BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

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MISSOULA ELEMENTARY ASSISTANTS AND PARAPROFESSIONALS CLASSIFIED ASSOCIATION,	)	
Appellants,	)	OSPI 202-92
vs.	)	**DECISION *AND* ORDER**
TRUSTEES, MISSOULA SCHOOL DISTRICT NO. 1,	)	
Respondents.	)	

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PROCEDURAL HISTORY

Appellants, Missoula Elementary Assistants and Paraprofessionals Classified Association (the Association) and Respondents, Trustees, Missoula School District No. 1 (the District), are parties to a Collective Bargaining Agreement (CBA). The Association filed a grievance under the CBA Grievance Procedure alleging that the District violated the CBA when it adopted a mid-contract requirement that only aides with a special education endorsement would be placed on the higher, paraprofessional instructional assistant salary schedule. The grievance was denied by the Board of Trustees.

The Association then filed an appeal with the County Superintendent of Schools. The County Superintendent held a hearing on January 2, 1992, and issued Findings of Fact, Conclusions of Law and Order affirming the District's denial of the Association's grievance. The Association appealed the County

Superintendent's decision to the State Superintendent on March 21, 1992. The parties briefed the appeal and the matter was deemed submitted for decision on June 22, 1992.

On August 25, 1992, the State Superintendent issued an ORDER requesting that the parties brief the following issue:

> Whether the County Superintendent had jurisdiction to hear the appeal of the Board of Trustees' decision denying the grievance.

The District and the Association joined in a Motion for Postponement of the briefing schedule pending judicial review of the State Superintendent's decision in Althea Smith v. Board of Trustees, Judith Basin County School District No. 12, Montana First Judicial District, Lewis and Clark County, Cause No. CDV-92-1331, 12 Ed. Law 24 (1993).

On October 7, 1992, the State Superintendent GRANTED the motion for postponement. The District Court's decision in Smith was issued on February 11, 1993. The parties briefed the jurisdiction issue following the Smith decision.

STANDARD OF REVIEW

This Superintendent's review of a County Superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in § 2-4-704, MCA, and adopted by this Superintendent in Rule 10.6.125, ARM. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed under an abuse of discretion standard. Harris v. Trustees, Cascade County School Districts No. 6 and F, 241 Mont. 274, 786 P.2d 1164 (1990). The petitioner bears

the burden of showing that he has been prejudiced by a clearly erroneous ruling. Terry v. Board of Regents, 220 Mont. 214, at 217, 714 P.2d 151, at 153 (1986).

The State Superintendent may not substitute her judgment for that of a County Superintendent as to the weight of the evidence on questions of a fact. Findings are upheld if supported by substantial, credible evidence in the record. A finding is clearly erroneous only if a "review of the record leaves the Court with the definite and firm conviction that a mistake has been committed." State Compensation Mutual Insurance Fund v. Lee Rost Logging, 252 Mont. 97, at 102, 827 P.2d 85 (1992).

Conclusions of law are subject to more stringent review. Conclusions of law are reviewed to determine if the agency's interpretation of the law is correct. Steer. Inc. v. Dept. of Revenue, 245 Mont. 470, at 474, 803 P.2d at 603 (1990).

DECISION *AND* ORDER

The County Superintendent has jurisdiction to hear and decide an allegation of breach of a collective bargaining agreement under the Montana Supreme Court's decision in Canvon Creek Education Association v. Board of Trustees, Yellowstone County School District No. 4, 241 Mont. 73, 785 P.2d 201 (1990). The decision of the County Superintendent is hereby AFFIRMED.

DISCUSSION

The Association raised the following issues on appeal to the State Superintendent:

1. The County Superintendent erred in Finding of Fact #17 that evidence was lacking that the school district established a

practice of consistently limiting placement on the P.I.A salary schedule to certified individuals with a special education endorsement.

2. The county superintendent erred in Conclusion of Law #4 that the school district assigned assistants to the P.I.A. salary schedule consistent with the collective bargaining agreement.

