BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

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BOARD OF TRUSTEES, ROSEBUD COUNTY SCHOOL DISTRICT NO. 19, COLSTRIP, MONTANA, Appellant, vs. ELMER R. BALDRIDGE, Respondent.	OSPI NO. 249-95 (Fourth Appeal) **DECISION AND ORDER**

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This is an appeal by Rosebud County School District No. 19, Colstrip, (hereinafter Colstrip or "the District") of a decision by Shirley Barrick, Fergus County Superintendent, acting for the Rosebud County Superintendent. The County Superintendent reversed the District's May 16, 1988, decision to terminate the employment of Elmer Baldridge, a tenured teacher.

This is the fourth review of this matter by this Superintendent. The first two County Superintendent orders issued were remanded and the third order was reversed by this Superintendent. On appeal, the Supreme Court again remanded to the County Superintendent because her third order did not comply with § 2-4-623, MCA, or ARM 10.6.119 and her reasoning was unreviewable. Baldridge v. Rosebud County School District 19, 264 Mont. 199, 870 P.2d 711 (1994) (hereinafter "Baldridge").

The Court did not reach the substantive merits of the case, stating, "We do not comment upon whether due process was followed

by the Board nor do we pass judgement on whether Baldridge should have been terminated." Baldridge, 870 P.2d at 715. The Montana Supreme Court remanded with the instructions that the County Superintendent must:

> [comply] with the statutes and rules applicable in drafting her decision . . . [and] provide underlying facts to support the findings of fact and ensure that the conclusions of law are supported by authority or reasoned opinion.

Baldridge, 870 P.2d at 718.

This matter was originally heard May 30, 1989, and has not been reheard on remand. In her fourth order issued January 19, 1995, the County Superintendent again reversed Mr. Baldridge's termination. The District appealed on the grounds that the County Superintendent erred as a matter of law in her conclusion that the school district failed to establish good cause for the termination.

STANDARD OF REVIEW

This Superintendent's review of county superintendents' orders is based on the standard of review of administrative decisions established by the Montana Legislature in § 2-4-704 and adopted by this Superintendent in ARM 10.6.125.

Findings of fact are reviewed under a clearly erroneous standard. Harris v. Trustees, Cascade County School Districts No. 6 and F, 241 Mont. 274, 786 P.2d 1164 (1990). Baldridge, 870 P.2d at 714 (1994). 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." Wage Appeal v. Board of Personnel Appeals, 208 Mont. 33, 40, 676 P.2d 194, 198 (1984). State Compensation Mutual Insurance Fund v. Lee Rost Logging, 252 Mont. 97, 102, 827 P.2d 85, 88 (1992).

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, 474, 803 P.2d 601, 603 (1990). Baldridge, 870 P.2d at 714 and 715 (1994).

DECISION AND ORDER

The County Superintendent was the trier of fact who heard the evidence and this Superintendent affirms her findings of fact. Given the County Superintendent's numerous findings which are supported by the record, that Elmer Baldridge had, in fact, engaged in the conduct that the District considered incompetent or unfit conduct by a teacher, her conclusions of law that the District failed to establish good cause for Mr. Baldridge's dismissal is incorrect and is REVERSED.

Discussion

I. The determination of what conduct constitutes grounds for dismissal is a conclusion of law. The Montana Supreme Court reviews the determination of what conduct constitutes incompetence or unfitness (or other grounds for dismissal) as a conclusion of law.

> The findings of the School district establishing Harris' incompetence are supported by the record. They are not therefore clearly erroneous. Given this evidence, the conclusion of law stating that Harris was properly terminated for incompetence and unfitness was not an abuse of discretion. The judgement in this regard is affirmed.

Harris v. Bailey, 244 Mont. 279, 798 P.2d 96, 100 (1990).

In Baldridge, 870 P.2d at 714 and 715, the Supreme Court clarified the standard of review for conclusions of law it had set forth in Throssell v. Board of Trustees, 248 Mont. 392, 812 P.2d 767 (1991). The Court wrote that the standard for reviewing conclusions of law stated in Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990), also applies in contested cases between school districts and teachers.

This means that the standard of review for conclusions of law is different than that for findings of fact. "[N]o discretion is involved when a tribunal arrives at a conclusion of law -- the tribunal either correctly or incorrectly applies the law." Baldridge, 870 P.2d at 714. This Superintendent must defer to a county superintendent's findings if there is substantial, credible evidence in the record. There is no deference to conclusions of law, however. Conclusions of law are reviewed to determine if the county superintendent correctly applied statute and case law to the facts he or she found.

