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ADMINISTRATIVE LAW

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INTRODUCTION

Case law in Montana does not accurately reflect the extent of activity which has been generated by the adoption of the Montana Administration Procedure Act (hereinafter MAPA or the Act).[1] Adopted in 1971,[2] the Act has had a tremendous impact on nearly every state agency. The Act's definition of "agency"[3] is very broad and encompasses hundreds of governmental entities. Only four categories of state activity are excepted.[4]

Despite the extensive impact, the Montana Supreme Court has reviewed only four administrative law cases during the period between September, 1977, and September, 1978. There are a number of reasons for the limited number of cases. The first is the complexity of agency procedures. The procedures prescribed by MAPA usually involve numerous quasi-judicial steps[5] before an issue is

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1. MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 2-4-101 to 711 (1978) (formerly codified at REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], §§ 84-4201 to 4229 (Supp. 1977)).

2. The Act became effective December 31, 1972.

3. MCA § 2-4-102(1) (1978) (formerly codified at R.C.M. 1947, § 82-4202(1) (Supp. 1977)) cross-references the definition of "agency" to MCA § 2-3-102 (1978) (formerly codified at R.C.M. 1947, § 82-4227 (Supp. 1977)). That section provides:

> (1) "agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except:
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> (a) the legislature and any branch, committee or officer thereof;
>
> (b) the judicial branches and any committee or officer thereof;
>
> (c) the governor, except that an agency is not exempt because the governor has been designated as a member thereof; or
>
> (d) the state military establishment and agencies concerned with civil defense and recovery from hostile attack.

4. In addition to exempting the above entities from its operation, MCA § 2-4-102(1) (1978) (formerly codified at R.C.M. 1947, § 82-4202 (Supp. 1977)) excludes the following:

> (a) the state board of pardons, except that the board shall be subject to the requirements of 2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules shall be published in the Montana administrative code and register;
>
> (b) the supervision and administration of any penal institution with regard to the institutional supervision, custody, control, care, or treatment of youths or prisoners;
>
> (c) the board of regents and the Montana university system;
>
> (d) the financing, construction, and maintenance of public works.

5. In a typical case, quasi-judicial steps may include hearing before an appointed hearing officer, rehearing, appeal of the hearing officer's decision to the department, rehearing, appeal of the department's decision to a supervisory board or commission, and rehearing at that level. There has been no case holding that rehearings must be sought as part of the available administrative remedies; they are regarded as an option for aggrieved persons. Nevertheless, at least three steps are usually required before the matter is ripe for judicial review. The Montana Administrative Procedure Act does, however, provide an avenue of relief from intermediate agency action. Where review of a final agency decision would not

presented to the district court for review. The time involved and expenses incurred by a private party who believes that he or she has been aggrieved by an agency decision can be burdensome. A protestant may become intimidated and exhausted by the complicated procedures involved in stopping, compelling or altering agency action. Consequently, there is a tendency simply to give up before a final adjudication by the supreme court.[6]

Secondly, the time-honored rule that all administrative remedies must be exhausted before seeking relief in the courts prevents immediate judicial resolution of disputes. The Act contains a codification of this rule[7] and the supreme court has recognized this requirement in a post-MAPA case.[8] Neither the district court nor the supreme court has jurisdiction to review an administrative decision until a protestant has pursued every available remedy provided by the agency pursuant to MAPA's directives.

The third and primary reason that the number of cases does not correspond to the extent of administrative activity is the limitation imposed by the Act which prevents judicial review of some administrative actions. Only "final decisions"[9] in "contested cases"[10] are reviewable. The scope of review does not include daily informal decisions, which are estimated to constitute ninety percent of agency actions.[11] The reviewing court sits without a jury and its inquiry is confined to the record, with certain exceptions.[12] The court's options with respect to the disposition of a matter are also limited. It may affirm an agency's decision or remand for further

provide an adequate remedy, intermediate agency action is immediately reviewable. MCA § 2-4-701 (1978) (formerly codified at R.C.M. 1947, § 82-4216 (part)(Supp. 1977)).

6. After a determination by the district court on a petition for judicial review, an appeal may be taken to the supreme court as in civil cases. MCA § 2-4-711 (1978) (formerly codified at R.C.M. 1947, § 82-4217 (Supp. 1977)).

7. MCA § 2-4-702 (1978) (formerly codified at R.C.M. 1947, § 82-4216 (Supp. 1977)).

8. State of Montana *ex rel.* Jones v. Giles, 168 Mont. 130, 132, 541 P.2d 355, 357 (1975).

9. "Final decision" usually means an ultimate determination of the merits of an aggrieved person's case made at the highest possible level of the administrative hierarchy.

