

BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

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JODY FRANK,)	
)	
Appellant,)	OSPI 272-97
)	
vs.)	<u>DECISION AND</u>
)	<u>ORDER</u>
)	
TRUSTEES, SUPERIOR SCHOOL)	
DISTRICT NO. 3,)	
)	
Respondent.)	
)	

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PROCEDURAL HISTORY

Jody Frank is appealing Acting Mineral County Superintendent Rachel Vielleux’s order affirming Superior School District No. 3 Trustees' [hereinafter "the District" or "the Trustees"] decision to terminate Ms. Frank because of a reduction in force [RIF].

Ms. Frank holds a class 2, level 1 certificate that qualifies her to teach kindergarten through eighth grade. She was a tenured teacher employed by the District from January, 1991, until June, 1997. During school year 1996-97 she taught sixth grade. She was a member of the Superior Education Association [SEA]. The terms of her employment were governed by a collective bargaining agreement [CBA] between the District and the SEA (Joint Exhibit 2).

In the CBA the District and the SEA negotiated the order of lay-off in the event of a RIF. CBA Paragraph 21.3 stated that the order would be: normal attrition, part-time non-tenured teachers, full-time non-tenured teachers and, finally, tenured teachers according to seniority.

The District also employed Kari Labbe. Ms. Labbe was hired after Ms. Frank as a kindergarten teacher and then as a Title 1 reading instructor. In December, 1996, she changed

positions in the District. She began to work in a pre-school program the District called “Smart Start” or the “Already Reading and Writing Preschool Program.” The pre-school program was not part of the District’s accredited elementary school program. Although Ms. Labbe had a teaching certificate, teacher certification was not required for the position according to the testimony of Ms. Labbe and the District Superintendent (Transcript, pages 104 and 158). The State's accreditation standards did not apply to the program.

Both the District Superintendent (Transcript, page 162) and Ms. Labbe (Transcript, pages 96—97) testified that the District made the position non tenured without seniority when it created the pre-school program in December 1996. The SEA did not challenge the District’s action at that time. It did not assert that this was a teaching position that should be included in the bargaining unit and governed by the terms of the CBA. The SEA did not seek to have the bargaining unit defined through a unit clarification petition.

In April 1997, due to a decrease in elementary students, the Trustees determined that two elementary teaching positions for school year 1997-98 would be eliminated. The declining ANB and the necessity for the RIF were not disputed. The RIF of the least senior person was also not in dispute. The dispute was whether Ms. Frank or Ms. Labbe was subject to the RIF. The Trustees determined that Ms. Frank was the teacher to be RIFFED. She appealed to the County Superintendent who affirmed the District. Ms. Frank then appealed to this Superintendent.

Ms. Frank’s statements of the issues on appeal are:

The County Superintendent erred in holding that Ms. Frank’s termination was for good cause. The County Superintendent erred in holding that Ms. Frank’s termination was in compliance with the collective bargaining agreement. The County Superintendent erred in holding that Ms. Frank’s tenure rights were not violated. The County Superintendent erred in holding that Respondent terminated Ms. Frank in a timely manner. The County Superintendent erred in holding that the decision to terminate Ms. Frank was not made prior to the school board’s hearing. The County Superintendent exceeded her jurisdiction in making conclusions of law

based on the Montana Collective Bargaining for Public Employees Act and further erred in her interpretations of that Act.

Notice of Appeal, page 2 (10/28/97).

For purposes of this review these issues are stated as:

1. Does substantial credible evidence support the County Superintendent's finding that Ms. Frank was correctly selected as one of two elementary teachers to lose their teaching position in a RIF because she was the second least senior?
2. Did the procedural errors of the District cause substantial prejudice to Ms. Frank that violated her due process rights?
3. Did the County Superintendent exceed her jurisdiction in making conclusions of law based on the Montana Collective Bargaining for Public Employees Act?

Having reviewed the record, the County Superintendent's Findings of Fact, Conclusions of Law and Order, and the Parties' briefs, the State Superintendent of Public Instruction now enters the following:

ORDER

The order of the Missoula County Superintendent upholding the Board's decision to terminate Jody Frank is AFFIRMED.

STANDARD OF REVIEW

The State 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 ARM 10.6.125. Findings of fact are reviewed to determine if they are supported by substantial, credible evidence in the record. The State Superintendent may not substitute her judgment for that of a county superintendent on the weight of the evidence. 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, 676 P.2d 194, 198, 208 Mont. 33, 40 (1984). Conclusions of law are

reviewed to determine if the correct standard of law was applied. See, for example, Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy Keenan, 241 Mont. 274, 786 P.2d 1164 (1990) and Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, 803 P.2d 601 (1990).