The prior three remands in this case were on the grounds that the County Superintendent's Order did not contain explicit statements of facts supporting the findings based exclusively on the evidence and supporting authority. In this Order the County

Superintendent correctly followed the directions of the Supreme Court. Her Order contains reviewable findings of fact with citation to supporting evidence.

The Rosebud County Superintendent incorrectly applied the Montana statute and case law to the facts of this case, however. A review of the record in this case leaves the definite and firm conviction that the County Superintendent's Order is incorrect[1].

II. Error of Law in this Order. Conclusion of Law 26 is the County Superintendent's ultimate conclusion. It states:

> "I conclude that the School Board has failed to establish sufficient evidence, either clear and convincing or by a preponderance of the evidence, sufficient to support a dismissal for incompetency, unfitness, violation of board policies, individually or cumulatively."

Given the County Superintendent's numerous findings, based on a preponderance of the evidence that Mr. Baldridge engaged in incompetent and/or unfit conduct for a teacher, this conclusion is a non sequitur and an error of law.

School trustees have statutory authority to terminate a teacher under contract for incompetency and unfitness to teach. Section 20-4-207(1) states: "The trustees of any district may

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[1] Review of administrative findings of fact is also analogous to review of findings in a non-jury case. The Supreme Court has held that findings of fact in a non-jury case are reviewed under a three part test: one, are the findings supported by substantial evidence; two, has the trial court misapprehended the effect of the evidence; and, three, does a review of the record leave the definite and firm conviction that a mistake has beeen committed. Interstate Prod. Credit Ass'n v. DeSaye, 250 Mont 320, 323, 820 P.2d 1285, (1991). Using this standard of review, the County Superintendent's Order reinstating Mr. Baldridge would be reversed because, given her findings that the egregious conduct did in fact occur, she has misapprehended the effect of the evidence and the Order leaves this Superintendent with the firm conviction that a mistake has been made.

dismiss a teacher before the expiration of his employment contract for immorality, unfitness, incompetence, or violation of the adopted policies of such trustees."

In this case, the County Superintendent's Order includes the following findings with cites to the record:

> 11. On April 11, 1988, High School Principal Pearce received a letter from Mr. and Mrs. Comer, parents of Tina Comer, complaining about an incident which occurred in Baldridge's class on March 30, 1988. The incident involved Baldridge placing a rubber glove on his hand in front of his face, palm in, and asking, "May I have a female volunteer?" (Respondent Exhibit 4; Tr. pp. 18, 1.24-25, 44-45, 79, 97, 107, 413). . . . [This is referred to as "the glove incident" in the transcript and Order.]
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> 15. Baldridge explained that in the process of cleaning the lab, there was glassware on the counter. Baldridge had asked the students when they had time to assist him. "I picked up the glove, put it on my right hand, half turned back to the classroom, and said, 'May I have a female volunteer from the audience?" (Tr. p. 412, 1.23). . . .
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> 16. During his testimony before the School Board, Baldridge testified:
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> > "(i)t seemed to me, in the first period, the joke got a real big hit. My kids know that we joke and laugh around alot. It got such a big hit that I took the show on the road, more or less, and did it a couple more times. I didn't do it in all the classes, though, I guess we were too busy in a couple of them. I did it in several classes." (Respondent Exhibit 2, p. 143)
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> 17. The glove incident occurred during three separate class periods. . . . The students laughed at the incident and Baldridge testified before the School Board that it was a joke. (Respondent Exhibit 3, pp. 6-7; Tr. pp. 18, 24-25, 44-45; Respondent Abbott 2, p. 143).
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> . . . .
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> 23. Baldridge provided a detailed account of the "stop, drop and blow" incident and believed Chris

Novasio had misunderstood him (Tr. p. 416, 1.7). Baldridge testified as follows.

> "On the Monday following District Music Festival of 1988, I had a student, Jay Cotner, who was arguing with me about his ability to turn in an assignment late, he'd been given the assignment prior to leaving, given the entire weekend to work on it, he did not have it done. He wanted to have an extra day to turn it in and I rather heatedly were discussing this issue, 'No, you know my policy.' etcetera. 'You know the policy, you know that everything has to be turned in on time, that's why I give it to you early when you go places. Higher responsibility for people who have high positions in the school.' During the course of the conversation, it became, like I say, rather heated to the point where I forcefully terminated the conversation. "Stop means quit arguing with me. Stop it. Quit." (Tr. p.416, 1.19) "[Drop means] Drop the subject." (Tr. p.416, 1.22). "[Blow means] Blow it out your ass. Get out of here. I did not say, 'Blow it our your ass' to the kid, I say 'Blow'. Blow this pop stand, get out of here.'" (Tr. p. 416, 1.24).