10. A "contested case" is defined at MCA § 2-4-102(4) (1978) (formerly codified at R.C.M. 1947, § 82-4202(3) (Supp. 1977)) and means "any proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for a hearing."

11. DAVIS, ADMINISTRATIVE LAW TEXT 88 (1972).

12. The parties may, by stipulation, agree to shorten the record. MCA § 2-4-702(4) (1978) (formerly codified at R.C.M. 1947, § 82-4216(4) (Supp. 1977)). The district court may, upon application of a party, allow additional evidence to be presented if the evidence is shown to the court's satisfaction to be material and good reasons for failure to present it are given. The court may hear the evidence or may remand to the agency for additional proceedings. MCA § 2-4-702 (1978) (formerly codified at R.C.M. 1947, § 82-4216(5) (Supp. 1977)). Proof may be taken in court of alleged irregularities in procedure at the administrative level and the court may allow the parties to submit briefs and make oral arguments. MCA § 2-4-704(1) (1978) (formerly codified at R.C.M. 1947, § 82-4216(6) (Supp. 1977)).

proceedings; it may reverse or modify only if "substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions" are tainted by specific errors.[13]

These limitations are directed only to the district court; the Act does not specify what the role of the supreme court is when a district court's decision is appealed. Although the supreme court has not stated its perception of its role in review of administrative decisions in any case decided since MAPA was adopted, an early administrative law case describes its function as that of a "watchdog" of administrative agencies.[14] The supreme court seems to have incorporated the Act's limitations on district court review in its own treatment of administrative cases. In *Vita-Rich Dairy, Inc. v. Department of Business Regulation,*[15] the court stated the reasons for limited judicial review: (1) limited judicial review of administrative decisions strengthens the administrative process by encouraging the full presentation of evidence at the initial administrative hearing; (2) judicial economy requires court recognition of the expertise of administrative agencies in the field of their responsibility; and (3) limited judicial review is necessary to determine that a fair procedure was used, that questions of law were properly decided, and that the decision of the administrative body was supported by substantial evidence.[16] Although the court did not directly adopt this statement as a definition of its own role, its enunciation of these policy reasons for limited judicial review may provide a key to the court's consideration of future administrative law cases.

This survey, then, analyzes four cases in the context of the policy statement of *Vita-Rich Dairy.*

I. *Western Bank of Billings v. Banking Board*[17]

Rimrock Bank of Billings filed application with the Montana

13. MCA § 2-4-704(2) (1978) (formerly codified at R.C.M. 1947, § 82-4216(7) (Supp. 1977)) provides that the court may reverse or modify the decision only if:
(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;
(g) because findings of fact, upon issues essential to the decision were not made although requested.

14. Peterson v. Livestock Commission, 120 Mont. 140, 149, 181 P.2d 152, 157 (1947).

15. 170 Mont. 341, 553 P.2d 980 (1976).

16. *Id.* at 344-45, 553 P.2d at 982-83.

17. ___ Mont. ___, 570 P.2d 1115 (1977).

Banking Board for a certificate of authorization. At the required hearing, Western Bank appeared in opposition to the application and filed a motion to deny the application as insufficient as a matter of law or, alternatively, to grant the applicant sixty days to cure deficiencies. The extra time would have allowed Western Bank to complete further discovery. After denying the motion, the board granted the application. Its decision was affirmed by the district court. On appeal to the supreme court, the court consolidated nine issues which were raised as error into three principal questions.

The first issue concerned the sufficiency of Rimrock's application. Western Bank contended that, because of an alleged deficiency, the board should not have conducted the hearing. After considering Western Bank's objections, the board allowed the hearing to continue after ruling that the deficiency in the application was insubstantial.[18]

The Montana Supreme Court agreed with the board's decision: "Western's contention is tantamount to saying that the slightest defect in the application at the time of the administrative hearing, [*sic*] deprives the board of jurisdiction to proceed with the hearing."[19] The court reasoned that "applications in administrative proceedings are roughly analogous to pleadings in civil actions" and held that "[p]leadings and applications in an administrative matter should [be construed as are pleadings in civil litigation] so as to do substantial justice."[20] A determination of whether substantial rights were prejudiced by a deficiency is required. The court declared that "prejudice is never presumed but it must affirmatively appear that the error has affected a substantial right of the party on the merits of the case."[21] In examining whether prejudice had occurred to Western Bank, the court found none and held that Rimrock's application was sufficient to give the board jurisdiction to proceed with the hearing.[22]

