BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

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ROBERT JONES, Appellant.	)	
v.	)	DECISION AND ORDER
RAVALLI COUNTY SCHOOL DISTRICT NO. 15-6, Respondent.	)	OSPI 19-82

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This is an appeal by Robert Jones, Appellant, from the final order of the Acting Ravalli County Superintendent of Schools, affirming the decision of the Board of Trustees of Ravalli County School District #15-6 not to renew Appellant's teaching contract for 1980-81, and affirming the adequacy of the reasons given for the termination.

The findings of fact and record reveal that Appellant was employed by the Florence/Carlton School District during the school year 1979-1980. Appellant is a non-tenured teacher.

On April 8, 1980, Appellant was orally notified by the District Superintendent that he was recommending to the Board of Trustees that Appellant not be offered a teaching contract for the 1980-81 school year.

On April 8, 1980, the District Superintendent also submitted, in writing, to the Appellant, a letter confirming the oral notice and outlined specific areas for future professional growth. These areas included:

(1) working and communicating effectively with parents, and

(2) his teaching approaches and expectations for student's work, their interests and needs.

On April 14, 1980, the Board of Trustees formally notified the Appellant that his services would not be renewed at the end of the 1979-80 school year.

On April 21, 1980 Appellant requested reasons for the dismissal by the school board, pursuant to Section 20-4-206(3) MCA. The Board of Trustees provided Appellant with the reason for nonrenewal as "it is believed the district can hire a better teacher."

Appellant had been advised in his first evaluation, in the school year 1978-79, of criticism for having sent out a large number of poor work slips; and criticism by the district superintendent of the high number of below-average grades given by the Appellant to his students during the 1979-80 school year. Appellant acknowledged that an excessive number of below-average grades would indicate poor teaching, but denied that the grades given by him to his students indicated more than the ordinary below-average grades as are given on the standard grade curve. The County Superintendent also found that the transcripts of the classes taught by the Appellant during the school year 1979-80 disclosed that in three of the five classes, taught by the Appellant, nearly one-half to more than one-half of the students in these classes received failing or below-average grades, and in only one of the five classes was the number below-average less than 25% of the enrollment.

On June 5, 1981, Appellant filed a Petition for Judicial Review in the District Court of the Fourth Judicial District. Appellant filed this action directly from the decision of the Board of Trustees of District #15-6 without exhausting his administrative remedies. See Section *20-3-210* and Section 202-107 MCA.

The Board of Trustees filed a Motion for Summary Judgment on the grounds that Appellant had failed to exhaust the remedies provided by school law. The Court concluded that as a matter of law, Appellant was not entitled to have his cause heard in the District Court until he had exhausted the remedies as set forth by the legislature for proceedings of this nature. Defendant's Motion for Summary Judgment was granted.

Following the Court order, Appellant appealed the Board of Trustee decision to the Ravalli County Superintendent of Schools. Appellant raised the following issues:

1. Whether the reason given by the school district that they "believed the district can hire a better teacher" is adequate compliance with Section 20-4-206(3) Montana Codes Annotated.
2. Whether the termination of Appellant by the school board was proper.

The County Superintendent permitted a formal hearing on the issues raised in the appeal and produced a transcript of the hearing which was made available to this State Superintendent and is made a part of the record. Section *2-4-704* MCA. Because the issue of whether a non-tenured teacher was entitled to a hearing pursuant to Sections *20-3-210* and Section *2-4-102* et seq. MCA, has not been raised here, this Superintendent will not address that issue here.

The County Superintendent concluded that: The termination of employment of Appellant was proper; a notice of termination was timely; Appellant made timely application for reasons for termination of employment; and the Board of Trustees made timely and proper response to the request for reasons. (See finding of facts, conclusions of law).

The County Superintendent also found that the reason given by the Board of Trustees as "it is believed the district can hire a better teacher", together with the additional reasons provided by the district superintendent to the Appellant as reasons for his non-recommendation, are an adequate specification of reasons as required under Section 20-4-206(3) MCA. Further, the County Superintendent concluded Appellant rights as a non-tenured teacher is not contingent upon "just cause."