MEMORANDUM OPINION

1. Does substantial credible evidence support the County Superintendent's finding that Ms. Frank was correctly selected as one of two elementary teachers to lose their teaching position in a RIF because she was the second least senior?

a. Yes. Ms. Frank does not challenge the District's decision to RIF two elementary teachers. The District's elementary enrollment was decreasing (exhibit 4) and its general fund budget was determined by enrollment (§ 20-9-306 through 20-9-308, MCA). To deal with the decreasing budget and enrollment, the District decided to eliminate two elementary teaching positions.

Ms. Frank, who taught sixth grade, was the second least senior teacher under contract in the elementary school program at the time of the RIF. She was therefore one of the two individuals RIFFED. The evidence established that at the time of the RIF Ms. Labbe did not hold a teaching position in the collective bargaining unit governed by the CBA. She was a district employee working in a pre school program neither required by state law or subject to accreditation standards.

When the position was created the District required Ms. Labbe to give up her seniority (Transcript, pages 96, 97 and 162.) (Tenure is a statutory right that applies to district positions requiring teacher certification. If the District had required that the individual filling the position hold a teaching certificate it would not have the power to determine the position did not carry tenure.) By requiring the forfeiture of seniority the District established its intention to consider the position as outside of the collective bargaining unit and not covered by the CBA.

Substantial credible evidence establishes that Ms. Labbe did not hold a teaching position that was in the collective bargaining unit governed by the CBA. The position did not carry tenure and Ms. Labbe had to forfeit her CBA seniority rights to accept the position (Joint Exhibit 3 and Transcript, pages 96 and 97).

Ms. Labbe was a member of the SEA in December when she took the position but the SEA took no action at that time. By its inaction the SEA appears to have acquiesced to the District's decision to create a non-teaching position outside the collective bargaining unit that was not governed by the CBA's terms, including seniority. Article 1.2 of the CBA states:

1.2 Unless otherwise indicated, the term Teacher when used hereinafter means an individual certified in Class 1, 2, 4, or 5 as provided in Section 20-4-106, the current School Laws of Montana, but shall not include certified individuals who are not currently under contract to perform classroom teaching. Teacher, however, shall include speech and hearing clinicians and school psychologists employed by the School District, but shall exclude Superintendent, Principals, and Assistant Principals. (Emphasis added.)

The SEA did not assert Ms. Labbe's CBA rights. It appears to have agreed with the District that she was not under contract to perform classroom teaching. The SEA did not challenge the District's action creating a pre-school position that was not a teaching position in the collective bargaining unit governed by the CBA and its seniority provisions.

In December 1996, the SEA could have raised the issue that the pre-school position belonged in the collective bargaining unit. Although pre-school positions are not subject to State accreditation standards, and therefore do not come under the jurisdiction of the Office of Public Instruction, a public policy argument can be made that if a school district chooses to offer a pre-school program the teaching staff should be certified staff. An argument could also have been made, first to the School Board and then to the Board of Personnel Appeals if necessary, that employees in the

bargaining unit and employees in the pre-school program have a similar community of interest. The SEA did not raise the issue, however, when the position was created.

The issue of whether or not the position belonged in the collective bargaining unit should have been raised with the Trustees, and the Board of Personnel Appeals if necessary, in December, 1996, however; it is not a matter for the County Superintendent or this Superintendent. In May, 1997, the position was not in the collective bargaining unit covered by the SEA and Ms. Frank's argument that, as an SEA member she could bump into a position not covered by the CBA, is untenable. On appeal, Ms. Frank argues that she has seniority rights over Ms. Labbe. That argument is a non sequitur, however, because the position Ms. Labbe held was not governed by the CBA's seniority provisions. The CBA does not give a member bumping rights to a position that is not part of the bargaining unit.

b. Ms. Frank also raised the issue of the District's position that Ms. Labbe was not an employee. The District argued at hearing that Ms. Labbe was not an employee of the District. In its proposed findings of fact the District offered the following finding:

Labbe did not enter into an employment contract with the District as it was the intent of Labbe and the Board of Trustees that she not be a District employee. In resigning her position, Labbe voluntarily relinquished her tenure and seniority rights.

Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Order, FOF 23, pages 3-4 (9/26/97).

There is no support for the District's position. Ms. Labbe was a District employee. She worked in a program offered to children and parents living in the District, the Superintendent was her supervisor, the District paid her through the district payroll system, withheld from her check, and paid worker's compensation insurance on her salary. Her position was considered part of Teacher's Retirement System [TRS] and the employee's contribution was withheld from her salary. The

District paid the employer's contribution to TRS. She worked in the District's school building using the District's supplies and equipment.

