by 37-1-317. The remedies provided by this section may not be applied either to licensees or to employees of licensees.

History: En. Sec. 1, Ch. 212, L. 2015.

Compiler's Comments

Effective Date: Section 3, Ch. 212, L. 2015, provided that this section is effective on passage and approval. Approved April 9, 2015.

Applicability: Section 4, Ch. 212, L. 2015, provided: "[This act] applies to acts or practices constituting unlicensed practice of a profession or occupation on or after [the effective date of this act]." Effective April 9, 2015.

Part 4

Uniform Regulations for Licensing Programs Without Boards

Part Compiler's Comments

Severability: Section 49, Ch. 481, L. 1997, was a severability clause.

37-1-401. Uniform regulation for licensing programs without boards — definitions. As used in this part, the following definitions apply:

(1) "Complaint" means a written allegation filed with the department that, if true, warrants an injunction, disciplinary action against a licensee, or denial of an application submitted by a license applicant.

(2) "Department" means the department of labor and industry provided for in 2-15-1701.

(3) "Investigation" means the inquiry, analysis, audit, or other pursuit of information by the department, with respect to a complaint or other information before the department, that is carried out for the purpose of determining:

(a) whether a person has violated a provision of law justifying discipline against the person;

(b) the status of compliance with a stipulation or order of the department;

(c) whether a license should be granted, denied, or conditionally issued; or

(d) whether the department should seek an injunction.

(4) "License" means permission in the form of a license, permit, endorsement, certificate, recognition, or registration granted by the state of Montana to engage in a business activity or practice at a specific level in a profession or occupation governed by:

(a) Title 37, chapter 35, 72, or 73; or

(b) Title 50, chapter 39, 74, or 76.

(5) "Profession" or "occupation" means a profession or occupation regulated by the department under the provisions of:

(a) Title 37, chapter 35, 72, or 73; or

(b) Title 50, chapter 39, 74, or 76.

History: En. Sec. 1, Ch. 481, L. 1997; amd. Sec. 111, Ch. 483, L. 2001; amd. Sec. 21, Ch. 410, L. 2003; amd. Sec. 18, Ch. 11, L. 2007; amd. Sec. 10, Ch. 502, L. 2007.

Compiler's Comments

2007 Amendments — Composite Section: Chapter 11 in (4)(a) and (5)(a) after "72" deleted "or 76"; and made minor changes in style. Amendment effective July 1, 2007.

Chapter 502 in definitions of license and profession in (a) after reference to chapter 72 inserted reference to chapter 73; and made minor changes in style. Amendment effective October 1, 2007.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

2003 Amendment: Chapter 410 in definition of license and in definition of profession or occupation inserted (a) relating to Title 37, chapters 35, 72, and 76. Amendment effective October 1, 2003.

Severability: Section 23, Ch. 410, L. 2003, was a severability clause.

2001 Amendment: Chapter 483 in definition of department substituted reference to department of labor and industry for reference to department of commerce and substituted "2-15-1701" for "2-15-1801". Amendment effective July 1, 2001.

37-1-402. Unprofessional conduct — complaint — investigation — immunity. (1) A person, government, or private entity may submit a written complaint to the department charging a licensee or license applicant with a violation of this part and specifying the grounds for the complaint.

(2) If the department receives a written complaint or otherwise obtains information that a licensee or license applicant may have violated a requirement of this part, the department may investigate to determine whether there is reasonable cause to believe that the licensee or license applicant has committed the violation.

(3) A person or private entity, but not a government entity, filing a complaint under this section in good faith is immune from suit in a civil action related to the filing or contents of the complaint.

History: En. Sec. 2, Ch. 481, L. 1997.

37-1-403. Notice — request for hearing. (1) If the department determines that reasonable cause exists supporting the allegation made in a complaint and the provisions of 37-1-321 do not apply, the department legal staff shall prepare a notice and serve the alleged violator. The notice may be served by certified mail to the current address on file with the department or by other means authorized by the Montana Rules of Civil Procedure.

(2) A licensee or license applicant shall give the department the licensee's or applicant's current address and any change of address within 30 days of the change.

(3) The notice must state that the licensee or license applicant may request a hearing to contest the charge or charges. A request for a hearing must be in writing and must be received in the offices of the department within 20 days after the licensee's receipt of the notice. Failure to request a hearing constitutes a default on the charge or charges, and the department may enter a decision on the basis of the facts available to it.

