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NOTES

MANDAMUS AND MAPA JUDICIAL REVIEW

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I. INTRODUCTION

Mandamus lies to remedy the failure of an administrative agency to hold a hearing before denying a claim. A critical requisite for mandamus is satisfied when an administrative agency fails to hold a hearing on a claim as required by the Montana Administrative Procedure Act[1] [hereinafter referred to as the "MAPA" or the "Act"]. *State ex rel. Stowe v. Board of Administration of the Public Employees Retirement Division*[2] provides the basis for issuing writs of mandamus in these cases. This note delineates the requisites for mandamus, examines the *Stowe* decision to show how the critical requisite for mandamus is fulfilled by the failure of an administrative agency to hold a MAPA hearing, and offers suggestions toward a more effective MAPA.

II. REQUISITES FOR MANDAMUS

Mandamus is a prerogative writ which issues from a court of superior jurisdiction.[3] Its name is Latin and means "we command."[4] The writ may be directed to a private or municipal corporation or its officers, to an executive, administrative or judicial officer, or to an inferior court.[5] It commands the performance of specified acts or directs the restoration of the complainant to rights or privileges of which he has been illegally deprived.[6] Statutes govern the writ in Montana[7] and make it an attractive remedy by allowing successful applicants to recover attorney fees.[8] The statutes also prescribe pen-

1. REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], §§ 82-4201 to 4229 (Supp. 1977).

2. [Hereinafter cited as *Stowe*], ___ Mont. ___, 564 P.2d 167 (1977).

3. In Montana "It may be issued by the supreme court or the district court, or any judge of the district court. . . ." R.C.M. 1947, § 93-9102.

4. BLACK'S LAW DICTIONARY 1113 (4th ed. 1968). In Montana it may also be called a "writ of mandate." R.C.M. 1947, § 93-9101.

5. R.C.M. 1947, § 93-9102 provides in part: "It may be issued . . . to any inferior tribunal, corporation, board, or person. . . ."

6. R.C.M. 1947, § 93-9102 provides in part: "It may be issued . . . to compel the performance of an act . . . or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded . . . ."

7. R.C.M. 1947, § 93-9101 to 9114.

8. So construing R.C.M. 1947, § 93-9112 are: State *ex rel.* O'Sullivan v. District Court, 127 Mont. 32, 37, 256 P.2d 1076, 1078-79 (1953); State *ex rel.* Lynch v. Batani, 103 Mont. 353, 364, 62 P.2d 565, 569 (1936); State *ex rel.* Gebhardt v. City Council of Helena, 102 Mont.

alties for disobedience of the writ.[9]

A. *Clear Legal Duty—No Discretion*

Mandamus lies to compel action but not to control discretion.[10] The action compelled must be a clear legal duty[11] (the petitioner having a clear legal right) and must involve no element[12] of discretion.

Ordinarily administrative agencies have discretion as to the substance of a petitioner's claim. Agencies often have no discretion as to the procedure they must follow in deciding the claim. Consequently, mandamus ordinarily may command that power or discretion be exercised but not to what substantive effect it shall be exercised.[13] For example, where a hearing is a required procedure the writ ordinarily may say "hold a hearing and decide" but may not say "grant (or deny) petitioner's substantive claim."

B. *No Other Remedy*

Mandamus is an extraordinary writ and issues only where there is no other adequate remedy.[14] R.C.M. 1947, § 93-9103 declares that "[t]he writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law."

The MAPA provides for judicial review of contested cases.[15] An administrative agency which has denied a petitioner's claim without a MAPA hearing will argue that mandamus does not lie against

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27, 42, 55 P.2d 671, 678 (1936); State *ex rel.* Shea v. Cocking, 66 Mont. 169, 176-77, 213 P. 594, 596 (1923).

9. R.C.M. 1947, § 93-9114 provides:

> When a preemptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court or judge that any member of such tribunal, corporation, or board, or person upon whom the writ has been personally served, has, without just excuse, *refused or neglected* to obey the same, the court may, upon motion, impose a *fine* not exceeding *one thousand dollars*. In case of *persistence* in a *refusal* of obedience, the court may order the party to be *imprisoned* until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ. [Emphasis added]

10. State *ex rel.* Barnes v. Town of Belgrade, 164 Mont. 457, 470, 524 P.2d 1112, 1113-14 (1974).

11. State *ex rel.* Butte Youth Service Center v. Murray, ___ Mont. ___, ___, 551 P.2d 1017, 1019 (1976); Burgess v. Softich, 167 Mont. 70, 73, 535 P.2d 178, 179 (1975); State *ex rel.* Russell Center v. City of Missoula, 166 Mont. 385, 388, 533 P.2d 1087, 1089 (1975). R.C.M. 1947, § 93-9102 provides in part: "It may be issued . . . to compel the performance of an act which the law specially enjoins as a duty resulting from an office or station. . . ."

