



ADMINISTRATIVE RULES OF MONTANA



18.3.105 PROCEDURES

- (1) If the department receives or learns of credible information that a person has engaged in conduct which may warrant debarment, the department shall initiate and follow the following procedure.
- (2) The administrator of the division concerned with the alleged conduct or contract will obtain any information that may be readily obtained on the alleged conduct. If the administrator, deputy director, or department's legal counsel initially determines that there exists credible evidence that the person has committed a violation set forth above, they shall notify the director in writing of the known information supporting or rebutting such a determination.
- (3) If the director, in his discretion, agrees that, from the information available, credible evidence exists that the person has committed a violation set forth above, the director shall mail, certified return receipt requested, a written notice to the person. The notice shall contain a statement of the pertinent facts, the alleged violations being considered, notice of the right to an administrative hearing, and that debarment is being considered. If debarment is proposed based on a debarment by another state or federal agency, a copy of that debarment or its notice letter will be attached.
- (4) A person against which debarment is proposed shall be provided an opportunity for administrative hearing. A written request for hearing must be received by the department's chief counsel within 14 calendar days after the date of the mailing of the notice of the determination.
 - (a) Failure to timely submit a written request constitutes a waiver of the opportunity for administrative hearing and appeal, and a final debarment decision by default may then be entered by the director, which is not subject to appeal.
 - (b) Default orders will use the procedure stated in Model Rule 10, ARM 1.3.214.
- (5) The person against whom debarment is being considered has the right to be accompanied, represented and advised by counsel, and to appear in person or by or with counsel. Counsel will not be provided by or at the expense of the department.
- (6) Service of notice and later documents for the hearing will be complete and effective when made upon a person, or his counsel, if he has counsel.
- (7) Upon timely receipt of a written request for an administrative hearing, the director shall appoint a hearing examiner. A written notice appointing the hearing examiner shall be issued by the director, and sent to the person requesting the hearing.
- (8) The proceedings may be handled informally using the procedures stated in model Rule 11, ARM 1.3.215.
- (9) A notice of hearing shall be sent by the hearing examiner to the person requesting the administrative hearing. The notice shall include:

- (a) A statement of the date, time, and location of the hearing;
 - (b) A reference to the provisions of the violation(s) involved;
 - (c) A short, understandable statement of the matters asserted; and
 - (d) A statement advising the party of its right to be represented by legal counsel at the hearing.
- (10) The hearing examiner shall not engage in communications prohibited by 2-4-613, MCA.
- (11) For administrative hearings:
- (a) The department shall record any administrative hearing conducted and maintain an administrative record of the proceedings. The administrative record shall include:
 - (i) the initial determination of the administrator;
 - (ii) the written request for administrative hearing;
 - (iii) the appointment of the hearing examiner;
 - (iv) the notice of administrative hearing;
 - (v) the evidence offered to, or considered by, the hearing examiner;
 - (vi) any objections and rulings thereon;
 - (vii) all matters placed on the record at the administrative hearing;
 - (viii) all briefs or memoranda submitted by the parties; and
 - (ix) any transcript made of the proceedings.
 - (b) The hearing examiner presiding over the hearing shall have the powers and duties stated in 2-4-611(3) , MCA.
 - (c) Discovery will be available to the parties in accordance with Rules 26, 28 through 37 (except Rule 37(b) (1) and 37(b) (2) (d)) of the Montana Rules of Civil Procedure in effect as of the date of the adoption of these rules. Provided that: all references in the Montana Rules of Civil Procedure to a "court" are considered to refer to the department; all references to the use of subpoena power are considered to refer to the power in these rules; references to "trial" are considered to refer to the hearing; all references to "plaintiff" are considered to refer to a "party"; all references to "clerk of court" are considered to refer to the department person designated by the director to keep documents filed in the case.
 - (i) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the department, the refusal to obey the department's order shall be enforced as provided in these rules.
 - (ii) If a party seeking discovery from the department believes he has been prejudiced by a protective order issued by the department under Rule 26(c) , Montana Rules of Civil Procedure, or, if the department refuses to make discovery, the party may petition the District Court, First Judicial District for the County of Lewis and Clark, for review of the intermediate agency action under 2-4-701, MCA.
 - (d) The department and the hearing examiner shall have the same authority, powers, and responsibilities for issuing and enforcing subpoenas and subpoena duces tecum as stated in Model Rule 25, ARM 1.3.230.