History: En. Sec. 3, Ch. 481, L. 1997; amd. Sec. 8, Ch. 80, L. 2015.

Compiler's Comments

2015 Amendment: Chapter 80 in (1) in middle of first sentence inserted "and the provisions of 37-1-321 do not apply". Amendment effective July 1, 2015.

Saving Clause: Section 12, Ch. 80, L. 2015, was a saving clause.

Severability: Section 13, Ch. 80, L. 2015, was a severability clause.

37-1-404. Hearing — adjudicative procedures. The procedures in Title 2, chapter 4, governing adjudicative proceedings before agencies, the Montana Rules of Civil Procedure, and the Montana Rules of Evidence govern a hearing under this part. The department has all the powers and duties granted by Title 2, chapter 4.

History: En. Sec. 4, Ch. 481, L. 1997.

37-1-405. Findings of fact — order — report. (1) If the department finds by a preponderance of the evidence, following a hearing or on default, that a violation of this part has occurred, the department shall prepare and serve findings of fact, conclusions of law, and an order as provided in Title 2, chapter 4. If the licensee or license applicant is found not to have violated this part, the department shall prepare and serve an order of dismissal of the charges.

(2) (a) The department shall within a reasonable amount of time report to the public the issuance of a summary suspension, a notice under 37-1-403, an accepted stipulation, a hearing examiner's proposed decision, and a final order.

(b) In addition to any other means of notice, the department shall post the required information on a publicly available website.

(c) This subsection (2) may not be construed to require a meeting to be open or records to be disseminated when the demands of individual privacy clearly exceed the merits of public disclosure.

History: En. Sec. 5, Ch. 481, L. 1997; amd. Sec. 5, Ch. 225, L. 2007.

Compiler's Comments

2007 Amendment: Chapter 225 substituted (2) concerning report of suspension for former text that read: "(2) The department may report the issuance of a notice and final order to:

(a) the person or entity who brought to the department's attention information that resulted in the initiation of the proceeding;

(b) appropriate public and private organizations that serve the profession or occupation; and

(c) the public." Amendment effective January 1, 2009.

Severability: Section 6, Ch. 225, L. 2007, was a severability clause.

Administrative Rules

ARM 24.101.404 Posting disciplinary orders on licensee lookup database.

37-1-406. Sanctions — stay — costs — stipulations. (1) Upon a decision that a licensee or license applicant has violated this part or is unable to practice with reasonable skill and safety due to a physical or mental condition or upon stipulation of the parties as provided in subsection (4), the department may issue an order providing for one or any combination of the following sanctions:

- (a) revocation of the license;
- (b) suspension of the license for a fixed or indefinite term;
- (c) restriction or limitation of the practice;
- (d) satisfactory completion of a specific program of remedial education or treatment;
- (e) monitoring of the practice by a supervisor approved by the disciplining authority;
- (f) censure or reprimand, either public or private;
- (g) compliance with conditions of probation for a designated period of time;
- (h) payment of a fine not to exceed \$1,000 for each violation;
- (i) denial of a license application;
- (j) refund of costs and fees billed to and collected from a consumer.

(2) Any fine collected by the department as a result of disciplinary actions must be deposited in the state general fund.

(3) A sanction may be totally or partly stayed by the department. To determine which sanctions are appropriate, the department shall first consider the sanctions that are necessary to protect or compensate the public. Only after the determination has been made may the department consider and include in the order any requirements designed to rehabilitate the licensee or license applicant.

(4) The licensee or license applicant may enter into a stipulated agreement resolving potential or pending charges that includes one or more of the sanctions in this section. The stipulation is an informal disposition for the purposes of 2-4-603.

(5) A licensee shall surrender a suspended or revoked license to the department within 24 hours after receiving notification of the suspension or revocation by mailing the license or delivering it personally to the department.

History: En. Sec. 6, Ch. 481, L. 1997.

37-1-407. Appeal. (1) A person who is disciplined by the department under 37-1-402 through 37-1-406 or denied a license may appeal the decision to the district court as provided in Title 2, chapter 4.

(2) A person who disputes the department's deficiency determination made pursuant to 37-1-321 may appeal the decision to the commissioner of labor and industry. Consideration of the dispute is not an adversarial or a contested case hearing. The commissioner's decision may be appealed as provided in subsection (1).

History: En. Sec. 7, Ch. 481, L. 1997; amd. Sec. 9, Ch. 80, L. 2015.

