

BEFORE THE BOARD OF PRIVATE SECURITY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT AND
ARM 24.182.401 fee schedule and) ADOPTION
the adoption of NEW RULES I)
through V training courses standards)
and curriculum)

TO: All Concerned Persons

1. On August 25, 2011, the Board of Private Security (board) published MAR notice no. 24-182-33 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 1603 of the 2011 Montana Administrative Register, issue no. 16.

2. On September 19, 2011, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. Several comments were received by the September 27, 2011, 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 stated the board should not raise the fees, stating that it will cut into profit margins and create a burden on security companies during difficult financial times.

RESPONSE 1: After considerable review and discussion of the budget and income, the board concluded that it is reasonably necessary to increase fees as proposed to keep fees commensurate with program costs as required by 37-1-134, MCA.

The board has run deficits in its cash balance in increasing amounts over the last three fiscal years: -\$33,000 in FY 2008, -\$46,000 in FY 2009, and -\$107,000 in FY 2010. A fee increase was done in 2010, but despite the increase, the board ended the fiscal year with a negative cash balance of -\$52,884. That fee increase did not raise the cash balance because it went into effect after the renewal period when the majority of the board's income would have been received.

During FY 2011, as a cost savings measure, a full-time application specialist position was eliminated for the board, leaving the program manager to do both jobs. The board intends to only replace this position as a half-time position and these expenses have been included in the projection discussed below.

It is necessary to raise fees to restore a positive cash balance and increase revenue to meet the board's budgetary appropriation. The board recognizes current economic conditions, but maintains that the increases proposed is reasonable. If the board continues to control expenses and does not encounter any unexpected expenses, the board projects a \$137,000 cash balance at the end of FY 2014.

COMMENT 2: A commenter stated the board should not raise fees for security guards and that a hundred dollars for a security guard license is grossly exorbitant. The commenter asserted that the guards' low hourly wages make it difficult to pay higher license fees, especially when their employers do not pay the license fees.

RESPONSE 2: The board does not control the hourly wage of licensees nor employers' policies on paying their employees. For the response to the remainder of the comment, please see Response 1.

COMMENT 3: One commenter opined that the state could reduce its annual operating costs by not renewing all licenses every year, or not all at the same time. The commenter suggested staggering renewal periods and having a longer period of renewal, such as four or six years, will save costs.

RESPONSE 3: Because the number of licensees is relatively few, the workload at renewal time is manageable, and staggering or extending the renewal period would not have a significant cost benefit. If the renewal period were extended to cover more than one year, the renewal fees would need to be raised accordingly to cover the operating expenses for the lengthened time period and may instead become a hardship for many licensees. The board notes that during renewal period is when the board generates approximately 67 percent of its revenue for the fiscal year.

COMMENT 4: One commenter opined that introducing the fee increase now, after the legislative session, amounts to an end run around the Legislature. The commenter further stated that the fee increases constitute a tax increase, appear legally questionable, and suggested that if the board cannot balance its books, it is the fault of the board administrators. The commenter asserted that employees should be laid-off to balance the budget, rather than by increasing the fees.

RESPONSE 4: The board notes that licensure fees are not set forth in statute and do not require a bill introduced into the Legislature to be changed. Rather, the Legislature, in 37-1-134, MCA, has delegated the setting and charging of fees to the licensing boards through the administrative rulemaking process. The board notes that the Legislature continues to monitor and have jurisdiction over the rulemaking of the boards, and through its Economic Affairs Interim Committee, has reviewed the proposed fee increase under present consideration.

The fees are not a "tax" in the sense that they are not levied to support the general fund. The fees are imposed on individuals engaging in particular occupations and professions and fund a special revenue fund that only operates to regulate the particular occupations and professions.

For the response to the remainder of the comment, please see Response 1.

COMMENT 5: A commenter suggested the board streamline its operations and engage in more diligent time management to avoid raising fees, or that the board delay raising them until the business climate improves.