12. State *ex rel.* Anderson v. Gile, 119 Mont. 182, 187, 172 P.2d 583, 586 (1956).

13. State *ex rel.* Rowe v. District Court, 44 Mont. 318, 326-27, 119 P. 1103, 1107 (1911) (dictum).

14. State *ex rel.* May v. Hartson, 167 Mont. 441, 445, 539 P.2d 376, 378-79 (1975) (applying R.C.M. 1947, §§ 93-9102, 9103).

15. R.C.M. 1947, § 82-4216.

it because the petitioner has another adequate remedy, namely MAPA judicial review. *Stowe* provides two theories which defeat this argument.

III. STOWE

A. The Facts

Daniel Stowe was totally and permanently disabled when he fell down a flight of stairs in the course of his employment by the city of Helena. Stowe's employment was terminated and he was given an application for refund of his contributions to the Public Employees Retirement Division [hereinafter referred to as the "PERS"].[16] He was not told and he did not know that he had a right to apply for a disability retirement allowance. Stowe signed the refund application, received a refund of his contributions, and lost all PERS membership benefits.[17] Later Stowe applied for reinstatement to PERS and submitted a claim for a disability retirement allowance. The Board approved Stowe's reinstatement on the condition that he redeposit his refunded contributions with interest[18] and determined that his benefits would start from the date of redeposit. Stowe redeposited his refunded contributions with interest, requested that the benefit payments start from the date of injury, and requested a hearing on his claim for benefits between the date of injury and the date of redeposit. Shortly thereafter Stowe filed with the Board a petition, several affidavits and other papers documenting his claim and again requested a hearing.

The Board did not grant a hearing date. It met, ruled against Stowe's petition, and informed him of the decision by letter dated May 27, 1975. The Board never informed Stowe that it had any questions about his claim nor that it intended to deny his petition.

On July 17, 1975 Stowe petitioned for a writ of mandamus to compel the Board to start payment of the benefits from the date of his injury. The Board argued that mandamus did not lie for two reasons. First, Stowe had another adequate remedy in MAPA judicial review but lost it by not petitioning for review within the statutory thirty days from sevice of the agency's final decision.[19] Second, it had no clear legal duty to start the payments from the earlier

16. R.C.M. 1947, § 68-1905 (Supp. 1977) permits a refund of contributions where a member's service is discontinued because of disability.

17. R.C.M. 1947, § 68-1603 (Supp. 1977) provides in part that "If any part of a member's accumulated normal contributions are refunded pursuant to section 68-1905, he ceases to be a member and all membership service to his credit is canceled."

18. For reinstatement of previous membership service R.C.M. 1947, § 68-1906 (Supp. 1977) requires the redeposit with interest.

19. R.C.M. 1947, § 82-4216(2) (Supp. 1977).

date. The district court agreed and denied Stowe's mandamus petition. Stowe appealed.

B. *Estoppel*

The Montana supreme court held that the Board was estopped from asserting that MAPA judicial review was Stowe's only remedy.[20] Because the Board "at no time indicated it was bound by and acting pursuant to the MAPA"[21] and did not render "even token compliance"[22] with the Act, it was held to be "manifestly unfair"[23] to limit Stowe to his judicial review remedy under the MAPA.

The Board failed to comply with a host of procedures required by the MAPA. Stowe's claim was a "contested case."[24] For contested cases the MAPA specifically requires notice and hearing,[25] details record requirements,[26] prescribes the form and content and

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20. Stowe, ___ Mont. at ___, 564 P.2d at 170, 171.

21. *Id.* at ___, 564 P.2d at 170.

22. *Id.* at ___, 564 P.2d at 171.

23. *Id.* at ___, 564 P.2d at 170.

24. R.C.M. 1947, § 82-4202(3) (Supp. 1977) provides in part: "'Contested case' means any proceeding before an agency in which a determination of legal rights, duties or privileges is required by law to be made after an opportunity for hearing." R.C.M. 1947, § 82-4209(1) (Supp. 1977) provides that "In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." This is circular. The court treated Stowe's claim as a "contested case." Stowe, ___ Mont. at ___, 564 P.2d at 170-71.