- (e) The usual order of presentation at a hearing shall be:
 - (i) Argument and the submission of evidence and testimony on behalf of the department;
 - (ii) Argument and the submission of evidence and testimony from the party requesting the hearing; and
 - (iii) The introduction of rebuttal evidence and testimony by the department.
- (f) The hearing may be continued with recesses as determined by the hearing examiner.
- (g) Evidence introduced at the hearing may be received in written form or oral testimony given under oath or affirmation. Parties have a right to cross-examine all persons testifying at a hearing.
 - (i) The hearing examiner may consider hearsay evidence for the purpose of supplementing or explaining other evidence. A decision should not ordinarily be based wholly upon hearsay evidence, however, circumstances in some cases may require it (i.e., debarment based on a prior debarment in another jurisdiction) , at the discretion of the hearing examiner.
 - (ii) Judicially noticed facts are not hearsay.
 - (iii) Fraudulent, criminal or other seriously improper conduct of any individual (officer, director, shareholder, partner, employee, or other individual associated with a person) may be imputed to the person when the conduct occurred in connection with the individual's performance of duties for or on behalf of the person, or with the person's knowledge, approval, or acquiescence. The person's acceptance of the benefits derived from the conduct will be evidence of such knowledge, approval or acquiescence.
 - (iv) The department's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.
 - (v) Exhibits shall be marked and the markings shall identify the party offering the exhibit. Exhibits shall be preserved by the department as part of the administrative record.
- (h) Objections to offers of evidence must be made at the time of the offer and shall be noted in the administrative record. A hearing examiner may rule on evidentiary objections at the time of the hearing, after receipt of oral or written argument by the parties, or at the time of entry of the proposed decision.
- (i) The person must present all potential and available grounds to contest the debarment, and failure to raise an issue before the hearing examiner will waive that issue's consideration on any appeal or potential judicial review.
- (j) The department's burden of proof for the hearing will be a preponderance of the admissible evidence presented. That is proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.
- (k) After the hearing and any required post-hearing briefs and submissions, the hearing examiner shall enter a proposed decision, which shall be served on all parties by certified mail, return receipt requested, to their designated agent. The proposed decision shall

contain findings of fact and conclusions of law supported by the administrative record, and recommend a proposed action to the director.

(12) The director shall within 30 days review the proposed

decision and enter the department's final decision. The director may accept, reject or modify the proposed decision. The director's final decision shall contain findings of fact and conclusions of law, and shall be mailed to the parties by certified mail, return receipt requested.

(13) The sole method of appeal of the director's decision is as follows:

(a) The director's decision is final unless appeal is made

to the commission. An appeal may only be made if it is submitted to the director in writing, and only if received by the director's office no later than 10 calendar days after date of mailing of the final decision to the designated agent of the appealing party. If delivery of the final decision is refused or for any other reason not able to be delivered to the designated agent (i.e., returned as undeliverable, addressee moved and left no forwarding address, etc.), the decision will be final and the 10-day appeal period will begin to toll on the date the certified letter is returned to the director's office.

(b) Appeal of the director's decision is to the commission, which shall review the administrative record of the proceedings and its findings and conclusions only. The commission will determine whether or not the findings and conclusions are supported by that record. The commission may affirm, reject or modify the director's decision. If the commission determines that the record does not support the findings and conclusions, it may refer the matter back to the director for any action the commission deems appropriate and directs.

(c) The commission's review will not be a de novo hearing, nor will it receive written briefs from a party except on the issue of whether or not the findings and conclusions are supported by the administrative record. The commission will not hear oral argument or testimony, or receive any evidence that was not presented in the hearing.

(d) A stenographic record of the oral proceedings of the administrative hearing will be transcribed upon receipt of a written request. The department may arrange for the record to be transcribed by a business, rather than by the department, in which case the requester will be responsible to make direct arrangements for payment with the firm. Otherwise, the estimated cost of transcription and mailing must be paid by the requester prior to transcription of the record. Any balance of payment due must be received by the department prior to delivery, and any amount determined to be excess shall be returned to the requester upon completion of the transcript.

(e) All final decisions and orders shall be available for

public inspection on request. Copies of final decisions and orders will be given to the public on request on payment of reasonable costs.

(14) The period of debarment will be commensurate with the

seriousness of the cause(s), and be for a specified term. While the term will usually not exceed three years, if circumstances warrant, a longer period of debarment may be imposed.

- (a) The date(s) of the offenses for which debarment is imposed are inapplicable to a debarment period and participation in projects or contracts.
 - (b) Projects or contracts already awarded to a person at the time it is debarred will not be affected, except as follows: A bid may be rejected, or contract award rescinded, if a person submits the bid or is awarded the contract after the date on which it was debarred by any agency or in any jurisdiction.
- (15) The procedures herein provided are mandatory for anyone wishing to contest a debarment. Failure to properly request a hearing, present all defenses, or to perfect an appeal will be a failure to exhaust administrative remedies, and will absolutely waive the protesting party's right to any judicial review that might otherwise be available.
- (16) Reinstatement of a debarred person occurs automatically after the completion of the entire time period of the debarment.

Authorizing statute(s): 60-2-201 and 60-3-101, MCA

Implementing statute(s): 60-2-111, 60-2-112, and 60-3-101, MCA

History: NEW, 1996 MAR p. 3133, Eff. 12/6/96; AMD, 2001 MAR p. 978, Eff. 6/8/01.