While Ms. Frank is correct that Ms. Labbe was an employee, that does not change the outcome of this case. Ms. Labbe was an employee of the District, but she did not hold a position that was in the bargaining unit and governed by the CBA's seniority. Ms. Frank could not assert her CBA seniority rights to fill a position not in the bargaining unit and not governed by the CBA.

c. In her appeal Ms. Frank also raised the issue that she should have been offered a position as a 7th and 8th grade English teacher. This issue is also irrelevant to the outcome of this case. A 7th and 8th grade English teacher resigned during the year. The person who held the district librarian position at the time, Ms. Jones, was qualified to teach 7th and 8th grade English and transferred into the position. A new librarian was hired to fill the library position. Ms. Frank's certification allowed her to teach 7th and 8th grade English but she did not apply for the position, possibly because Ms. Jones was more senior than Ms. Frank. The new librarian resigned effective June, 1997, but Ms. Jones did not give up her position as an English teacher (Transcript pages 74 and 75.) The fact that Ms. Frank could fill a position as an English teacher is irrelevant to this appeal because there was no position as English teacher to fill. The District did not have to compel Ms Jones to give up her position as 7th and 8th grade English teacher in order to give the position to Ms. Frank.

2. Did the procedural errors of the District cause substantial prejudice to Ms. Frank that violated her due process rights?

No. The totality of the facts and circumstances do not establish that Ms. Frank's due process rights were violated or that the District's procedural errors negate the economic necessity to RIF. The events leading up to Ms. Frank's termination are:

April 14, 1997-- District Superintendent Regnier sent Ms. Frank a memo stating that:

You are hereby notified that your status as a teacher in Superior School Dist. #3 will be discussed at the April 22, 1997, special meeting of the Board of Trustees, in the high school library. A recommendation will be forth coming from myself to not renew your teaching contract, effective June 10, 1997. The District anticipates that it will be necessary to reduce and/or reallocate expenditures for programs and staff in order to provide for an appropriate budgeting balance for the 1997/98 school year. Educational programs and staffing are currently under review. The Board of Trustees has not yet made a final decision regarding budget allocations for these items. Furthermore, the District is uncertain about the amount of federal appropriations that will be available and the impact of possible reductions in federal funding on its budget.

Exhibit J-7 (4/14/97).

April 22, 1997 -- The elementary principal made a presentation at the regular board meeting regarding anticipated enrollment decreases. He recommended that the District RIF two positions. The Board accepted the recommendation that two elementary positions be eliminated. During the discussion Ms. Frank was named as one of the two individuals who would be RIFFED based on seniority. (Exhibit J-4.)

April 23, 1997 -- The Superintendent sent the board a letter recommending that a RIF of two elementary positions was necessary for four reasons ("junior high" and high school staffing, teacher to pupil ratio in the elementary program, general fund budget limits, contract negotiations, and increase in health insurance). The letter states that:

The Superior Education Association negotiated agreement and school laws of Montana require that a RIF be based on teacher seniority. Our seniority records therefore indicate that Jody Frank is the tenured teacher that would be affected. Mrs. Frank needs to be afforded the right to a hearing on this issue and I have scheduled it for May 13, 1977, (sic) 7:30 P.M., in the high school library. She has the right to waive the hearing and I will inform you if she chooses to do so.

Exhibit J-8 (4/23/97).

April 25, 1997 -- The Board Chair sent Ms. Frank written notice that the District was eliminating two elementary teaching positions, that the terms of the CBA established seniority as the criterion for determining which individuals would be subject to the RIF, that "Our records indicate

you are the least senior eligible teacher,” and that she had a right to a hearing. Attached to the letter was a receipt prepared by the school district stating, “I acknowledge receipt of a letter of termination and notice of hearing.” (Exhibit J-9.)

May 6, 1997 -- The Montana Education Association’s UniServ Consultant sent a letter to the District on Ms. Frank’s behalf stating that she was not the least senior tenured teacher and that the hearing on the recommendation was not timely. (Exhibit J-10.)

May 13, 1997 -- The District held a hearing and voted to terminate Ms. Frank. The Board minutes state “Motion by Mr. Kuchera, and sec. by Mr. Seemann that the Board confirm their earlier decision to terminate Mrs. Frank due to RIF. (Exhibit J-5.) Ms. Frank appealed to the County Superintendent.

The 1997 Legislature amended § 20-4-205, MCA, effective July 1, 1997. This appeal arose prior to the changes. Section 20-4-205(1) (1995) stated:

(1) The trustees shall provide written notice by May 1 to all tenure teachers who have been reelected. Any tenure teacher who does not receive notice of reelection or termination shall be automatically reelected for the ensuing school fiscal year.

Section 20-4-204(2) (1995) stated:

(2) Whenever the trustees of a district receive a recommendation for termination, the trustees shall, before May 1 of the current school fiscal year, notify the teacher of the recommendation for termination and of the teacher's right to a hearing on the recommendation. The notification must be delivered by certified letter or by personal notification for which a signed receipt is returned. The notification must include:

- (a) the statement of the reason or reasons that led to the recommendation for termination; and
- (b) a printed copy of this section for the teacher's information.