This State Superintendent has followed the Montana Administrative Procedures Act in all school controversy appeals made to him pursuant to Section *20-3-107* MCA.

Section 2-4-704(2) MCA, allows an Appellate judicial review body to reverse or modify the decision if substantial rights of the Appellant have been prejudiced, because the administrative findings, inferences. conclusions or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(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) because findings of fact, upon issues essential to the decision, were not made although requested.

The Montana Administrative Procedures Act clearly mandates that this State Superintendent or any District Court not substitute their judgment for that of the County Superintendent as to the weight of evidence on questions of fact. Further, the Montana Supreme Court has said that the burden is substantial on an appealing party to show an agency's decision had substantially prejudiced the rights of the Appellant. See N. Plains Resource Council v. Board of Natural Resources and Conservation, ___Nont.___, 594 P.2d 297 (1979). The Montana Supreme Court refers to the County Superintendent appropriately as the lower Appellate tribunal. See Yanzick v. School District #23, Mont.___, 641 P.2d 431, 39 St. Rptr. *191* (1982). This Superintendent must base his Decision on a review of the record, without the benefit of listening to and observing the demeanor, conduct and testimony of witnesses. This Superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings and conclusions are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record

Appellant raises identical issues before this Superintendent as were raised before the County Superintendent with regard to the reasons provided by the school district and compliance with Section 20-4-206 MCA. It appears that Appellant is contesting the conclusions of law rendered by the County Superintendent as to sufficiency of reasons. Appellant also raises issues of: whether it was an error for the County Superintendent to consider additional reasons presented by the school district at this hearing; whether the district superintendent evaluation was proper; and whether the County Superintendent ignored several Supreme Court decisions with regard to the termination of an employee's contract.

Recently, the Montana Supreme Court has rendered significant decisions with regard to the role of Boards of Trustees and the contract-employee rights of teachers in Montana. In Yanzick, supra, the Supreme Court dealt with the nonrenewal of a contract of a tenured teacher. Among the issues decided by the Court was that the standard of review of the Montana Administrative Procedures Act would be applied to the County Superintendent. More significantly, however, the Court further recognized the ultimate power of the local Board of

Trustees to govern the school districts, recognizing both the statutory and the constitutional rights vested in the local boards to supervise, manage and control their school, including the hiring and firing of teachers. The Court, in emphasizing the Constitutional nature of the local school board, quoted a Montana constitutional delegate in part:

> ...I feel, therefore, that we should give constitutional recognition and status to the local boards to--first of all to allay the fears which have been expressed, which I think are well founded concerning the preservation of local autonomy...

Further, the court in Yanzick citing Kelsey v. School District #25, *84* Mont. *453, 276* P.2d, *26 (1929)* stated:

> A wide discretion is necessarily reposed in the trustees who compose the board. They are elected by popular vote, and, presumably, are chosen of reason of their long standing in the community, sound judgment, and their interests in the educational development of the young generation which is so soon to take the place of the old.

Further, the Supreme Court stated:

> In emphasizing that teachers work in a very sensitive area, and that school authorities have the duty to screen teachers as to their fitness to maintain the integrity of school.

This quotation from Abler v. Board of Education *342* US *485 (1952)* was relied on by the Court:

> A teacher works in a sensitive area in a classroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and duty to screen officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. ~Yanzick, p. *201, 202, 203.*

It is important to note that the court determined that a finding of "just cause" was necessary for the non-renewal of a tenured teacher pursuant to Section 20-4-204. However, the decision in Yanzick, defined the hroad discretionary power left with the local school boards, with the constitutional references.

Montana Constitution, Article X, Section 8, provides:

> The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law. (emphasis supplied)

The Court in Yanzick affirmed the decision of the school district and terminated a competent and well versed tenured teacher. See findings of facts detailed in Yanzick, p. 202, 201, 203.

