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MEMORANDUM

RECEIVED

SEP 25 2012

OBPP

TO: Dan Villa  
FROM: Mike Manion *mm*  
DATE: September 25, 2012  
RE: Improvements to the Montana Mental Health Nursing Care Center

You have asked that I analyze the September 7, 2012 opinion (Opinion) from the Legislative Services Division, Legal Services Office, addressing the improvements to the Montana Mental Health Nursing Care Center (Center). In preparing this analysis, I have reviewed the Opinion and other relevant statutes bearing on the issue.

SUMMARY

The Opinion focuses on §§ 17-7-211(2) and 18-2-102, MCA, which address the ability of the Budget Director to approve a long-range building program budget amendment and the authority of an agency to construct a state building, respectively. These two statutes, however, do not necessarily apply to the work being done at the Center. The simplest way to look at this is to separately analyze the statutory authority of the DPHHS and A&E and then interpret the statutes as a whole to ascertain legislative intent.

Here, the Budget Director did not approve a long-range building program budget amendment to HB 4 passed in 2007. Rather, DPHHS had the statutory authority under § 17-7-138, MCA, (Operating Budget statute) and § 17-7-139, MCA, (Program Transfer statute) to provide the funding without legislative review so long as the funding was not going to effect a significant change (defined as an operating budget change or transfer exceeding (i) \$1 million or (ii) 25% of a budget category and the change or transfer is greater than \$75,000) in agency or program scope,

objectives, activities, or expenditures. The expenditures for the Center's improvements do not meet the statutory definition of a significant change. Under § 17-8-101(5), MCA, DPHHS had the authority to transfer this money to A&E for the work to be done.

Section 18-2-105, MCA, allows A&E to accept funds and authority from other agencies, and § 17-7-302, MCA, authorizes A&E to encumber the transferred funds from one fiscal year to the next for the alteration, repair, maintenance, or renovation of a state building.

Section 18-2-102, MCA, does state that legislative approval is necessary for constructing a building whose cost exceeds \$150,000. Here, the 2007 Legislature in HB 4 approved \$750,000 of improvements to the Center. A&E is not required to obtain additional legislative approval to spend transferred money for a construction project (even if the amount exceeded \$150,000) so long as the transferred money was used for purposes within the scope of the initial legislative approval. The transferred money for the Center is being used for improvements to the Center, which is within the scope of the 2007 HB 4 legislative approval.

In short, A&E and DPHHS do have the authority to do the work as proposed.

### **FACTS**

The Opinion outlines the basic facts regarding the improvements to the Center and the intended use for the renovated Wing D. Three statements, however, need clarification as I understand the facts. The Opinion states that the budget director, under § 17-7-211, MCA, has approved a long-range building program budget amendment to HB 4 passed in the 2007 session. *Opinion* at p.3. This is incorrect. Here, the Budget Director approved the transfer of money from DPHHS to A&E but not as a budget amendment to HB 4. This is an important distinction under the law because it dictates what statutes apply to this situation. Second, the Opinion references the expenditure of \$813,000 for the Wing D renovation. The budget change documents, however, show that \$924,094 was transferred. Finally, the Opinion states that the 2007 Legislature did not consider the renovation of Wing D when it approved HB 4. Yet, the project detail explanation attached to the Governor's Budget mentions the substantial problems with the various wings, including Wing D.

### **STATUTES**

As noted in the Summary above, the easiest way for me to understand this issue is to separately discuss the statutory authority of DPHHS and A&E, and then

analyze how these statutes interact together. First, I will review DPHHS's authority; next, I will analyze A&E's authority; and, finally, I will integrate these statutes so that the Legislature's intent is interpreted as a whole.

## 1. DPHHS Statutes

Under the Law section, the Opinion quotes a part of § 17-7-138(1)(a), MCA. *Opinion* at pp.5 &7. This statute discusses state agency expenditures and that significant changes in agency or program scope, objectives, activities, or expenditures must be submitted to the legislative fiscal analyst for review and comment by the legislative finance committee before any implementation of the change. The statute also provides that an agency or program is considered to have a significant change in its scope, objectives, activities, or expenditures if the operating budget change exceeds (i) \$1 million or (ii) 25% of a budget category and the change is greater than \$75,000. The Opinion acknowledges that DPHHS has not hit the \$1 million threshold or the 25%/\$75,000 threshold. *Opinion* at p. 7 ("Although DPHHS has not yet hit the \$1 million mark, it is nearing it, so this statute may apply if the costs of alteration arise. Nevertheless, DPHHS intends to spend money from its 2011 HB 2 appropriation for the renovation of Wing D.") With this statement, the Opinion appears to acknowledge that DPHHS may spend this money for the Wing D improvements without the reviews noted in §17-7-138(1)(a), so long as the cost is below \$1 million.