RESPONSE 5: See Response 1.

COMMENT 6: Commenters asserted that fees should not be raised in the proposed amounts and not this frequently, and pointed out that the board just raised fees in 2010 and should not raise them again.

RESPONSE 6: See Response 1.

COMMENT 7: One commenter suggested that if the board enforced licensing requirements against loss prevention and unlicensed security companies providing services, it would not be necessary to raise licensure fees.

RESPONSE 7: Loss prevention for retail merchants is exempt under 37-60-105(b), MCA. As for other unlicensed practice of private investigator and private security, neither Title 37, chapter 60 (Private Investigators, Private Security and Fire Entities, and Process Servers), nor Title 37, chapter 1 (General Provisions), authorize such inspections. This authorization could be achieved only through legislation. If it were introduced, the board would have to undergo an analysis to provide a fiscal impact to determine both income and expenses associated with such a proposal.

The board and department have the authority to investigate and take action on complaints of unlicensed practice filed by members of the public and, in most cases, this the only way the board finds out about such allegations. The costs of conducting such investigations presently are born out in the current fee proposal.

COMMENT 8: A commenter stated that if the board hired enforcement staff to audit security agencies every six months, and fined those operating without licenses, the board could reduce the amount of the fee increase.

RESPONSE 8: See Response 7.

COMMENT 9: A commenter stated the \$20 increase for a firearm endorsement is not commensurate with the actual cost to type the word "firearm" on a license.

RESPONSE 9: The board notes that the fee increase is commensurate with the entire cost of processing a firearm endorsement. To obtain a firearm endorsement, the security guard must qualify or requalify annually and submit proof of having done so to the board office. Some security guards (or the company on behalf of individual security guards) submit more than one certification a year.

Each time the board office receives such documentation, staff must scan the paperwork electronically and update the individual security guard's record. At renewal time, a percentage of all firearm endorsements has expired, requiring the license to be printed without the endorsement. When staff receives the request and documentation to support adding the firearm endorsement again, staff must process that documentation and print a new ID card.

COMMENT 10: A commenter noted that the board used to provide annual training, but due to lack of interest and costs, training is no longer being provided. The

commenter asserted that, even with this cut, the board is still raising fees and it is not apparent what licensees get, if anything, from their licensure fees.

RESPONSE 10: The purpose of the board is to safeguard the public health, safety, and welfare against illegal, improper, or incompetent actions committed by security companies and their licensed employees, firearms instructors, private investigators, or process servers. In this sense, the beneficiary of the licensing system is not the licensees, but the public.

The board may consider providing annual training once again when the financial status has improved. In the meantime, the types of costs that are part of operating the program include utilities, rent, equipment, supplies, mail, personnel, a new database, compliance and enforcement actions, and legal costs.

COMMENT 11: A commenter agreed that the fee increases are appropriate and licensing is a benefit, but stated there seems to be no enforcement or proof that enforcement exists. Licensure without enforcement is pointless.

RESPONSE 11: See Responses 7 and 10.

COMMENT 12: One commenter suggested that, with the fee increase, the state should request new photos for licenses and update the security manager license examination that was created in the 1960s and 1970s, because electronics have evolved greatly in the past ten years.

RESPONSE 12: Under ARM 24.182.403, the photograph must fairly and accurately represent the appearance of the licensee. If it does not, the board may require the submission of a new photo. The board could impose a requirement to update a photograph after a set interval; however, there would be a cost associated with that, which at this time, the board has determined is not prudent to require.

The board notes that the resident manager exam was last updated in 2009. Both before and after the revision, the exam consisted of only a laws and rules examination, and did not include any technical industry-specific information not otherwise covered in the applicable laws and rules.

4. The board has amended ARM 24.182.401 exactly as proposed.
5. The board did not adopt NEW RULES I through V as proposed.

BOARD OF PRIVATE SECURITY
HOLLY DERSHEM-BRUCE,
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 November 14, 2011