The legislature has indicated its desire to place local control of schools in the local school districts, especially control of teachers. The Courts have continually recognized that control and affirmed their decisions. School District #12, Phillips County v. Hughes, 170 Mont. 267, 272-273, 552 P.2d, 328, 331 (1976). School District #4 v. Kohlberg, 169 Mont. 368 (1969), Yanzick.

The general broad powers of the trustees of the school district to hire and fire teachers is set forth in Section 20-3-324, MCA. The statute states in part:

> ...the trustees of each district shall have the power and it shall be their duty to perform the following duties or acts:
>
> (1) employ or dismiss a teacher, principal, or other assistant upon the recommendation of the district superintendent, the high school principal, or other principal as the board may deem necessary, accepting or rejecting such recommendation as the trustees shall in their sole discretion determine, in accordance with the provisions of the school personnel part of this title.
>
> ...in accordance with the provisions of Title 20, Chapter 4. Section 20-3-324, MCA.

Also of significance is the recent Montana Supreme Court decision in B.M., a minor, by Leona M. Burger, her guardian Ad litem v. State of Montana, et.al. ___Mont.___, _____P.2d_____, St. Rprt. (1982). The Court placed an additional concern, tort liability, on boards of trustees in their capacity to administer schools. The importance of the decision in B.M. again is wide ranging, in that the

Court had discussed public policy and the duties and responsibilities of school authorities and school boards to ensure that students in this state receive appropriate education and placed direct responsibility on boards of trustees to maintain an educational standard of care.

The boards of trustees sit in a fiduciary capacity. They hold the helm of each school district, establishing and developing not only a competent system but more importantly the best educational system that public money can provide. They oversee the budgets and the public financing of schools on the local level and they maintain the ultimate decision on hiring and firing of teachers. They are directly accountable to the parents and students of a school system if sound education is not provided. They are also responsible to ensure that the educational school system does not meddle in mediocrity in just getting along, but does strive to achieve and seek excellent standards in teaching and preparing our youngsters as future adults of this state. The ultimate result of this duty and responsibility is to ensure that our youngsters are receiving the best education public money can buy and at the same time afford those well competent and accepted teachers in the school system privileges of tenure.

Appellant argues cases like Cookson v. Lewistown School District #22, 351 F.Supp. 983 (D.Mont. 1972) have no application in the determination of whether the reason provided by this particular school district is sufficient and legally proper under the standards of review of the Montana Administrative Procedures Act. Appellant argues that these cases were decided in 1972 and since that time, there have been changes in rights, interests and status of non-tenured teachers.

A brief history of the status of non-tenured teacher cases and law in Montana is in order.

The clearest statement of the board's right to weed out all but the best teachers was made by a federal district court in Montana. In upholding a non-reappointment that the school board justifies on the basis that only average teaching could be expected from the teacher, the court said:

> It is quite clear that Montana has adopted an employment policy... which frees a school board from any tenure problems during the first three years of a teacher's employment. These

> three years are the testing years during which not only may the teacher's merits be weighed, but the school's needs for a particular teacher assessed... (I)In the interests of creating a superior teaching staff a school board should be free during a testing period to let a teacher's contract expire without a hearing, without any cause personal to the teacher, and for no reason other than that the board rightly or wrongly believes that ultimately it may be able to hire a better teacher. Cookson, p. 984-986.

In Cookson, the Federal Court determined that at that time the laws of Montana permitted a school district to terminate the services of a non-tenured teacher without reason.

By 1975, (Mont. Laws ch. 142) the Legislature amended what was then RCM 1947 Section 75-6505.1 (now Section 20-4-206(3) MCA) and required that the school district, if requested to do so, give the reasons for a failure to renew a non-tenured teacher.

Section 20-4-206(3), M.C.A. provides:

> When the Trustees notify a nontenured teacher of termination, the teacher may, within 10 days after receipt of such notice, make written request to the trustees for a statement in writing of the reasons for termination of employment. Within 10 days after receipt of the request, the trustees shall furnish such statement to the teacher.