Compiler's Comments

2015 Amendment: Chapter 80 in (1) inserted "by the department under 37-1-402 through 37-1-406"; inserted (2) regarding appeal of deficiency determination; and made minor changes in style. Amendment effective July 1, 2015.

Saving Clause: Section 12, Ch. 80, L. 2015, was a saving clause.

Severability: Section 13, Ch. 80, L. 2015, was a severability clause.

37-1-408. Reinstatement. A licensee whose license has been suspended or revoked under this part may petition the department for reinstatement after an interval set by the department in the order. The department may hold a hearing on the petition and may deny the petition or order reinstatement and impose terms and conditions as provided in 37-1-312. The department may require the successful completion of an examination as a condition of reinstatement and may treat a licensee whose license has been revoked or suspended as a new applicant for purposes of establishing the requisite qualifications of licensure.

History: En. Sec. 8, Ch. 481, L. 1997.

37-1-409. Enforcement of fine. (1) If payment of a fine is included in an order and timely payment is not made as directed in the order, the department may enforce the order for payment in the district court of the first judicial district.

(2) In a proceeding for enforcement of an order of payment of a fine, the order is conclusive proof of the validity of the order of payment and the terms of payment.

History: En. Sec. 9, Ch. 481, L. 1997.

37-1-410. Unprofessional conduct. The following is unprofessional conduct for a licensee or license applicant in a profession or occupation governed by this part:

(1) being convicted, including a conviction following a plea of nolo contendere and regardless of a pending appeal, of a crime relating to or committed during the course of practicing the person's profession or occupation or involving violence, the use or sale of drugs, fraud, deceit, or theft;

(2) permitting, aiding, abetting, or conspiring with a person to violate or circumvent a law relating to licensure or certification;

(3) committing fraud, misrepresentation, deception, or concealment of a material fact in applying for or assisting in securing a license or license renewal or in taking an examination required for licensure;

(4) signing or issuing, in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;

(5) making a misleading, deceptive, false, or fraudulent advertisement or other representation in the conduct of the profession or occupation;

(6) offering, giving, or promising anything of value or benefit to a federal, state, or local government employee or official for the purpose of influencing the employee or official to circumvent a federal, state, or local law, rule, or ordinance governing the licensee's profession or occupation;

(7) receiving a denial, suspension, revocation, probation, fine, or other license restriction or discipline against a licensee by a state, province, territory, or Indian tribal government or the federal government if the action is not on appeal or under judicial review or has been satisfied;

(8) failing to comply with a term, condition, or limitation of a license by final order of the department;

(9) having a physical or mental disability that renders the licensee or license applicant unable to practice the profession or occupation with reasonable skill and safety;

(10) misappropriating property or funds from a client or workplace or failing to comply with the department's rule regarding the accounting and distribution of a client's property or funds;

(11) interfering with an investigation or disciplinary proceeding by willful misrepresentation of facts, failure to respond to department inquiries regarding a complaint against the licensee or license applicant, or the use of threats or harassment against or inducement to a client or witness to prevent them from providing evidence in a disciplinary proceeding or other legal action or use of threats or harassment against or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal action from being filed, prosecuted, or completed;

(12) assisting in the unlicensed practice of a profession or occupation or allowing another person or organization to practice or offer to practice the profession or occupation by use of the licensee's license;

(13) using alcohol, an illegal drug, or a dangerous drug, as defined in Title 50, chapter 32, to the extent that the use impairs the user physically or mentally in the performance of licensed professional duties; or

(14) exhibiting conduct that does not meet generally accepted standards of practice. A certified copy of a judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring within the scope of practice and the course of the practice is considered conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards.

History: En. Sec. 10, Ch. 481, L. 1997; amd. Sec. 11, Ch. 502, L. 2007; amd. Sec. 13, Ch. 109, L. 2009.

Compiler's Comments

2009 Amendment: Chapter 109 at end of introductory clause substituted "part" for "chapter"; deleted former introductory clause of (2) and (2)(a) that read: "For the purposes of Title 37, chapters 72 and 73, and Title 50, chapters 74 and 76, the following additional practices are considered unprofessional conduct:

(a) addiction to or dependency on alcohol, an illegal drug, or a dangerous drug, as defined in Title 50, chapter 32"; in (13) at end after "mentally" inserted "in the performance of licensed professional duties"; in (14) at beginning inserted "exhibiting"; and made minor changes in style. Amendment effective October 1, 2009.

