

BEFORE DENISE JUNEAU, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,  
STATE OF MONTANA

\*\*\*\*\*

Marilyn Flammang )  
 )  
 Appellant, ) OSPI 324-10  
 )  
 vs. ) **DECISION AND ORDER**  
 )  
 GARDINER SCHOOLS BOARD OF )  
 TRUSTEES and LELAND STOCKER )  
 )  
 Respondent. )  
 )

\*\*\*\*\*

Having reviewed the record and considered the parties' briefs, the Superintendent of Public Instruction issues the following decision and order:

**PROCEDURAL HISTORY AND STATEMENT OF FACTS**

On July 23, 2009 the Gardiner Schools Board of Trustees (“Board”) entered into an employment contract with Marilyn Flammang (“Flammang”) for the 2009-2010 school year. Flammang was hired to serve as K-12 principal.

On January 6, 2010 Flammang requested that negotiations for her 2010-2011 contract be placed on the Board’s agenda for the January 13, 2010 board meeting. Her request was denied.

On January 15, 2010 Flammang met with district superintendent Leland Stocker (“Stocker”) and two board members for an evaluation of her performance as principal. A third board member was present, but not part of the committee evaluating Flammang.

On February 5, 2010 Superintendent Stocker delivered the written evaluation to Flammang, which she signed as having reviewed, but subsequently submitted a rebuttal to many of the comments made in the evaluation.

On February 8, 2010, the Board met but took no action on Flammang's employment with the district.

Flammang was notified by letter dated February 18, 2010 that Superintendent Stocker was going to recommend to the Board that she not be reelected for the 2010-2011 school year without cause. The Board held a special meeting on February 22, 2010, approving Stocker's recommendation regarding Flammang's employment with the district. On a vote of 4-1, the Board voted to not renew Flammang's contract, without cause, as of June 30, 2010.

Flammang appealed the Board's decision to not renew her contract with the Park County Superintendent by letter dated March 19, 2010.

On April 1, 2010, Ed Barich, Park County Superintendent, determined that he did not have jurisdiction and therefore denied the appeal.

Flammang filed a Notice of Appeal with the State Superintendent on April 15, 2010. The State Superintendent issued a Notice and Briefing Schedule, the parties submitted briefs, and this matter is now at issue.

### **ISSUE ON APPEAL**

Did the County Superintendent err in determining he did not have jurisdiction over this appeal?

### **STANDARD OF REVIEW AND AUTHORITY**

The State Superintendent of Public Instruction's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. §2-4-704 and adopted by the State Superintendent in Admin. R. Mont. 10.6.125.

The State Superintendent may reverse or modify the County Superintendent's decision if substantial rights of Flammang have been prejudiced because the conclusions of law and order are (a) in violation of constitutional or statutory provision; (b) in excess of the statutory authority; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable probative and substantial evidence on the whole record; (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (g) affected because findings of fact upon issues essential to the decision were not

made although requested. Admin. R. Mont. 10.6.125(4).

A County Superintendent's conclusion of law is reviewed to determine if the interpretation of law is correct. *Baldrige v Board of Trustees*, 264 Mont. 199, 870 P.2d 711 (1994).

### CONCLUSIONS OF LAW AND OPINION

#### **Issue No. 1. Did the County Superintendent err in determining he did not have jurisdiction over this appeal?**

No. The County Superintendent correctly concluded he did not have jurisdiction to hear this matter because it is not a contested case as defined by Montana law.

Montana law provides:

Mont. Code Ann. §20-3-210. Controversy appeals and hearings. (1) Except for disputes arising under the terms of a collective bargaining agreement or as provided under [20-3-211](#) or [20-4-208](#), the county superintendent shall hear and decide all matters of controversy arising in the county as a result of decisions of the trustees of a district in the county. \*\*\*

Admin. R. Mont. 10.6.101 SCOPE OF RULES (1) These rules govern the procedure for conducting all hearings on school controversy cases arising under the provisions of Title 20, MCA, before the county superintendent... and all appeals to the state superintendent of public instruction. \*\*\*

Admin. R. Mont. 10.6.102 SCHOOL CONTROVERSY MEANS CONTESTED CASE (1) Contested case means any proceeding in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing.

While this is a controversy resulting from a decision of the Board, not all decisions of a board of trustees are contested cases. The Montana Supreme Court has determined a dispute with a school board does not rise to the level of a contested case unless the individual has a constitutional interest at stake or a statutory right to a hearing. *Roos v. Kircher Public Sch. Bd. of Trs.*, 2004 MT 48, 320 Mont. 128, 86 P.3d 39, involved a nontenured teacher whose contract was not renewed. The Court held that although Roos raised allegations of policy violations, she failed to allege any violation of state statute granting an administrative hearing or constitutionally protected interest entitling her to a hearing before the county superintendent.