25. R.C.M. 1947, § 82-4209 (Supp. 1977) provides in part:

(1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(2) The notice shall include:

(a) A statement of the time, place and nature of the hearing.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

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

(4) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

26. R.C.M. 1947, § 82-4209 (Supp. 1977) provides in part:

(5) The record in a contested case shall include:

(a) All pleadings, motions, intermediate rulings.

(b) All evidence received or considered, including a stenographic record of oral proceedings when demanded by a party.

(c) A statement of matters officially noticed.

(d) Questions and offers of proof, objections, and rulings thereon.

(e) Proposed findings and exceptions.

(f) Any decision, opinion or report by the hearing examiner or agency member presiding at the hearing.

requires notice of final decisions.[27] The Board disregarded this entire catalogue of procedures and was therefore estopped from requiring Stowe to limit himself to MAPA judicial review.

The court also held that the Board had a clear statutory duty to start the benefits payments from the date of injury.[28] The Board was totally without discretion as to the substance of Stowe's claim. Because of this extraordinary duty[29] and the estoppel of the Board to raise the defense that Stowe had another adequate remedy, mandamus was appropriate to do more than order a MAPA hearing. The district court was reversed, the Board was ordered to start the benefit payments from the date of injury, and the cause was remanded to assess attorney fees to be awarded Stowe for proceedings in the district court.[30]

The opinion is deficient in establishing the basis for applying equitable estoppel. The elements of equitable estoppel in Montana law are clear. R.C.M. 1947, § 93-1301-6(3) crystallizes[31] equitable estoppel into statutory form. The statute requires all the common law elements:[32] 1. There must be conduct—acts, language, or silence—amounting to a misrepresentation or concealment of material facts. 2. The party estopped must have actual or imputed knowledge of the facts at the time of its conduct. 3. The true facts must be unknown to the estoppel asserter. 4. The conduct must be done with the intent or expectation that the estoppel asserter will act upon it or under such circumstances that it is natural and proba-

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(g) All staff memoranda or data submitted to the hearing examiner or members of the agency as evidence in connection with their consideration of the case.

27. R.C.M. 1947, § 82-4213(1) (Supp. 1977) provides:

(1) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

28. Stowe, ___ Mont. at ___, 564 P.2d at 170.

29. *See* discussion at n. 13, *supra.*

30. Stowe, ___ Mont. at ___, 564 P.2d at 171.

31. Gerard v. Sanner, 110 Mont. 71, 80, 103 P.2d 314, 319 (1940); Lindblom v. Employers' Liab. Assurance Corp., 88 Mont. 488, 494, 295 P. 1007, 1009 (1930); Waddel v. School Dist., 74 Mont. 91, 96, 238 P. 884, 885 (1925).

32. State *ex rel.* Howeth v. D. A. Davidson & Co., 163 Mont. 355, 366-67, 517 P.2d 722, 728-29 (1973); Smith v. Krutar, 153 Mont. 325, 332, 457 P.2d 459, 463 (1969); Hustad v. Reed, 133 Mont. 211, 222-23, 321 P.2d 1083, 1090 (1958); City of Billings v. Pierce Packing Co., 117 Mont. 255, 266-67, 161 P.2d 636, 640-41 (1945); Mundt v. Mallon, 106 Mont. 242, 249-50, 76 P.2d 326, 329 (1938); Lindblom v. Employers' Liab. Assurance Corp., 88 Mont. 488, 494-95, 295 P. 1007, 1009 (1930).

ble that it will be acted upon. 5. The estoppel asserter must rely and act upon the conduct. 6. The estoppel asserter must in fact change its position for the worse by acting upon the conduct. Silence works an estoppel only where the estopped party has a duty to speak[33] and intends to mislead or is willing to deceive the estoppel asserter.[34]

The opinion mentions neither the estoppel statute nor estoppel cases. It does not discuss the essential elements of estoppel. Apparently the court's opinion was that the Board's silence respecting the applicability of the MAPA to the proceedings worked the estoppel. A duty to speak is implied in the court's statement that the Board "at no time indicated it was bound by and acting pursuant to the MAPA."[35] This would fulfill the estoppel element numbered "1" above. It is unclear whether the elements numbered "2" through "6" above were present. The Board's intent to mislead or willingness to deceive would be the most difficult element to prove.