Code Commissioner Correction: In former (2) the phrase "additional practices are considered unprofessional conduct", which was originally stricken, was restored during the engrossing process. Because this phrase is rendered meaningless in the context of the amendments made by sec. 13, Ch. 109, L. 2009, the Code Commissioner has not codified the phrase.

Saving Clause: Section 53, Ch. 109, L. 2009, was a saving clause.

Severability: Section 54, Ch. 109, L. 2009, was a severability clause.

2007 Amendment: Chapter 502 in (1) after "applicant" inserted "in a profession or occupation"; inserted (2) providing that for certain occupations, the use of alcohol or drugs and conduct not meeting generally accepted standards are considered unprofessional conduct; and made minor changes in style. Amendment effective October 1, 2007.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

37-1-411. Practice without license — investigation of complaint — injunction — penalties. (1)

The department may investigate a complaint or other information received concerning practice by an unlicensed person of a profession or occupation governed by this part.

(2) The department may file an action to enjoin a person from practicing, without a license, a profession or occupation governed by this part.

History: En. Sec. 11, Ch. 481, L. 1997; amd. Sec. 5, Ch. 230, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 230 in middle of (1) after "complaint" inserted "or other information received". Amendment effective October 1, 1999.

37-1-412. Violation of injunction — penalty. (1) A person who has been enjoined and who violates an injunction issued pursuant to a proceeding under this part may be held in contempt of court and shall pay a civil penalty, as determined by the court, of not more than \$5,000. Fifty percent of the penalty must be deposited in the general fund of the county in which the injunction is issued, and 50% must be deposited in the state general fund.

(2) A person subject to an injunction for practicing without a license may also be subject to criminal prosecution. In a complaint for an injunction or in an affidavit, information, or indictment alleging that a person has engaged in unlicensed practice, it is sufficient to charge that the person engaged in the unlicensed practice of a licensed profession or occupation on a certain day in a certain county without averring further or more particular facts concerning the violation.

(3) Unless otherwise provided by statute, a person practicing a licensed profession or occupation in this state without complying with the licensing provisions of this title is guilty of a misdemeanor punishable by a fine of not less than \$250 or more than \$1,000, imprisonment in the county jail for not less than 90 days or more than 1 year, or both. Each violation of the provisions of this chapter constitutes a separate offense.

History: En. Sec. 12, Ch. 481, L. 1997; amd. Sec. 6, Ch. 230, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 230 at beginning of (1) after "who" inserted "has been enjoined and who" and after "part" inserted "may be held in contempt of court and"; inserted (2) providing that person subject to injunction for practicing without license is subject to criminal prosecution; inserted (3) providing that person practicing licensed profession without license is guilty of misdemeanor, authorizing fines, imprisonment, or both, and providing that each violation constitutes separate offense; and made minor changes in style. Amendment effective October 1, 1999.

37-1-413. Department authority. For each licensing program regulated by the department under this part, the department is designated as a criminal justice agency within the meaning of 44-5-103 for the purpose of obtaining confidential criminal justice information regarding licensees and license applicants and regarding possible unlicensed practice.

History: En. Sec. 4, Ch. 230, L. 1999.

Compiler's Comments

Effective Date: Section 24(1), Ch. 230, L. 1999, provided that this section is effective October 1, 1999.

37-1-414 through 37-1-419 reserved.

37-1-420. Continuing education — certification — other qualifications for continued licensure — audit. (1) The department on behalf of a program without a board may require licensees to participate in flexible, cost-efficient, effective, and geographically accessible continuing education.

(2) As a precondition of license renewal the department may not audit or require proof of continuing education or certification of a program that requires continuing education or state, regional, or national certification. However, a licensee who reactivates a license after the license has expired, as provided in 37-1-141, is subject to a mandatory continuing education audit.

(3) After the lapsed date provided for in 37-1-141, the department may conduct a random audit of up to 50% of all licensees who have renewed their licenses to determine compliance with a program's continuing education requirements.

(4) The department may audit licensees for compliance with state, regional, or national certification or other department requirements.

(5) The department shall provide a licensee not in compliance with continuing education or certification requirements with an opportunity to cure the noncompliance as provided in 37-1-321.

History: En. Sec. 5, Ch. 80, L. 2015.

Compiler's Comments

Saving Clause: Section 12, Ch. 80, L. 2015, was a saving clause.

Severability: Section 13, Ch. 80, L. 2015, was a severability clause.

Effective Date: Section 14, Ch. 80, L. 2015, provided: "[This act] is effective July 1, 2015."