



Revenue and Transportation Interim Committee

63rd Montana Legislature

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TO: Committee Members

FROM: Jaret Coles, Staff Attorney

RE: SJR 23: Office of Dispute Resolution and the Record on Appeal

DATE: November 21, 2013

During the October 1, 2013, Revenue and Transportation meeting, Senator Wittich requested a staff opinion in regard to whether the Department of Revenue (Department) is permitted to introduce new evidence in a State Tax Appeal Board (STAB) hearing when the evidence was not admitted by the Department's Office of Dispute Resolution (ODR). If new evidence is allowed, Senator Wittich asked what statutory changes would need to be implemented to prohibit the Department from submitting any new evidence while allowing a person or entity to bring forward additional evidence.

Before I provide my opinion and analysis, a caveat is necessary. Due to the constitutional constraints inherent in the separate powers of each branch of state government, an opinion provided to you by a Legislative Branch attorney is obviously not binding on the Department as an Executive Branch agency or on STAB.

QUESTIONS PRESENTED

1. Is STAB required to consider the Department's evidence if it was not presented in an ODR hearing?
2. If STAB is required to consider the Department's evidence that was not presented in an ODR hearing, what statutes would need to be amended to prohibit the Department from submitting new evidence in a STAB hearing while allowing a person or entity to bring forward new evidence?

SHORT ANSWER

1. Yes.

2. If the Legislature desires to prohibit the introduction of new evidence by the Department after an ODR hearing, it should consider amending sections [2-4-612](#), [15-1-211](#), and [15-2-302](#), MCA.¹

Section [15-1-211](#), MCA, provides a uniform dispute review procedure, and the Department currently implements some of these procedures through administrative rules.

Section [15-2-302](#), MCA, requires STAB to utilize the contested case procedures.

[Title 2, chapter 4, part 6](#), of the Montana Code Annotated sets forward the contested case procedures that are followed by STAB. Specifically, section [2-4-612\(1\)](#), MCA, provides that "[o]pportunity shall be afforded all parties to respond and present evidence and argument on all issues involved."

LEGAL ANALYSIS

1. The Opportunity to Present Evidence After a Hearing by the Office of Dispute Resolution

A. ODR Overview

Pursuant to section [15-1-211\(2\)\(b\)](#), MCA, the Department is required to establish a dispute resolution office (*i.e.*, Office of Dispute Resolution or ODR) to resolve certain disputes between the Department and persons or entities. The ODR is utilized for disputes involving centrally assessed property, income taxes, oil and gas production taxes, corporate income tax, retail telecommunications excise tax, and many more. In the event that a dispute cannot be resolved informally, section [15-1-211\(3\)\(c\)](#), MCA, provides that either party may refer a dispute to the ODR. Additionally, once the ODR receives a referral, it has 180 days to either issue a decision or provide the right to appeal.

B. ODR Procedure

As far as procedure is concerned, section [15-1-211](#), MCA, does not require the ODR to conduct a contested case hearing under the Montana Administrative Procedure Act. Instead, the Department is required to adopt a dispute review procedure by administrative rule, and there is no statutory requirement about what constitutes the record on appeal. *See* section [15-1-211\(1\)\(a\)](#). Pursuant to the Department's administrative rules, the ODR hearing examiner determines the formality and procedures for each dispute after considering factors such as whether attorneys are involved and the amount of potential liability. *See* [ARM 42.2.616](#). The hearings are generally

¹ While these are the primary statutes, other statutes may also need to be amended based on certain bill drafting guidelines.

conducted in Helena, but either party may request a telephonic hearing. See [ARM 42.2.619\(1\)](#) and (3). The hearing examiner has discretion to impose the rules of civil procedure, the rules of evidence, or both, and every party at a hearing has the right to introduce evidence. See [ARM 42.2.620\(1\)](#) and (2).

C. *STAB and Contested Case Provisions*

A person or entity that desires to appeal an ODR decision to STAB may do so within 30 days following receipt of notice of the final decision. See section [15-2-302\(2\)](#), MCA. Once STAB receives a case, section [15-2-302\(4\)](#), MCA, requires it to "conduct the appeal in accordance with the contested case provisions of the Montana Administrative Procedure Act". There is nothing in section [15-2-302](#), MCA, that requires STAB to consider the ODR record.

