BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

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STEPHEN HAMMER, AVIS ANDERSON and LEWIS MELBY, Appellants, vs. DAWSON COUNTY (MONTANA) HIGH SCHOOL DISTRICT, by and through its Board of Trustees, Respondent.	)	OSPI 240-94 **DECISION AND ORDER**

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PROCEDURAL HISTORY

Avis R. Anderson, Stephen L. Hammer and Lewis T. Melby are tenured teachers at Dawson County High School [DCHS]. They are appealing the May 26, 1994, decision of Dawson County Superintendent of Schools, Jean Grow. The decision, captioned "Clarification of Evidence Used by Dawson County Superintendent of School", stated the evidence the County Superintendent relied on in an earlier order. That order affirmed the DCHS Trustees' decision to lower these teachers yearly salaries by reducing the work days in their contracts.

This is the second appeal of this dispute, which began in April, 1992. At that time, the teachers were offered reduced contracts. Their contracts were for at least 180 days but the DCHS Superintendent recommended reducing their salaries by reducing the number of days to be worked.

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The Trustees held a hearing and voted to reduce the teachers' salaries. The teachers appealed to the County Superintendent who affirmed the Trustees' decision in an Order issued September 30, 1992. That Order was appealed to this Superintendent in Hammer, et. al. v. DCHS, OSPI Docket 216-92.

The issue in the first appeal was whether the procedural protections of the tenure statutes apply to salary reductions for tenured teachers. This Superintendent held that "[R]eduction in salary is a reduction in tenure rights and the procedural safeguards attached to dismissal also apply to a reduction in salary." (Hammer, et. al. v. DCHS Trustees, OSPI Docket No. 216-92, page 6, March 11, 1994)

The matter was remanded to the County Superintendent to reconsider her decision in light of the requirement that procedural protections apply to salary reductions. She was instructed that to reduce tenured teacher salaries there must be substantial, credible evidence of economic necessity and a uniform plan of cost reduction affecting the entire district.

On remand, the County Superintendent issued her May 26, 1994, Clarification and again affirmed the Trustees. The teachers again appealed.

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 ARM 10.6.125.

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, 786 P.2d 1164, 241 Mont. 274 (1990).

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, 676 P.2d 194, at 198, 208 Mont. 33, at 40 (1984). State Compensation Mutual Insurance Fund v. Lee Rost Logging, 827 P.2d 85, at 88, 252 Mont. 97, at 102 (1992).

Conclusions of law are reviewed to determine if the agency's interpretation of the law is correct. Steer, Inc. v. Dept. of Revenue, 803 P.2d 601, at 603, 245 Mont. 470, at 474 (1990).

DECISION AND ORDER

For the reason discussed below the decision of the Dawson County Superintendent is AFFIRMED.

DISCUSSION

1. Does the record contain substantial credible evidence to support the County Superintendent's findings?

A hearing has never been held in this case. As discussed in 2 below, this is a poor administrative practice. It is, however, the procedure both parties agreed to in this case.

The parties jointly submitted a Prehearing Memorandum and Order to the County Superintendent in July, 1992. This included a list of the teachers' Exhibits A through O and the DCHS Trustees' Exhibits 1 through 8. The Trustees and the teachers stipulated that "this matter may be submitted by briefs, and that no further evidence, other than that recited in the Prehearing Memorandum and Order is necessary." (Stipulation, page 2, August 14, 1992.)

That first decision of the County Superintendent (Order dated September 30, 1992) contained no findings by the County Superintendent relevant to her ultimate conclusion. It was impossible to tell what evidence the County Superintendent used to uphold the DCHS Trustees. This Superintendent remanded that Order with the following instructions.

> The County Superintendent should review the existing record to determine:
>
> > One, if the DCHS Trustees offered substantial, credible evidence of economic necessity for reducing tenured teachers' salaries. And,
> >
> > Two, if the DCHS Trustees offered substantial, credible evidence that reduction of tenured teachers' salaries is a part of a uniform plan of cost reduction affecting the entire district.
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> (Hammer, et. al. v. DCHS Trustees, OSPI Docket No. 216-92, page 4, March 11, 1994)

The record was a stack of exhibits presented without the benefit of testimony at a hearing. It was this Superintendent's opinion that the record contained no evidence of economic

necessity or a uniform plan, but a finding on the question was the providence of the County Superintendent.

Using that record, the County Superintendent issued a second Order on May 26, 1994. The second Order cites to evidence in the record that convinced the County Superintendent that economic necessity existed -- a failed mill levy the year before, budget committee recommendations, proposed cost reductions and board minutes (see May 26, 1994 Order, pages 2 and 3). The Order also cites to evidence that convinced the County Superintendent that a uniform plan of district wide cost reduction existed -- board minutes showing budget and cost reductions (see May 26, 1994 Order, page 3).