The second issue concerned the sufficiency of evidence in the record to support the board's decision to grant the certificate of authorization.[23] Making no reference to its implied adoption of the substantial evidence rule in *Vita-Rich Dairy*,[24] the court cited a civil

18. *Id.* at ___, 570 P.2d at 1118.
19. *Id.* at ___, 570 P.2d at 1117.
20. *Id.* at ___, 570 P.2d at 1118.
21. *Id.*, *citing* Conway v. Fabian, 108 Mont. 287, 323, 89 P.2d 1022, 1037 (1939).
22. *Id.*
23. *Id.* at ___, 570 P.2d at 1120.
24. The substantial evidence rule is the most commonly adopted standard of review on the question of sufficiency of the evidence. This standard represents a middle position between a prohibition against any review on questions of fact and de novo review. DAVIS, ADMINISTRATIVE LAW TEXT 526-32, 535-44 (1972).

case for damages[25] as authority for adopting the substantial evidence rule as the standard of review in *Western Bank*. The court merely stated that it "has repeatedly held that its function on appeal is to determine whether there is substantial evidence in the record to support the judgment."[26] In affirming the board's decision the court found "the evidence presented amply fulfills each and every one of the statutory and regulatory requirements for a new bank."[27]

The third issue raised in the case was based upon a challenge to the legality of regulations adopted by the board.[28] Western Bank argued that the regulations were invalid because the board had improperly rejected a petition requesting a public hearing upon the proposed regulations. In a rather technical analysis, the court dismissed these contentions.[29] While affirming the legality of the regulations, the court noted that even if the challenge were meritorious, inquiry was prohibited because the issue was raised only on appeal.[30] In reaching the result, however, the court included dicta in the opinion which could provide considerable support for denying hearings on proposed rules for rather insubstantial reasons.[31] Arguably, this may defeat access to administrative decision-making, one of the underlying goals of MAPA.[32]

II. *County of Blaine v. Moore*[33]

Blaine County sought judicial review of an order by the Department of Social and Rehabilitative Services (SRS) that held the county liable for payments to St. James Hospital on behalf of medically indigent residents. The order was appealed to and reversed by the Board of Social and Rehabilitation Appeals. The decision of the appeals board was, in turn, affirmed by the district court. On appeal to the supreme court, Blaine County raised five issues for review.[34]

25. Strong v. Williams, 154 Mont. 65, 460 P.2d 90 (1969).
26. ___ Mont. at ___, 570 P.2d at 1120.
27. *Id.* at ___, 570 P.2d at 1121.
28. *Id.*
29. *Id.*
30. *Id.*
31. The court concluded that since the petition requesting a hearing on the proposed regulations contained no *allegation* that the petitioners were "persons who will be directly affected by the proposed rule . . ." as required by MCA § 2-4-302(4) (1978) (formerly codified at R.C.M. 1947, § 82-4204(1)(b) (Supp. 1977)), the petition was insufficient.
32. MCA § 2-3-101 (1978) (formerly codified at R.C.M. 1947, § 82-4226 (Supp. 1977)) states that legislative guidelines must be adopted to "secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency."
33. ___ Mont. ___, 568 P.2d 1216 (1977).
34. *Id.* at ___, 568 P.2d at 1220.

The outcome of each issue rested, essentially, on whether there were sufficient facts in the record to support the judgment.[35]

From the beginning of the opinion, the court failed to acknowledge the principles underlying limited judicial review which were recognized in *Vita-Rich Dairy*.[36] The words "substantial evidence" do not appear in the opinion and the court mentions neither the scope nor the standard of review. The court apparently proceeded upon the assumption that it must determine the "correctness" of the decision rather than determining that there was substantial evidence to support the rulings on questions of fact and determining whether questions of law were correctly decided.

The holding has little value as precedent except to SRS and to counties. No important points of law are clarified. A simple affirmation of the district court's judgment would have served as well.

III. *Baker National Insurance Agency v. Department of Revenue*[37]

A consolidated appeal was filed by several corporations which each owned both an insurance company and a bank. The insurance company-bank affiliates had made application to the Department of Revenue to be allowed to file consolidated tax returns. The applications were denied and an appeal was brought before the State Tax Appeal Board. The board affirmed the department's decision, holding first that the businesses did not qualify as "unitary" businesses as required by statute, and second, that consolidated tax returns could not be filed when the department, having the discretion to determine when such returns are appropriate, had not granted its permission to file. The district court affirmed the board's decision.