3. The County Superintendent made a procedural error in not permitting Appellant to introduce evidence relating to proposed language for the **1991-1992** collective bargaining agreement.

The Association filed a grievance under the negotiated grievance procedure set forth in Article 6 of the CBA. The grievance was denied at Levels One, Two and Three. The grievance could not be advanced to Level Four, Binding Arbitration, because it did not involve discipline or discharge. Following the Board's denial of the grievance at Level Three, the Association filed an appeal with the County Superintendent. The County Superintendent affirmed the Board's decision denying the grievance on the grounds that the Board's action did not breach the CBA. The Association then appealed the decision of the County Superintendent to the State Superintendent in accordance with § **20-3-107**, MCA, and ARM **10.6.121.**

The County Superintendent has jurisdiction to decide whether the District breached the terms of the CBA. Canyon Creek, supra.

The Association alleged that the District breached the following provision of the CBA: "Placement on the P.I.A. Schedule is contingent upon review of the Assistant's college programs for relevant course work." The Association argues that the breach occurred when the District unilaterally decided to interpret the phase "relevant course work" to mean "special education

endorsement." The Association contends that prior to the change, an assistant who was certified (as a teacher) or had a relevant college degree was placed on the P.I.A. Schedule and after the change only an assistant with an endorsement in special education was placed on the P.I.A. Schedule. The CBA contains no criteria upon which to determine which course work of an assistant is "relevant." The District contends that it has a management right to make that determination. The Association contends that it should have been permitted to introduce "bargaining history" exhibits to assist the County Superintendent in resolving the dispute between the parties and that her refusal to admit such exhibits is reversible error.

In Conclusion of Law #6, the County Superintendent states: "The language of the contract is not ambiguous." This is a finding of fact rather than a conclusion of law. It is a general rule of labor law that:

> 'Past practice, no matter how well established that practice may be, cannot alter the terms of a contract whose clear and unambiguous terms establish what amounts to negotiated mutual promises by the parties to a contract.'. . . Arbitral opinions are legion in which clear and unambiguous contract language is credited by the arbitrator as being dispositive of an issue. F. Elkouri, E.A. Elkouri, How Arbitration Works, 4th Ed., 1985-87 Supplement, p. 66 (1988).

Respondent's Brief dated May 14, 1992, page 11.

This Superintendent is persuaded that the County Superintendent did not err in upholding the District's objection to the admission of Joint Exhibit #3. Given her finding that the language of the CBA was not ambiguous, the County Superintendent

was constrained to interpret the CBA as written. The language in the CBA does not contain a criterion beyond the use of the phrase: "review of the assistant's college programs for relevant course work." The plain language of the CBA permitted the District to determine which college programs were relevant for placement of assistants on the P.I.A. schedule. Whether the relevancy was determined in regard to teacher certification, college degree or special education endorsement or a combination of the three, all such determinations were based on "review of the assistant's college programs for relevant course work."

The plain meaning of the CBA language permitted the change in criterion alleged by the Association. Whether the County Superintendent's Finding of Fact #17 is in err is immaterial to the decision.

EXCLUSIVITY OF CBA NEGOTIATED GRIEVANCE PROCEDURE

The District contends that the grievance procedure set forth in Article 6 of the CBA provides the exclusive remedy for processing the Association's grievance alleging breach of the CBA. A review of the complete record before the County Superintendent fails to show that the District raised this exclusivity issue in the proceeding before the County Superintendent. (See Prehearing Order of County Superintendent dated January 28, 1992.) The State Superintendent's review of the County Superintendent's decision is limited to "those issues determined by the County Superintendent." Harris v. Bauer, 206 Mont. 480, 672 P.2d 26, 40 St.Rep. 1793, at 1800 (1983). Since the issue of the exclusivity of the CBA

grievance procedure was first raised in this appeal to the State Superintendent, the issue will not be considered.

DATED this 15 day of July, 1994.

Nancy Keenan
NANCY KEENAN

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 8th day of July, 1994, a true and exact copy of the foregoing Decision and Order was mailed, postage prepaid, to the following:

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