The County Superintendent was particularly persuaded by an attachment to Exhibit 5 showing high school budget reductions for FY 92-93 of $187,500. This evidence was in the record the parties chose to create -- a stack of exhibits attached to a pre-hearing order. The first few pages of the teachers' Exhibit B-1 and Trustees' Exhibit 5 are the same document. Exhibit 5 has more pages, however, including a page captioned "High School Budget Reductions FY92-93." This was attached to the DCHS Trustees Exhibit 5. It was not attached to the teachers' Exhibit B-1.

Under the procedure agreed to in this case, the parties asked the County Superintendent to sift through "exhibits" without any foundation or guidance in the form of direct or cross examination by a witness. She was given carte blanche by both

parties to make what she would of the documents and she found a document attached to Exhibit 5 to be persuasive. That document is in the record and it does show $187,500 of reductions that the DCHS Trustees considered. The teachers made no objection to it.

Given the procedure agreed to below, this document is substantial credible evidence and this Superintendent will let the finding stand. The purpose of a review of findings of fact on appeal is not to determine if this Superintendent would notice the same findings based on the evidence. 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.

2. Procedure followed in this case.

The parties chose to follow an odd procedure in this case. They handed the County Superintendent a stack of papers and let her give the stack what meaning and weight she could decipher without the benefit of foundation or testimony. The County Superintendent's Order is based on the record the parties created using a procedure to which they both agreed, however, and it is unpersuasive for the losing party to argue that the County Superintendent gave too much weight to a particular exhibit.

For the future, this Superintendent urges the DCHS Trustees and the Glendive-MEA to review the procedures they use to resolve their disputes. This Superintendent receives significantly more appeals involving Dawson County High School than any other

Montana school. This appeal, for example, is DCHS and the local MEA's seventh appeal to this office in two year.

Frequently, as in this appeal, the Order is issued without a hearing. For example, in the last year Snow v DCHS, OPI Docket No. 230-93, Beck v DCHS, OPI Docket No. 233-94, and Hammer et. al. v DCHS, OPI Docket NO. 216-92, were all appeals from Dawson County of Orders that contained Findings of Fact made without the benefit of a hearing. In this case, a dispute involving $2,229 has resulted in two County Superintendent orders, two orders by this Superintendent and at least nine briefs, but the parties never went to a hearing. Neither side went to the trouble of putting on evidence that supported their version of the facts.

In Baldridge v. Rosebud County School District 19, 870 P.2d 711, 715, 264 Mont. 199, 51 St.Rep 166, 13 Ed.Law 18 (1994), the Montana Supreme Court wrote that county superintendent's must "issue 'findings of fact accompanied by a concise and explicit statement of the underlying facts supporting the findings based exclusively on the evidence and supporting authority or reasoned opinion for each conclusion of law.'"

To meet this standard county superintendents must almost always hold a hearing before writing an order. Hearing evidence -- testimony and exhibits -- helps a superintendent decide what, in fact, occurred. The main reason for administrative process is to have a forum to find what in fact occurred and apply those facts to statutes and decided law in the area of the administrative officer's expertise.

Administrative hearings are about facts and facts are found in hearings. Skipping the hearing step is rarely appropriate. If a dispute is significant enough to merit an administrative review, it is worth the time and trouble of organizing and presenting evidence at a hearing. If the parties can agree to the facts, a hearing is not necessary. Otherwise there should be a hearing.

Everyone involved in the school controversy process wants to avoid long, drawn out hearings. County superintendents should attempt to keep the hearing as short and simple as possible. County superintendents should hold a pre-hearing conference as provided in ARM 10.6.107. A pre-hearing order, however, is not a substitute for a hearing, which is what happened in this case.

There is a need to hear evidence only on relevant factual issues and there is no reason to hear repetitive evidence. There is also no point in holding a hearing until the parties, or their attorneys, can articulate what questions of fact and law they want the county superintendent to decide. All of this should be resolved in the pre-hearing process.

Following the pre-hearing conference, county superintendents should require the parties, or their attorneys, to submit in writing exactly what is in dispute, what each side's factual contentions are, what evidence in the form of testimony and exhibits will be offered to prove those contentions, and what law applies. The parties should stipulate to agreed facts at this point.

If a pre-hearing conference reveals that there is no factual dispute, the parties can submit agreed facts and the county superintendent can reach a decision by applying the law to the agreed facts. If the parties cannot agree on the facts there is a need for a hearing.

When writing the order, a county superintendent must distinguish between the parties' agreed facts and their findings of fact. Agreed facts do not require evidentiary support. The county superintendent's findings of fact, however, must be supported by evidence in the record.

CONCLUSION

Findings are upheld if supported by substantial, credible evidence in the record. Wage Appeal v. Board of Personnel Appeals, 676 P.2d 194, at 198, 208 Mont. 33, at 40 (1984). State Compensation Mutual Insurance Fund v. Lee Rost Logging, 827 P.2d 85, at 88, 252 Mont. 97, at 102 (1992). Because the County Superintendent's decision in this case meets this standard it is affirmed.

DATED this 2 day of January, 1996.

Nancy Keenan

NANCY KEENAN

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 2nd day of January, 1996, a true and exact copy of the foregoing Decision and Order was mailed, postage prepaid, to the following:

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