On appeal to the supreme court, the decision was again affirmed.[38] The court confined its inquiry to a determination that the record contained substantial evidence to support the judgment and a finding that no abuse of discretion occurred. In its opinion, the court at least tacitly acknowledged its function as a "watchdog" of the administrative process.[39]

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35. Neither the county nor the court characterized the five issues presented for review as issues of fact. All were questions of whether each entity which had made a determination of liability had erred in that decision. The distinction between questions of fact and conclusions of law is important in that the former should stand as found by the district court if supported by substantial evidence and the latter are clearly within the exclusive province of the court. For a general discussion of the distinction between questions of fact and law in administrative cases *see* SCHWARTZ, ADMINISTRATIVE LAW 587-88 (1976) and COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 339-41 (1951).

36. *See* text accompanying note 16, *supra*.

37. ___ Mont. ___, 571 P.2d 1156 (1977).

38. *Id.* at ___, 571 P.2d at 1157.

39. *See also* Peterson v. Livestock Commission, 120 Mont. 140, 149, 181 P.2d 152, 157 (1947).

Two issues were presented on appeal; one was framed in a manner appropriate to judicial review, while the other was not. The issues were:

> 1. Whether the parent-subsidiary corporations are conducting a unitary business as defined by [Montana Code Annotated (hereinafter MCA) § 15-31-141 (1978)].
> 2. Whether respondent has the discretionary authority to determine when consolidated returns are appropriate.[40]

The first issue should have been whether there was substantial evidence in the record to support the finding that appellants were not operating a unitary business. The second issue was appropriately stated since it asked the court to determine a question of law: whether the agency had discretion to perform a particular act.[41]

In resolving the first issue, the court applied the appropriate test adopted in *Western Bank*:[42] "We, therefore, hold the record contains substantial evidence to support the District Court's finding that appellants were not conducting a unitary business operation."[43] Expert testimony in the record established that the financial records of the two entities were not interdependent, a prerequisite imposed by the statute.[44]

The second issue required application of principles of statutory construction. The statute allowing consolidated returns provides, in part:

> (1) Corporations which are affiliated may not file a consolidated return unless at least 80% of all classes of stock of each corporation involved is owned directly or indirectly by one or more members of the affiliated group.
> (2) Corporations may not file a consolidated return unless the operation of the affiliated group constitutes a unitary business and permission to file a consolidated return is given by the state department of revenue. For purposes of this section, a "unitary business operation" means one in which the business operations conducted by the corporations in the affiliated group are interrelated or interdependent to the extent that the net income of one corporation cannot reasonably be determined without reference to the operations conducted by the other corporations.[45]

The court concluded that the plain meaning of the statute was "not readily gleaned from its language" and turned to an examina-

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40. ___ Mont. at ___, 571 P.2d at 1158.
41. *See* note 35, *supra.*
42. *See* text accompanying notes 17 to 32, *supra.*
43. ___ Mont. at ___, 571 P.2d at 1160.
44. MCA § 15-31-141 (1978) (formerly codified at R.C.M. 1947, § 84-1509 (Supp. 1977)).
45. *Id.*

tion of legislative history. The records of the House Ways and Means Committee contained a statement that "under existing law it is left entirely up to the State Board of Equalization [now the Department of Revenue] whether to allow a corporation to file a consolidated return."[46] Therefore, the court held that the statute "is permissive rather than mandatory and respondent did not abuse its discretion in denying appellants' request for permission to file a consolidated return."[47]

IV. *The United States National Bank of Red Lodge v. Department of Revenue*[48]

A group of banks filed complaints in district court alleging the Department of Revenue had illegally taxed United States obligations owned by the banks. The department filed motions to dismiss based on the contention that the complaints involved a matter of valuation for tax purposes, not an illegal tax. Since the banks had not sought a hearing through administrative channels, the department asserted that the failure to exhaust administrative remedies deprived the court of jurisdiction.

