

BEFORE THE BOARD OF FUNERAL SERVICE
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 24.147.401 fee schedule)

TO: All Concerned Persons

1. On February 23, 2012, the Board of Funeral Service (board) published MAR notice no. 24-147-34 regarding the public hearing on the proposed amendment of the above-stated rule, at page 351 of the 2012 Montana Administrative Register, issue no. 4.

2. On March 16, 2012, a public hearing was held on the proposed amendment of the above-stated rule in Helena. Several comments were received by the March 23, 2012, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

COMMENT 1: One commenter opposed the increases and stated that the timing of the fee increase during the present economic circumstances is unreasonable.

RESPONSE 1: The board recognizes the difficulty of the present economic circumstances and notes that the board rejected previous requests from the department to increase fees. However, in anticipation of a negative cash balance prior to the revenue-generating renewal cycle (which, in fact, transpired after the proposed rule notice in the amount of \$10,000), and in consideration of the fairly constant number of licensees generating revenue offset by increased expenses, the board decided it could no longer avoid proposing to increase fees.

COMMENT 2: One commenter opposed the 50 percent increase all at once, but suggested the board instead raise fees gradually over a period of time. A 20 percent or 25 percent increase would be acceptable, but an increase of 50 percent is out of proportion.

RESPONSE 2: A 20 percent or 25 percent increase would not have been sufficient to address the amount of FY 2011 expenses alone, and with an anticipated increase of ten percent of expenses over last fiscal year, a 50 percent increase is necessary. The board is concerned about costs associated with incremental fee increases and is attempting to balance necessary revenue with these concerns.

COMMENT 3: A commenter suggested the board reduce operating expenses and implement a smaller fee increase.

RESPONSE 3: The board will continue to examine operating expenses with scrutiny. The department, likewise, will continue to organize and provide its administrative services to the board in an economical manner as possible, including implementing a new database and division reorganization that it anticipates will improve department services to the board.

At each meeting, the board discusses and provides copies of its budget, income, and expense statements to the public and encourages public comment on those items.

COMMENT 4: Several commenters opposed the increases and argued that the board is not using the fees to appropriately police the industry and ensure public safety. The commenters might accept the increased fees if licensees had greater confidence in the board's enforcement arm, but asserted the board has allowed a crematory operator to do removals, remove pacemakers, and discuss prices and arrangements for final disposition, which the commenters state are things only licensed morticians may do. As long as the board allows this threat against consumer protection to continue, no fee increase should be approved.

RESPONSE 4: The board has incurred expenses to process, investigate, and where supported by the evidence and law, prosecute complaints against licensees for unprofessional conduct and against individuals for unlicensed practice. A significant portion of this work goes on outside of public view and may go unnoticed by licensees. The board is also pursuing public enforcement actions, and the defense of these actions, and anticipated legal costs associated with doing so is included in the projected expenses for the fiscal year 2012 and 2013. These costs are also part of the reason why the board finds it necessary to increase fees.

COMMENT 5: Several commenters asserted that language in the reasonable necessity statement providing the need to increase fees by 50 percent now in order to avoid another increase in the near future implies that the board decided to increase fees beyond what is needed to cover current costs, and therefore violates statute. The commenters asserted that 37-1-134, MCA, which requires fees to be set commensurate with costs, refers to current costs, not anticipated costs. It is not appropriate for the board to build a reserve with fee increases for potential future costs that are not currently being incurred, just to avoid going through future rulemaking if and when increases are needed.

COMMENT 6: Several commenters stated that even though the board's current budget shows a significant negative difference between income and expenditures, the statement of reasonable necessity for the increases was inadequate, as it did not set forth whether the revenue expected from the fee increases would be commensurate with costs. Although the board appears to have considered various options of raising licensing fees, the commenters opined that the method used to justify the 50 percent fee increase on all licenses appears arbitrary.