. . . .

24. District Superintendent complained Baldridge made a statement to several high school students that he (Baldridge) would "give you twenty bucks if you make that kid cry." Baldridge admitted he made these statements. . . . (Tr. p.19, 1.15; p.22, 1.8; Tr. p.80, 1.23; Tr. p.81, 1.6; Respondent Exhibit 2, p. 144; Tr. pp. 419-421). . . .

25. Baldridge admitted telling a joke in class that involved the term "testes". Baldridge further testified he had used that particular joke for fives years. (Respondent Exhibit 2, p. 146; Tr. p. 422). . . .

28. District Superintendent alleged Baldridge made repeated indirect references to himself and others as a "prick" by either stating "He's what Cinderella (Snow White) did to her finger", or stating "You guys might think I'm a little _____", making a motion to prick his finger. At the County Superintendent hearing, Baldridge denied making a phallic reference. At the School Board hearing, Baldridge admitted making references to the gesture of "pricking one's finger" as an irritation.

. . . .

29. District Superintendent alleged Baldridge "flipped off" of [sic] "gave the finger" to students during the school day on school property. At the School Board hearing Baldridge admitted:

> "The highest form of respect to certain students. I see you. I acknowledge that you exist in a message between you and me. That you and I understand. I have never used this gesture in a [sic] offensive, in a negative connotation, ever. I have only used it with the best of the best kids with whom I associate. (Respondent Exhibit 2, p. 148.)

To summarize, the County Superintendent found that:

1. What has come to be referred to as "the glove incident" happened. Elmer Baldridge made a derogatory joke (either overtly sexual or based on sexual stereotyping) about female students during at least 3 class periods.

2. On many occasions he used obscene phrases or double entendres in conversations with students and while teaching.

3. For at least five years he told inappropriate jokes to students during class.

4. He routinely made obscene gestures to students.

The District maintained that this conduct occurred and that it constituted good cause to terminated Mr. Baldridge. The County Superintendent found this conduct did, in fact, occur but concluded as a matter of law it did not constitute good cause to terminate. This is erroneous reasoning.

The County Superintendent's Order does not condone Mr. Baldridge's conduct but she reached the subjective determination that the conduct was perceived as humorous by students and therefore concluded the conduct did not constitute good cause for termination. Whether students, in fact, consider a teacher's conduct to be humorous would be very difficult to determine. In any case, that fact is irrelevant to the analysis of whether the

teacher's conduct occurred and whether school board trustees could reasonably conclude the conduct constitutes good cause for termination.

It is the trustees, not the county superintendent, who have the discretion to decide what conduct constitutes good cause for termination. School boards must exercise their discretion reasonably, not arbitrarily and capriciously. The county superintendent's role in a termination hearing is to objectively determine if, in fact, the conduct occurred. If a county superintendent finds that conduct, in fact occurred, he or she must determine whether the trustees acted reasonably, given the conduct. This determination does not mean a county superintendent decides how students responded to the conduct. It means she determines whether a reasonable school board could reach the decision to terminate based on the conduct.

An isolated incident of inappropriate conduct would not always establish good cause to terminate. School District Trustees v Holden, 231 Mont. 491, 754 P.2d 1506 (1988). Nor can trustees arbitrarily and capriciously apply double standards to teachers. A board cannot tolerate conduct by some teachers while arguing that the same conduct constitutes lack of fitness or incompetence to teach in other teachers.

As is the case in this appeal, a reasonable school board can conclude that derogatory jokes about students, repeated covert and overt sexual references, sexual stereotyping and generally

inappropriate social conduct such as obscene gestures and double entendres constitutes good cause to terminate.

The District did not base the termination on one incident. The evidence, including Mr. Baldridge's own testimony, established many incidents of inappropriate conduct for a teacher. The County Superintendent's findings establish frequent inappropriate comments, sexist remarks, dirty jokes and obscene gestures over a period of five years. Nor does the record establish that the District routinely tolerated this type of conduct in other teachers.

The District followed the requirements of due process and met its their burden of proving Mr. Baldridge's lack of fitness and incompetency to teach in the Colstrip District. Applying the facts in this case to statute and case law, the County Superintendent's conclusion of law that the District did not have good cause to terminate Elmer Baldridge is an error of law and is reversed.

DATED this 6th day of June, 1996.

Nancy Keenan

NANCY KEENAN

BALDRIDG.249

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 6th day of June, 1996, a true and exact copy of the foregoing DECISION AND ORDER was mailed, postage prepaid, to the following:

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