The district court granted the motions and appeal was brought from the dismissal. Ordinarily no appeal would lie from a district court's dismissal for failure to exhaust administrative remedies because the ruling is not one which falls within the statutory provisions for judicial review under MAPA. Judicial review is available only after a determination on the merits. MCA § 2-4-702 (1978)[49] provides that "a person who has *exhausted all administrative remedies* available within the agency and who is aggrieved by a *final decision* in a contested case is entitled to judicial review . . . ."[49.1] MCA § 2-4-711 (1978)[50] provides that "an aggrieved party may obtain review of a *final judgment* of a district court . . . by appeal to the Supreme Court. . . ."[51]

A person whose complaint is dismissed because of a failure to exhaust administrative remedies is not entitled to appellate review because the dismissal is not a final judgment of the district court on the merits of the case. In *U.S. National Bank,* however, an appeal was allowed because the dismissal had the *effect* of a final judgment. Plaintiffs could not recommence the administrative process because the statute of limitations had run. The court cited a

46. ___ Mont. at ___, 571 P.2d at 1160.
47. *Id.*
48. ___ Mont. ___, 573 P.2d 188 (1977).
49. Formerly codified at R.C.M. 1947, § 82-4216 (Supp. 1977).
49.1. Emphasis added.
50. Formerly codified at R.C.M. 1947, § 82-4217 (Supp. 1977).
51. Emphasis added.

civil case[52] wherein the granting of a motion to dismiss for failure to state a claim upon which relief could be granted was held to be appealable. The court said that "the practical effect of the district court's order is to leave appellant without opportunity for further judicial relief, just as if judgment had been rendered against him. Therefore, the order . . . is properly before this Court on appeal."[53] The court provided an exception to the exhaustion of remedies rule and followed the rule of *Larson v. State*:[54] "where the issue is illegality of a tax, as opposed to a valuation, the matter may be brought directly before the courts."

The *U.S. National Bank* holding should not be read as an unqualified assertion that a plaintiff will be accorded judicial access when administrative remedies are no longer available. Plaintiffs asserted a claim that was not subject to administrative determination, the illegality of a tax. If plaintiffs had filed a complaint in district court after the time specified for administrative review on a matter that was clearly one on which an agency must make a final decision, the court would certainly find the rule of this case inapplicable. In remanding, the court in *U.S. National Bank* pointed out that it was not reaching the merits of the case and noted that "[i]t is entirely possible the Department's interpretation of the facts may later prove to be correct."[55] The court emphasized that "[i]f in subsequent proceedings the Department proves that this case involves an issue of valuation rather than imposition of an illegal tax, appellants would be barred from court for failure to first exhaust their administrative remedies of appeal to the tax appeal boards. . . ."[56] This statement should prevent attempts to use the case as precedent for judicial access when administrative remedies simply have not been pursued within the statutory period.

Another important factor contributed to the court's reversal of the district court's ruling on the motions to dismiss. The court was distressed by the fact that the defendant, Department of Revenue, had succeeded in foreclosing the plaintiffs' case simply by asserting that plaintiffs were wrong in charging that an illegal tax had been levied. The court reiterated the rule that "the only relevant inquiry in reviewing a District Court order granting a . . . motion to dismiss is whether the complaint, standing alone, sets forth facts which, if true, vest the District Court with subject matter jurisdiction."[57] In

52. Hasbrouck v. Krsul, 168 Mont. 270, 272, 541 P.2d 1197, 1198 (1975).
53. ___ Mont. at ___, 573 P.2d at 190.
54. 166 Mont. 449, 456, 534 P.2d 854, 858 (1975).
55. ___ Mont. at ___, 573 P.2d at 191.
56. *Id.* at ___, 573 P.2d at 190.
57. *Id.*

this case, plaintiffs' allegations were sufficient; nevertheless, defendant's unsupported denials were allowed to prevail. The court summarized its feeling with the statement that "the most troublesome aspect here is that the defendant was permitted simply to say 'Nay' upon affidavit and thereby prevent plaintiffs from having their day in court."[58]

CONCLUSION

These cases provide some guidance to the court's perception of its role in reviewing administrative orders. There are some indications that the court will adhere to the principles of deference to administrative expertise, judicial economy, and due process which were enunciated in *Vita-Rich Dairy*.[59] Albeit indirectly, the court appears to have adopted the substantial evidence rule which requires affirmation of the agency's decision on questions of fact if the record contains substantial evidence to support the decision. But the *County of Blaine* case, where the court failed to distinguish between questions of fact and law or to follow any of the guidelines of *Vita-Rich Dairy*, indicates that the court may not have a clear commitment to limited review of administrative law cases.

58. *Id.* at ____, 573 P.2d at 191, *citing* Harrington v. Holiday Rambler Corp., 165 Mont. 32, 37, 525 P.2d 556, 559 (1974).

59. *See* text accompanying note 16, *supra*.