[Title 2, chapter 4, part 6](#), of the Montana Code Annotated sets forward the contested case procedures. In regard to evidence, section [2-4-612\(1\)](#), MCA, provides that "[o]ppportunity shall be afforded all parties to respond and present evidence and argument on all issues involved." (emphasis added). There is nothing in the contested case provisions that provides STAB with the authority to bind the Department to the ODR record. Consequently, the Department (or the taxpayer) is permitted to present evidence that was not part of the ODR record.

2. Statutory Revisions Necessary to Prevent the Department From Introducing Evidence That Was Not Introduced During an ODR Hearing

A. *Section 15-1-211, MCA*

Section [15-1-211](#), MCA, provides the Department with the authority to adopt administrative rules regarding the procedures that are utilized by the ODR. Under current Department procedures, the hearings can be informal. If the Department is prohibited from introducing new evidence at the STAB hearing then consideration may need to be given to whether the ODR proceedings can continue to remain informal. Moreover, on some occasions the parties agree to waive the ODR hearing and proceed directly to STAB, which would mean there would not be a record for STAB to consider. As such, consideration may also need to be given in regard to whether an ODR proceeding is required. These policy decisions and any policy decisions regarding procedure (*i.e.*, testimonial oath requirements, timelines, and discovery procedure) could be incorporated into section [15-1-211](#), MCA.

B. *Section 15-2-302, MCA*

Section [15-2-302\(2\)](#), MCA, provides that a person or entity may appeal an ODR decision to STAB within 30 days following receipt of notice of the final decision. Additionally, pursuant to section [15-2-302\(4\)](#), MCA, STAB is required to conduct the appeal in accordance with the contested case provisions of the Montana Administrative Procedures Act (MAPA). This section could be amended to establish exceptions to the contested case provisions that would prohibit the

Department from introducing new evidence while allowing a person or entity to bring forward new evidence. In drafting the legislation, consideration may need to be given in regard to whether the Department is allowed to present any testimonial evidence in a STAB proceeding. For example, is a person that testified for the Department in an ODR hearing allowed to testify in front of STAB on the same issues or is the record limited to the ODR transcript? The legislation could be drafted to clarify whether it pertains to documentary evidence, testimonial evidence, or both.

C. Section 2-4-612, MCA

Section [2-4-612](#), MCA, gives either party in a contested case proceeding the opportunity to present evidence. In order to prevent confusion, an exception clause should be inserted in section [2-4-612](#), MCA, that refers to the amendments in section [15-2-302](#), MCA.

CONCLUSION

Both the ODR and STAB are independent under current law, and STAB is not bound to the record that was developed in an ODR proceeding. Legislation could be introduced to prohibit the Department from introducing new evidence in a STAB hearing after an ODR hearing, so long as a person or entity is not subject to the prohibition. In drafting legislation, consideration should be given to whether any testimonial evidence can be brought forward by the Department in a STAB hearing.

I hope that I have adequately addressed the questions that were raised. Please feel free to contact me with any questions or concerns.

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APPENDIX

2-4-612. Hearing -- rules of evidence, cross-examination, judicial notice. (1)

Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(2) Except as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence. Objections to evidentiary offers may be made and shall be noted in the record. When a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

(3) Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(4) All testimony shall be given under oath or affirmation.

(5) A party shall have the right to conduct cross-examinations required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence.

(6) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data. They shall be afforded an opportunity to contest the material so noticed.

(7) The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

History: En. Secs. 9, 10, 11, Ch. 2, Ex. L. 1971; R.C.M. 1947, 82-4209(3), 82-4210, 82-4211(part).

15-1-211. Uniform dispute review procedure -- notice -- appeal. (1) The department shall provide a uniform review procedure for all persons or other entities, except as provided in subsection (1)(a).

(a) The department's dispute review procedure must be adopted by administrative rule and applies to all matters administered by the department and to all issues arising from the administration of the department, except estate taxes, property taxes, and the issue of whether an employer-employee relationship existed between the person or other entity and individuals subjecting the person or other entity to the requirements of chapter 30, part 25, or whether the employment relationship was that of an independent contractor. The procedure applies to assessments of centrally assessed property taxed pursuant to chapter 23.

(b) (i) The term "other entity", as used in this section, includes all businesses, corporations, and similar enterprises.

(ii) The term "person" as used in this section includes all individuals.