“ [A]n aggrieved person must be able to identify a legal right to contest a school board's decision; absent a statutory or constitutional right to a hearing, a county superintendent does not

have jurisdiction to hear a matter. “ Id. at ¶10.

Mont. Code Ann. §20-4-206(3), clearly states “trustees may nonrenew the employment of a nontenure teacher at the conclusion of the school fiscal year with or without cause.”

The Montana Supreme Court in *Roos* clarified that a nontenure teacher has no right to a hearing when not given a new contract. “Furthermore, in *Irving v. School District No. 1-1A* (1991), 248 Mont. 460, 813 P.2d 417, we upheld the State Superintendent’s decision that a teacher denied contract renewal did not have the right to appeal. We stated that, “Nowhere in ... the statutes ... is [the teacher] given a right to appeal her non-renewal. Moreover, as a non-tenured teacher she has no legally recognized property right in a new contract.” Id. at ¶11.

Flammang argues her due process rights were violated because the Board did not hold a hearing on whether to renew her contract. Flammang’s employment contract with the District is for the school year 2009-2010 and does not contain a renewal clause. Furthermore, she has not obtained tenure with the District and Montana law does not require a hearing when a non-tenured teacher’s contract is not renewed.

Flammang cites several cases in support of her position that her due process rights were violated. These cases are able to be distinguished from the instant case. *Pryor School District Nos. 2 & 3, Big Horn County v. Superintendent of Public Instruction and Youngquist*, 218 Mont. 73, 707 P.2d 1094 involves the termination of a non-tenure teacher during the term of his contract pursuant to Mont. Code Ann. §20-4-207, not the non-renewal of a contract which falls under Mont. Code Ann. §20-4-206. Mont. Code Ann. §20-4-207 provides for a right to a hearing, while Mont. Code Ann. §20-4-206 does not.

*Jarussi v. Board of Trustees of School Dist. No. 28, Lake County*, 204 Mont. 131, 664 P.2d 316 was not a case before the County Superintendent and involved violation of open meeting laws. The District Court and Supreme Court determined that because open meeting laws were violated the board’s action to rescind the contract was void. Under the open meeting laws, district courts have the jurisdiction to void actions taken at meetings where the open meeting laws have been violated. (Mont. Code Ann. §2-3-213)

*Board of Trustees of Garfield County High School v. Eaton*, 185 Mont. 453, 605 P.2d 1083 (1979) involved dismissal of a county high school principal under the provisions of Mont. Code Ann. §20-4-401, which are distinct from the provisions of Mont. Code Ann. §20-4-206.

Flammang also alleges misconduct by the board in connection with an evaluation of her

performance as principal. Flammang does not allege, however, the board's policies on evaluation contained a right to a hearing or due process protections. The Montana Supreme Court discussed whether policy decisions were appealable in *Dupuis v. Board of Trustees, Ronan School District No. 30*, 2006 MT 3, 128 P.3d 1010 at ¶¶12-13.

To be appealable to the County Superintendent the policy decision at issue must be governed by a statute that grants an administrative hearing or an interest constitutionally protected by due process must be at stake... Similarly, absent a "contested case," the District policies do not grant the right to an appeal from an unfavorable decision.

Flammang did not have a constitutional or statutory right to a hearing on the Board's nonrenewal of her contract. This decision in no way condones the actions of the District in the way Flammang's contract nonrenewal was handled, but the County Superintendent correctly determined he did not have jurisdiction over Flammang's appeal of the Board's decision.

The decision of the Park County Superintendent is affirmed.

DATED this 30th day of June, 2010.

---

Denise Juneau  
Superintendent of Public Instruction

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 30<sup>th</sup> day of June, 2010, I caused a true and exact copy of the foregoing DECISION AND ORDER to be mailed, postage prepaid, to the following:

Alex Rate  
Rate Law Office, P.C.  
303 West Mendenhall, Suite 1  
Bozeman, Montana 59715

Jeffrey Weldon  
FELT, MARTIN, FRAZIER & WELDON, PC.  
PO Box 2558  
Billings, MT 59103-2558

Ed Barich  
Park County Superintendent of Schools  
414 East Callender  
Livingston, Montana 59047

/s/ Beverly J. Marlow  
Beverly J. Marlow  
Paralegal