In addition, § 17-7-139(1), MCA, authorizes transfer of appropriations between programs within each fund type within each fiscal year so long as the transfer is not prohibited by law or a condition contained in the general appropriation act. Similar to the restriction in § 17-7-138, MCA, significant changes in agency or program scope, objectives, activities, or expenditures must be submitted to the legislative fiscal analyst for review and comment by the legislative finance committee before any implementation of the change. "Significant change" in this budget transfer context has the same basic thresholds as those included in § 17-7-138(1)(a)—that is, to be a significant change the transfer must exceed (i) \$1 million dollars or (ii) 25% of a program's total operating plan and be greater than \$75,000.

A&E received funding transfers from two DPHHS divisions – Addictive and Mental Disorders Division (AMDD) and Health Resources Division (HRD). The Center falls under AMDD's authority. The funding for either division was not restricted in HB 2. The funding from AMDD came from the operating expenses budget. The funding from HRD came from the benefits budget. It may have been clearer to have first moved the funding from the HRD program to AMDD because

AMDD is responsible for the Center. However, in the end this is not significant because the funding did not trigger the thresholds discussed above.

Both §§ 17-7-138(1)(a) and 17-7-139(1), MCA, measure a significant change in agency or program scope, objectives, activities or expenditures if the budget or transfer change exceeds either the \$1 million threshold or the 25%/\$75,000 threshold. Since neither of these thresholds has been met, DPHHS is not at this point required to provide an explanation to the legislative fiscal analyst for review and comment by the legislative finance committee. In other words, the budget changes were not "a significant change in agency or program scope, objectives, activities, or expenditures" as defined in §§ 17-7-138(1)(a) and 17-7-139(1), MCA.

If DPHHS has the authority to spend the money, how does this authority get transferred to A&E? Section 17-8-101(5), MCA, allows an agency to transfer to another agency the authority to expend appropriated money so long as the original purpose of the appropriation is maintained. In this case a reasonable way to determine if the original purpose has been maintained is to evaluate if DPHHS has the authority to make the expenditures under §§ 17-7-138(1)(a) and 17-7-139(1), MCA. At this point, it does given that the thresholds have not been reached. If that is so, then the transfer to A&E is consistent with the appropriation.

In summary, since the Budget Director did not approve a long-range building program budget amendment, § 17-7-211(2), MCA, does not apply. Sections 17-7-138 and 17-7-139, MCA, on the other hand, do allow DPHHS to provide the funding for the Center improvements without legislative review because the funding has not effected significant changes in agency or program scope, objectives, activities, or expenditures.

## **2. A&E Statutes**

A&E has the authority to accept transferred funds under §§ 18-2-105(3) (the department may accept funds and authority from agencies) and 17-7-302, MCA, (an appropriation may be encumbered for the alteration, repair, maintenance or renovation of a building pursuant to the provisions Title 18, chapter 2).

The Opinion focuses on a state agency's authority to construct a building under § 18-2-102. The Opinion notes that "construction" includes alteration, repair, maintenance, and remodeling of a building and that this statute limits an agency's ability to construct a building without legislative approval if the cost exceeds \$150,000. Given that the money transferred from DPHHS to A&E exceeds \$150,000, the Opinion states that legislative approval was required. This is not necessarily the case.

In the 2007 session, HB 4 approved Center improvements totaling \$750,000. A&E's project detail accompanying the Governor's budget explained that the work would have a positive effect on the Center by restoring the patient wings (including Wing D) and providing a living environment that is bright cheerful and in line with the Center's mission. The Legislature, therefore, did generally approve this overall project including renovation of Wing D.

As noted, DPHHS transferred the money to A&E. For fiscal years 2010, 2011 and 2012 and for many years before that, A&E has had numerous projects where the money transferred from an agency exceeded \$150,000, but no additional legislative approval was received for the transfer. This is because the original project received the Legislature's approval (assuming it exceeded \$150,000) and the transferred money was going to be spent within the parameters of the approved project scope. Generally, in interpreting statutes, courts defer to an agency's interpretation of a statute. *Lewis v. B & B Pawnbrokers, Inc.*, 1998 MT 302, 292 Mont. 82, 968 P.2d 1145.

### 3. **Synthesis of Statutes**

Given the above statutes, the following may be reasonably concluded:

- Section 17-7-211, MCA, does not apply. Rather, §§ 17-7-138(1)(a) and 17-7-139(1), MCA, authorize the funding.
- DPHHS may transfer the spending authority to A&E. §17-8-101(5), MCA.
- A&E may accept transferred funds. §§17-7-302 and 18-2-105(3), MCA.
- Transferred money spent on building improvements—even if greater than \$150,000—does not need additional legislative approval so long as that money will be spent within the scope of the project initially approved by the Legislature. Section 18-2-102, MCA, does not require that the Legislature approve the expenditure in this case because the transferred money is being spent on improvements to the Center.
- Therefore, DPHHS and A&E have the statutory authority to proceed with the renovation.

Hopefully, this addresses the questions that you had.