An extensive review of the minutes of the Senate Education Committee of 1975 reveals some insight as to the intent of the amendment. The intent of the bill was to provide schools with direction of supervision for all teachers and not simply tenured teachers. Further, the legislature comments recorded, revealed that the "teachers should be given rationale." March 7, 1975, Senate Committee on Education minutes.

The legislature did not express that a non-tenured teacher was provided with a new substantive property interest or any right now enjoyed by a tenured teacher. The discretionary powers of the Board of Trustees and the local control were not altered.

This position was affirmed in apparently the sole administrative consideration of such a case in a case entitled In the Matter of the Appeal of Evelyn J. Keosaian. Decision and Order rendered June 4,

1976 by Superintendent Dolores Colburg. Both parties have cited this case as authority for their respective position.

In Keosaian, the State Superintendent narrowed the issues in the case to one. Whether the reason "we can find a better teacher" was a reason allowed by Section *75-6105.1* RCM *(1947)* now Section *20-4-206* MCA. Although my predecessor found that the reason does not comport with the intent of the statute, she did affirm the decision of the hoard to terminate and upheld the validity of the termination. She went on to say:

> "The foregoing does not change the fact that Ms. Keosaian's employment with the district will terminate at the end of her present contract since a statement of reasons is not a prerequisite to a valid termination."

The appeal was returned to the County Superintendent with instruction to order the Board of Trustees of School District No. *44*, Flathead County, to give Ms. Keosaian a statement in writing of the reason or reasons for the termination of her services. One other significant statement made by Superintendent Colburg was that she accepted that the Board's belief that they could have a better teacher was true. The case was not appealed and Mrs. Keosaian was terminated.

The Board's ability to not renew was reaffirmed five years later by Branch v. School Dist. No. 7, *432* F.Supp. *608* (D. Montana *1977)*. There, another hoard said that it refused to reappoint a non-tenured teacher because it "could hire a better teacher to complement the system." The teacher claimed that retaliation for her criticism was the real reason for the non-reappointment. In upholding the hoard the court noted that "the problem posed here is not whether there was good cause for not renewing the plaintiff's contract hut whether it was not renewed for some impermissible cause." Branch p. *610*. In the court's opinion, the plaintiff was "an able and effective teacher," hut the court refused to substitute its judgment for the school hoard's. It was the board's prerogative, the court said, lo select the type of teachers it wanted to put in the classroom as long as the decision was not taken to stop an activity protected by the First Amendment or for any other constitutionally impermissible reason and that the Board believed the reason to he true.

The court further illustrated in Branch that even though an interpretation was not requested, that the tenure laws provided more protections for the teacher requiring "explicit and clear reasons be given in writing." See Branch p. 610, footnote 5. It is well to repeat the in the cases of Yanzick and Branch, competent teachers were terminated. Both the Montana Supreme Court and the Federal District Court were not impressed nor did they find relevant the fact of satisfactory competency or good standing in terms of a teacher's ability. It was the board's prerogative, the courts have said, to select the type of teachers they wanted to put in the classroom as long as the decision. was not taken to stop an activity protected by the First Amendment or for any other constitutionally impermissible reason." In the case before us we find that the Board provided a reason. It was not constitutionally impermissible. They believed it to be true and their discretion has not been altered. (see transcript and record).

Other Federal District Courts have affirmed the boards' right not to reappoint a non-tenured teacher in order to strengthen the staff or to obtain a better teacher. See Powers v. Mancos School District, RE-6, 391 F.Supp. 322 (D. Colo. 1975), aff'd, 539 F.2d 28, (10th Cir. 1976), Phillippe v. Clinton-Prairied School Corp., 394 F.Supp. 316 (S.D. Ind. 1975), Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981).

Not everyone satisfies the prerequisite qualifications necessary to be granted tenure in a particular school district. Tenure is a privilege extended by the local school boards who is vested with the power from the community and responsible for the education.