The District argues that there was an ambiguity in the statute -- § 20-4-205 required written notice of termination by May 1 while § 20-4-204 required only that a District gives notice of the recommendation of termination and right to a hearing by May 1. The District argues that § 20-4-

204 is the more specific, controlling statute and the District met this standard. Ms. Frank argues that the District violated the procedural requirements of § 20-4-205 because Ms. Frank should have had written notice of termination by May 1, 1997. In other words, if the District was going to RIF a tenured teacher it had to hold the hearing prior to May 1.

As cited by the County Superintendent, the controlling case law on this issue is Michael Birrer v. Wheatland County, 786 P.2d 1161, 241 Mont. 262 (1990). In that case the Wheatland County School District No. 15 violated the requirements of § 20-4-204, MCA, by terminating a tenured teacher “. . . before notifying the teacher of the recommendation and giving the teacher a hearing thereon, clearly violated sec. 20-4-204, MCA.” (Emphasis original.)

Despite this clear violation, Justice Sheehy wrote for the Court:

We must also reject the argument of the school trustees that the procedure followed in the termination of Birrer was merely a "technical" irregularity, not affecting due process. The "technicality" here goes to the very heart of the 1985 amendment by the legislature. It is obviously the public policy adopted by the legislature to protect tenured teachers from unjustified terminations by requiring that school trustees keep an open mind relating to the suggested termination until both sides have an opportunity to be heard.

Notwithstanding the foregoing, however, we affirm the termination of Birrer because of the obvious rectitude of the trustee's decision. This is not a case where the teacher was terminated for some personal reason. He was not accused in any way of incompetence, immorality, unfitness or violation of Board policy. He faced no bias or unfair attitude. He was personally liked. What Birrer faced at the March 30 special meeting was the undeniable and overwhelming state of the school finances and the requirement that two teachers be eliminated in order to meet budgetary constraints. The trustees may have had a preformed opinion on March 9, 1987, when they accepted the recommendation of the School Superintendent. That conclusion, however, was not singly the result of the Superintendent's recommendation; the trustees, in the very performance of their duties as trustees, were surely aware of the financial situation, and were as much forced to a reduction in force by the knowledge as by the recommendation of the Superintendent.

Birrer v. Wheatland County, 786 P.2d 1161 at 1163.

The same reasoning applies in this case. Ms. Frank tries to distinguish her case from Birrer but the facts are very similar. Ms. Frank never contended that the District had any motivation for

terminating her other than the economic necessity of RIF and there is nothing in the record that indicates any other motivation on the part of the Board. There is nothing in the record that indicates she was disliked or targeted by the administration or the Board. Her termination was the unfortunate result of declining enrollment and limited budgets -- financial events over which neither the District nor Ms. Frank had any real control.

While Ms. Frank raises the issue that the Board decided to terminate her prior to the May 13, 1997, hearing, that is not supported by the record. The record shows that on April 22, 1997, the Board had decided to RIF two teachers for economic reasons. The criteria for determining the individuals to be RIFFED were established by the terms of the CBA. The criteria for RIFFING was not a matter to be heard and decided in the Spring of 1997 and the Board correctly believed that it did not have the discretion to vary from the criteria agreed to in the CBA. The hearing on May 13, 1997, was to determine if Ms. Frank was the least senior tenured teacher in the District. The Board had already determined that it was going to RIF based on seniority and was under the impression, correctly, that Ms. Frank was least senior. While the wording of the Board minutes could have been better (Exhibit J-5) her procedural rights were not violated.

3. Did the County Superintendent exceed her jurisdiction in making conclusions of law based on the Montana Collective Bargaining For Public Employees Act?

The County Superintendent's Order is not based on Title 39, Chapter 31, MCA. Neither a County Superintendent nor this Superintendent has jurisdiction under Title 39. The County Superintendent's order on appeal is not based on application or interpretation of Title 39, therefore she did not exceed her jurisdiction.

CONCLUSION

This case illustrates the problems school boards, school employees, students, and parents face because of decreasing budgets due to declining enrollment. Ms. Frank held a teaching position.

Ms. Labbe worked in the pre-school program. Ms. Frank had worked for the District longer than Ms. Labbe and would have had seniority over Ms. Labbe to any position governed by the collective bargaining agreement. Ms. Labbe's position was not in the collective bargaining unit, however. Ms. Frank's seniority under the CBA did not apply to positions not governed by the CBA so she did not have bumping rights to assume Ms. Labbe's position.

DATED this 21st day of March, 2000.

/s/ Nancy Keenan
NANCY KEENAN

Frank.272

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this _____ day of March, 2000, a true and exact copy of the foregoing DECISION AND ORDER was mailed, postage prepaid, to the following:

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