RESPONSES 5 and 6: Section 37-1-134, MCA, does not contain language referring to "current" costs or other limitations of that nature. The board did not decide to

increase fees beyond what it determined is reasonably necessary. The board disagrees with the premise that it must only set fees based on "current" costs, because failing to anticipate future expenses would likely result in fiscal insolvency.

There has been a 29.59 percent increase since FY 2009 in personal services, including a 26.03 percent increase in health insurance premiums. The board has experienced turnover in administrative staff, which contributed to this increase. Legal services increased by almost 30 percent, and the rent for the Business Standards Division at the Park Avenue building has increased by 32.31 percent, and is expected to continue to increase with the leasing of additional space.

Information technology costs have increased by 44 percent, due in part to a new database conversion and the development and refinement of online transactions. The board anticipates significant costs related to the litigation of contested cases, including district court and possible appellate court costs, to engage in housekeeping legislation, and to revise administrative rules, which have not been updated since 2006.

The following chart demonstrates the board's expenses have increased by an average of ten percent per year over the past four years, while the number of licenses and revenue remain constant. If expenses increase at ten percent, the total expenses would be \$130,298. Compared with FY 2011 income at \$101,946, the difference leaves the department short \$28,298. The proposed revenue increase at 50 percent will garner \$152,919 and, hopefully, provide a sufficient safety net to meet any significant unexpected costs.

It should be noted that FY 2011 income, on which the projections are based, exceeded past years' income due to additional revenue resources, such as new applications. If the number of applications and other sources of nonroutine and recurring revenue return to a more typical level, the 50 percent increase on license fees and the revenue generated will come very close to meeting the projected expenses of \$130,298.

FY	Expenses	% Increase Over Last Year	Revenue	Deficit or Surplus
2011	\$118,453	26%	\$101,946	\$(16,507)
2010	\$93,713	2%	\$89,128	\$(4,585)
2009	\$91,979	4%	\$89,985	\$(1,994)
2008	\$88,400	8%	\$87,294	\$(1,106)
2007	\$82,053		\$94,055	\$12,002

If the board does build its cash reserve, the provisions of 17-2-302, MCA, prohibit it from maintaining a cash balance in its special revenue fund greater than twice the annual appropriation for that year, or greater than the biennial appropriation from the account for the biennium. The department manages these balances to avoid this occurrence and will abate renewal fees whenever this condition exists, as provided in ARM 24.101.301. Further, the legislative fiscal division maintains oversight of these cash balances through its audit process.

COMMENT 7: One commenter stated the method of raising fees by 50 percent on all licenses does not take into account the small business owner licensees who own multiple funeral homes. The commenter stated that the business the commenter associates with has licensing fees for five facilities and four individuals that would increase from \$2,050 to \$3,225, a net increase of \$1,175.

RESPONSE 7: The board concluded that increasing fees by a percentage on each license type was the most equitable manner of achieving the necessary revenue increase. An owner operating multiple facilities will see increases in a variety of categories of expenses, one being the facility fee. The mortuary fee, for example, will increase from \$250 to \$375.

COMMENT 8: Several commenters suggested the board withdraw the fee proposal and "go back to the drawing board." The commenters stated the board should develop and communicate a written plan to the licensees to ensure that end-of-life services are being provided by appropriately licensed individuals, and establish a more equitable and just schedule for raising licensing fees. Then, the board could submit a new rulemaking proposal to raise fees that supports the written plan and provides detailed information on the financial projections of the board, especially which fees will go to execute the written plan, and that the board is collecting only those fees that will go toward the current year's expenses.

RESPONSE 8: The board decided not to incur the expense to go through another rulemaking process at this time. The board will continue to enforce its laws and rules by processing complaints, and defending or prosecuting those actions when contested. The board agrees that a work plan is a beneficial exercise in meeting the goals and objectives of the board.

4. The board has amended ARM 24.147.401 exactly as proposed.

BOARD OF FUNERAL SERVICE
R.J. (DICK) BROWN, CHAIRPERSON

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State April 16, 2012