(2) (a) Persons or other entities having a dispute with the department have the right to

have the dispute resolved by appropriate means, including consideration of alternative dispute resolution procedures such as mediation.

(b) The department shall establish a dispute resolution office to resolve disputes between the department and persons or other entities.

(c) Disputes must be resolved by a final department decision within 180 days of the referral to the dispute resolution office, unless extended by mutual consent of the parties. If a final department decision is not issued within the required time period, the remedy is an appeal to the appropriate forum as provided by law.

(3) (a) The department shall provide written notice to a person or other entity advising the person or entity of a dispute over matters administered by the department.

(b) The person or other entity shall have the opportunity to resolve the dispute with the department employee who is responsible for the notice, as indicated on the notice.

(c) If the dispute cannot be resolved, either the department or the other party may refer the dispute to the dispute resolution office.

(d) The notice must advise the person or other entity of their opportunity to resolve the dispute with the person responsible for the notice and their right to refer the dispute to the dispute resolution office.

(4) Written notice must be sent to the persons or other entities involved in a dispute with the department indicating that the matter has been referred to the dispute resolution office. The written notice must include:

(a) a summary of the department's position regarding the dispute;

(b) an explanation of the right to the resolution of the dispute with a clear description of all procedures and options available;

(c) the right to obtain a final department decision within 180 days of the date that the dispute was referred to the dispute resolution office;

(d) the right to appeal should the department fail to meet the required deadline for issuing a final department decision; and

(e) the right to have the department consider alternative dispute resolution methods, including mediation.

(5) The department shall:

(a) develop guidelines that must be followed by employees of the department in dispute resolution matters;

(b) develop policies concerning the authority of an employee to resolve disputes; and

(c) establish procedures for reviewing and approving disputes resolved by an employee or the dispute resolution office.

(6) (a) (i) The director of revenue or the director's designee is authorized to enter into an agreement with a person or other entity relating to a matter administered by the department.

(ii) The director or the director's designee has no authority to bind a future legislature through the terms of an agreement.

(b) Subject to subsection (6)(a)(ii), an agreement under the provisions of subsection (6)(a)(i) is final and conclusive, and, except upon a showing of fraud, malfeasance, or misrepresentation of a material fact:

(i) the agreement may not be reopened as to matters agreed upon or be modified by any

officer, employee, or agent of this state; and

(ii) in any suit, action, or proceeding under the agreement or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance with the agreement, the agreement may not be annulled, modified, set aside, or disregarded.

History: En. Sec. 1, Ch. 811, L. 1991; amd. Sec. 2, Ch. 529, L. 1995; amd. Sec. 1, Ch. 123, L. 1997; amd. Sec. 1, Ch. 36, L. 1999; amd. Sec. 2, Ch. 451, L. 1999; amd. Sec. 4, Ch. 9, Sp. L. May 2000; amd. Sec. 3, Ch. 419, L. 2013.

15-2-302. Direct appeal from department decision to state tax appeal board -- hearing. (1) A person may appeal to the state tax appeal board a final decision of the department of revenue involving:

- (a) property centrally assessed under chapter 23;
- (b) classification of property as new industrial property;
- (c) any other tax, other than the property tax, imposed under this title; or
- (d) any other matter in which the appeal is provided by law.

(2) The appeal is made by filing a complaint with the board within 30 days following receipt of notice of the department's final decision. The complaint must set forth the grounds for relief and the nature of relief demanded. The board shall immediately transmit a copy of the complaint to the department.

(3) The department shall file with the board an answer within 30 days following filing of a complaint.

(4) The board shall conduct the appeal in accordance with the contested case provisions of the Montana Administrative Procedure Act.

(5) The decision of the state tax appeal board is final and binding upon all interested parties unless reversed or modified by judicial review. Proceedings for judicial review of a decision of the state tax appeal board under this section are subject to the provisions of 15-2-303 and the Montana Administrative Procedure Act to the extent that it does not conflict with 15-2-303.

History: En. 84-709.4 by Sec. 2, Ch. 155, L. 1977; R.C.M. 1947, 84-709.4; amd. Sec. 1, Ch. 59, L. 1993; amd. Sec. 5, Ch. 594, L. 1993; amd. Sec. 9, Ch. 491, L. 1997; amd. Sec. 1, Ch. 67, L. 2005.