The application of estoppel in *Stowe* is supportable despite these criticisms. First, estoppel was invoked to avoid a "manifestly unfair" result.[36] Second, the vital principle of estoppel did apply. The gravamen of equitable estoppel is that one who hurts another by acting as though something false is true binds itself to live with its falsehood and bars itself from later pleading the truth.[37] When

33. City of Billings v. Pierce Packing Co., 117 Mont. 255, 267, 116 P.2d 636, 641 (1945); Sherlock v. Greaves, 106 Mont. 206, 217, 76 P.2d 87, 91 (1938); Solberg v. Sunburst Oil & Gas Co., 76 Mont. 254, 269, 246 P. 168, 175 (1926); Mettler v. Rocky Mountain Security Co., 68 Mont. 406, 411, 219 P. 243, 245 (1923); Moore v. Sherman, 52 Mont. 542, 548, 159 P. 966, 968 (1916); Kennedy v. Grand Fraternity, 36 Mont. 325, 340-41, 92 P. 971, 976 (1907); Finlen v. Heinze, 32 Mont. 354, 381-82, 80 P. 918, 925 (1905).

34. City of Billings v. Pierce Packing Co., 117 Mont. 255, 267, 161 P.2d 636, 641 (1945); Sherlock v. Greaves, 106 Mont. 206, 217, 76 P.2d 87, 91 (1938); Scott v. Jardine Gold Mining & Milling Co., 79 Mont. 485, 495-96, 257 P. 406, 410 (1927).

35. Stowe, ___ Mont. at ___, 564 P.2d at 170. *See* discussion at n. 21, *supra.*

36. *See* discussion at n. 23, *supra.*

37. EWART, AN EXPOSITION OF THE PRINCIPLES OF ESTOPPEL BY MISREPRESENTATION 3-7 (1900) on the definition of estoppel reports that:

> Lord Coke tells us that
>
> > "'Estoppel' cometh of the french word *estoupe,* from whence the English word *stopped;* and it is called an estoppel, or conclusion, because a man's own act, or acceptance, stoppeth or closeth up his mouth to allege or plead the truth."

Id. at 3. On the justification of estoppel Ewart asserts that:

> The true justification for estoppel by personal misrepresentation is clearly put in a note in the eleventh edition of Coke upon Littleton:
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> > "No man ought to allege anything but the truth from his defense; and what he has alleged once is to be presumed to be true, and therefore he ought not to contradict it; for as it is said in the 2 Inst. 272, *Allegans contraria non est audiendus.*" Blackburn, J., well states the matter:
> >
> > ". . . .When a person makes to another a representation, 'I take it upon myself to say such and such things do exist,' and the other man does really act upon that basis, it seems to me that it is of the very essence of

the Board denied Stowe's claim, it acted as though the MAPA did not apply. When Stowe sought mandamus the Board pleaded that the MAPA did apply so as to preclude the issuance of the writ. This was inequitable and the district court was properly reversed.

C. *No MAPA Judicial Review*

The court concluded that the letter of denial to Stowe was not a "final decision" within the meaning of the MAPA.[38] Yet the court apparently overlooked the implication of its conclusion. Had it recognized that the lack of a final decision precluded judicial review, it could have held that Stowe had no adequate remedy other than mandamus. Thus, the court's application of estoppel was unnecessary.

The right of MAPA judicial review arises upon[39] and continues for a period beginning at[40] service of an agency's "final decision." The court concluded that the Board's letter informing Stowe that his claim had been denied did not meet the requirements for a "final decision" under the MAPA.[41] The court said that "[w]hile there is little doubt that it was a final decision as far as the PERS board was concerned, it did not comply with the requirements of section 82-4213, R.C.M. 1947, as to the contents of a final order,"[42] quoting the pertinent provisions of the statute. These provisions included "findings of fact and conclusions of law, separately stated." Obviously the Board couldn't state findings of fact because it had held no hearing and developed no record. Nothing reviewable was done by the Board. Therefore, the right of MAPA judicial review under R.C.M. 1947, § 82-4216(1) never arose. The record to which MAPA judicial review must be confined[43] did not exist and the period of limitations for seeking judicial review never began and could not end. Consequently, Stowe did not lose his MAPA right of review because he never had it. There was no need to estop the Board from raising a defense which should have failed on its own merits.