Although a board may refuse to keep a competent teacher in order to seek a better one, it may not use the explanation to cover up a nonrenewal for a constitutionally impermissible reason. See Branch, Cookson, Keosaian, Roth v. Board of Regents, *408* U.S. 564 (1972). A Board may not refuse to renew a contract when the real reason for nonrenewal is the teacher's race, sex, national origin, or religion or desire to rid a teacher who has criticized the school's administration. Such protections from the First Amendment and other rights from the Constitution clearly cannot be the grounds or the basis for nonrenewal of a nontenured teacher. Appellant has not claimed any constitutionally impermissible reason as found in Roth and Keosaian and the record reveals no such evidence.

Non-tenured teachers do not have a vested property interest in the position. The non-tenured teacher is employed on a one-year basis. Their relationship is defined by a one-year contract. See Section 20-4-201. There are no entitlements to automatic renewal. To allow more will substantially weaken the tenured rights of those deserving teachers who are tenured with the district. This Superintendent has recognized the importance of those tenured rights and cannot allow such an indirect challenge on tenure to weaken the integrity of tenure laws. See Kisling v. School Board, OSPI 1/14-81, Decision and Order, Knudson v. School Board, OSPI 6-81, Decision and Order, Sorlie v. School District, OSPI #10-81, Decision and Order, affirmed 13th Judicial District Court, September 18, 1982. Whether a non-tenured teacher has interests requiring more procedural due process in a dismissal under contract is not presented to this Superintendent and will not be addressed.

Appellant has been granted more notification rights required by the legislature. He has received oral notification by the District Superintendent. Appellant received a letter confirming the oral notice of recommendation of non-renewal. He has been given reasons above and beyond those submitted by the trustees by the Superintendent. The District Superintendent is the executive officer of the Trustees and is completely subject to the direction and control of the Board of Trustees. See Section 20-4-402 MCA. The duties of providing additional reasons as part of his ministerial function to a non-tenured teacher are permitted by law. See Section 20-4-402 (8), School District #4 Lincoln County v. Colburg, 169 Mont. 368, 541 P.2d 84 (1974). Further, Appellant was provided a full evidentiary hearing with substantial evidence presented that supported the board's non-renewal because of the excessive number of poor grades issued, indication of poor teaching and continued criticism received from parents and concerned taxpayers. At no time was reference made to any subject other than his performance as a teacher. (See Yanzick, also Findings of Facts, Conclusions of Law dated March 19, 1982 as well as extensive transcript and testimony from Appellant and District Superintendent Willavize.) Appellant has received more procedural due process as a non-tenured teacher than several tenured teacher cases that have been appealed to this Superintendent.

Finally, the Appellant relies on two cases not relevant here: Nye v. Dept. of Livestock, ___Mont.___, ___P.2d___, 39 St. Rptr. 49 (1982), and Gates v. Life of Montana Insurance Company, ___Mont.___, ___P.2d___, 39 St. Rptr. 16 (1982). I will address both cases.

Nye involved an employee at will. Appellant here was not an employee at will but was employed for a specified term, under a contract which term ended with the close of the school year, and must be rehired by contract before he would again be an employee of the school district.

Re-employment here could be effected by notification by the Board of Trustees by April 15th of their intent to rehire the teacher for the following school year or by withholding notification of their intent not to rehire the teacher for the ensuing school year by that date. See Section ***20-4-206*** MCA. This case is not one of dismissal for cause, under contract. See Section ***20-4-207*** MCA. It is a case of non-renewal.

Appellant cites ~~Gates~~ as controlling. ~~Gates~~ involved the employment at will of an individual. Thereafter, the employer established procedural rules of personnel policy with regard to termination. The Court recognized that the company was not obligated to create these procedural rules, hut having done so was obligated to follow its own policies in termination or otherwise there was a breach of good faith and fair dealing. Here the Board did not hire Appellant at will but under a one-year contract for each of the two years of his employment, with a specified termination date. Also there was no testimony provided as to any procedural rules adopted by the Board nor any violation of those rules. In fact it would be improper for a school district to adopt procedural rules which would be contrary to Section 20-3-324 (1), MCA.

AFFIRMED.

DATED October 15. 1982.