



Montana Legislative Services Division

Legal Services Office

November 22, 2005

Senator Carolyn Squires
2111 South 10th Street West
Missoula, MT 59801

Dear Senator Squires:

You have asked that I review the facts of the ongoing dispute between Governor Schweitzer and the Public Employees' Retirement Board (PERB) and review the statutes applicable to that dispute to see if there are any statutory changes that should be considered by amendment or enactment by the Legislature. I gather from our conversation that the purpose of any such legislative action would be to strengthen the public's right to know regarding actions taken by state government and to participate in those actions.

I've outlined below a number of issues that have arisen in the dispute as the facts, or at least the allegations, in that dispute have been aired in the print and broadcast media here in Helena and in the civil complaint filed by the Governor's counsel in the First Judicial District (Cause No. BDV 2005-800). None of the possible statutory changes are dependent upon one another and they can therefore all be considered independently of one another, each on their own merits. Any legislation that results from the Legislature's consideration of these issues can be made to apply prospectively only and will therefore have no effect upon, or interfere with, the Governor's ongoing investigation or the civil action filed by the Governor here in the First Judicial District. I've not assigned any relative importance to any of the issues addressed below.

1. Qualifications of Executive Director: The Governor's budget director has been quoted as explaining several times that the training and experience of the executive director of the Montana Public Employee Retirement Administration (MPERA) are important factors in the operation of the Public Employees' Retirement System (PERS), particularly given the losses by the Board of Investments and the resulting unfunded liabilities of the System. However, there are no qualifications for that position expressed in law (see 2-15-1009 and 19-2-404, MCA). Legislation could be passed to amend 19-2-404 to require appropriate qualifications for this position.

2. Hiring Authority for PERB Staff: There have been allegations that the employment of the new MPERA Executive Director, whose position is authorized by 19-2-404, MCA, has not been an "arm's length" transaction and that equally, if not more, qualified applicants were passed over in the hiring process. If true, these allegations point to a lack of expertise by the PERB and the MPERA in the technically demanding skills of advertising for and evaluating job applications and applicants. One potential solution would be to bring the authority for hiring the

PERB staff back under the Department of Administration (DOA), where this expertise now resides in the Personnel Division of that department. The hiring authority for all of the board's staff, now referred to as MPERA, was changed from the DOA to the PERB with the enactment of sec. 17, Ch. 532, L. 1997, and could now be changed back. This change would require the amendment of 2-15-1009 and 19-2-404, MCA.

3. Appointment and Confirmation of PERB Members: Unlike numerous other policymaking boards in state government, there is nowhere in statute a requirement that the members of the PERB nominated by the Governor be confirmed by the Montana State Senate (see 2-15-1009, MCA, and compare with, e.g.: 2-15-1025, MCA [State Banking Board]; 2-15-1026, MCA [Board of County Printing]; 2-15-1706, MCA [Commission for Human Rights]; 2-15-1730, MCA [Alternative Health Care Board]; 2-15-1732, MCA [Board of Dentistry]; 2-15-1733, MCA [Board of Pharmacy]; 2-15-1747 [Board of Barbers and Cosmetologists]; 2-15-1765, MCA [Board of Plumbers]; 2-15-2106, MCA [Air Pollution Control Advisory Council]; 2-15-3106, MCA [Board of Horseracing]; 22-2-102, MCA [Montana Arts Council]). To the extent that the current situation involving the PERB can be seen as a lack of accountability or arises from a lack of appropriate constitutionally based checks and balances between the Executive Branch and the Legislative Branch of State government, a statutory requirement for confirmation by the Senate would seem appropriate.

4. Amendment of Statutes Involving Public Notice and Participation: Currently, under 2-3-103, MCA, administrative agencies must adopt procedures allowing public participation in certain agency decisions. This process depends in part on the definitions of "agency action" in 2-3-102, MCA, and the meaning of "significant interest to the public", which is not defined in statute but which the Attorney General, through the Model Rules, has defined as in accordance with 2-4-102(12)(a), MCA. However, 2-3-111, MCA, also requires an opportunity to submit views and data in a class of decisions that are not subject to the definition of "agency action". Exactly what decisions are addressed in 2-3-111, MCA, could be further clarified in statute or required to be clarified in agency rules, so as to include the type of decisions made by the PERB to hire a new executive director.

5. Extend Time for Filing Certain Public Disclosure Legal Actions: According to the allegations in the civil complaint filed by the Governor, either a subcommittee of the PERB or the PERB itself met "in secret" on at least five occasions, the first being September 6, 2005. Under 2-3-114 and 2-3-213, MCA, and case law interpreting Article II, sections 9 and 10 of the Montana Constitution, any decision made by the subcommittee or the PERB is voidable by judicial action. However, under those sections of law, any legal action to enforce the requirements of the open meeting statutes must be brought within 30 days of the date of the agency's decision. As the current controversy demonstrates, it would be difficult to meet that 30-day deadline if the agency is sufficiently secretive so that knowledge of the meeting is not gained until more than a

month later. For this reason, it would be appropriate to amend 2-3-114, MCA, and 2-3-213, MCA, to provide that the 30-day period begins to run when the agency's action is known or reasonably should be known to the public.

6. Widen Category of Persons Eligible to Bring Certain Public Disclosure Actions: Section 2-3-114, MCA, limits actions to enforce the requirements of Title 2, chapter 3, part 1, MCA, containing requirements for notice of meetings, to "any person whose rights have been prejudiced". However, 2-3-213, MCA, authorizing legal actions to be brought to enforce, 2-3-203, MCA, containing requirements that meetings be open to the public, contains no such limitation on who can bring suit. There is no logical reason for one statute to limit actions to injured persons and another to contain no such limitation at all. If the limitation were deleted from 2-3-114, MCA, lawsuits to enforce both open meeting laws would be governed by the judicially-recognized limitations that a party have "standing" or be the "real party in interest" that guarantee that only persons with judicially recognizable interests may file a lawsuit, even if that interest is the public's right to know being enforced by the news media. Section 2-3-114, MCA, also contains an obvious misstatement, similar to a typographical error, that needs to be corrected.

7. Provide for Costs and Attorney Fees for Certain Public Disclosure Actions: Section 2-3-221, MCA, now provides that costs and attorney fees may be awarded to a person who prevails in a legal action to enforce the constitutional right to know contained in Article II, section 9, of the Montana Constitution. However, it's not as clear as it could be that such a legal action includes an action brought in accordance with 2-3-114 and 2-3-213, MCA. Amending 2-3-221, MCA, to make that clear would be an appropriate action of the Legislature.

I will plan on addressing the potential responses to the situation concerning the PERB at the upcoming meeting of the SAVA Committee on November 30. In the meantime, if you have any questions on the foregoing, please feel free to contact me at (406) 444-3064.

Sincerely,

David S. Niss
Staff Attorney

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