This analysis is consistent with prior holdings of the Montana supreme court. In *State ex rel. Lovely v. Swanberg*[44] where a claim

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> justice that, between these two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is what I apprehend is meant by estoppel *in pais* or homologation."

Id. at 6 [footnotes omitted].

38. Stowe, ___ Mont. at ___, 564 P.2d at 171.
39. R.C.M. 1947, § 82-4216(1) (Supp. 1977).
40. R.C.M. 1947, § 82-4216(2) (Supp. 1977).
41. Stowe, ___ Mont. at ___, 564 P.2d at 171.
42. *Id.*, at ___, 564 P.2d at 171. *See also* R.C.M. 1947, § 82-4209 (Supp. 1977).
43. R.C.M. 1947, § 82-4216(6) (Supp. 1977).
44. 135 Mont. 10, 12, 335 P.2d 853, 854 (1959).

had been summarily denied without a hearing the court held that the claimant need not appeal but may resort to mandamus to compel a hearing since he had been denied an opportunity to make a record upon which to base his appeal. In *State ex rel. Morgan v. White*[45] the PERS Board failed to hold a hearing on a claim for a higher category of benefits than that previously approved by the Board. The claimant sought and the district court issued mandamus to command payment of the higher benefits. The type of benefits to which the claimant was entitled was a question within the discretion of the Board. Consequently mandamus to command payment of the higher category of benefits did not lie[46] and the district court was reversed. The cause nevertheless was remanded with directions that the district court order the Board to grant and hold a proper hearing and come to a record-based determination of the claimant's rights.[47]

The failure of an agency to perform its clear legal duty to hold a MAPA hearing and make a record-based decision prevents the MAPA right of review from arising. Therefore, the claimant has no remedy other than mandamus and the writ will issue. If it were otherwise administrative agencies could profit by their own procedural wrongs.[48]

IV. Toward a More Effective MAPA

The Montana Administrative Procedure Act rather than extraordinary writs should control administrative procedure. The Montana supreme court can promote a more effective MAPA. *Stowe* implied that an administrative agency has the duty to inform claimants that the MAPA governs claim proceedings. The court can elucidate this duty so as to strengthen the MAPA and reduce the need for control of agencies through extraordinary writs of mandamus.

The duty could be articulated this way: When an agency subject to the Act informs a claimant in a contested case of an adverse decision the agency must:

1. make a clear and conspicuous statement that the decision is final,
2. inform the claimant of its right of judicial review under R.C.M. 1947, § 82-4216(1), and
3. inform the claimant that the time limited for instituting the

45. 136 Mont. 470, 348 P.2d 991 (1960).

46. This illustrates what is characterized as the ordinary situation in the discussion at n. 13, *supra*.

47. 136 Mont. at 484-85, 348 P.2d at 998.

48. R.C.M. 1947, § 49-109 declares that "No one can take advantage of his own wrong."

MAPA judicial review is thirty days under R.C.M. 1947, § 82-4216(2).

If these disclosures were made, a case could be distinguished from *Stowe* to the effect that the denial is a "final decision" resulting in the accrual of a MAPA right of judicial review. A failure to institute the review within the time limited would result in dismissal. The scope of judicial review is broad enough to correct an agency's capriciousness and abuse of discretion[49] in failing to substantially comply with MAPA procedural requirements, especially holding a hearing and coming to a record-based decision. Should a reviewing court desire the benefit of an agency-developed record and agency expertise, remand procedures could be used. Agencies would be more likely to have satisfied MAPA procedural requirements before making these disclosures because the disclosures would enhance the prospect of early review where there has been no hearing.

V. CONCLUSION

Mandamus is the appropriate remedy for a person whose claim is denied without hearing by an administrative agency. Under the MAPA, state agencies have a clear legal duty to hold hearings in contested cases, and to base their decisions in such cases on the record. When an agency fails to hold a hearing, no right of judicial review under the MAPA arises, and the claimant is left with no remedy other than mandamus. Thus, the requisites for mandamus are satisfied—the agency has a clear legal duty to hold a hearing, and the petitioner has no other adequate remedy. The court should issue a writ of mandamus to compel a hearing.

Even if a court does not recognize that a claimant lacks the right to judicial review under the MAPA when an agency fails to hold a hearing, the *Stowe* decision provides an additional basis for mandamus. An agency's failure to comply with MAPA may estop it from asserting that the claimant has an adeqate remedy under the MAPA judicial review procedures.

49. R.C.M. 1947, § 1947, § 82-4216(7)(f) (Supp. 1977).