

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

NORMA JEAN KING,)	
)	
Petitioner,)	OSPI 323-09
)	
vs.)	DECISION AND ORDER
)	
HAYS/LODGE POLE SCHOOLS)	
)	
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

Norma Jean King (“King”) has been employed by the Hays/Lodge Pole School District (“District”) continuously since 1975. King is a tenured employee for the District and has a Class 1 educator’s license with an endorsement in elementary education and a Class 3 educator’s license with a K-12 principal endorsement. King served as high school principal from the 2006-2007 school year through June, 2009. The District did not provide written notice of reelection or termination to King by June 1, 2009. At a special meeting on June 1, 2009, the Hays/Lodge Pole School Board (“Board”) reassigned King to an elementary teaching position. King accepted a teacher’s contract for the 2009-2010 school year under protest and reserved her right to appeal the Board’s June 1, 2009 decision. On June 29, 2009, King filed an appeal of the Board’s June 1, 2009 decision with the Blaine County Superintendent of Schools.

Shirley Isbell, Hill County Superintendent of Schools, was appointed to preside over this matter. The parties stipulated to the facts, requested the hearing be waived and they be allowed to argue the legal issues in briefs. The county superintendent issued her decision on November 12, 2009, finding in favor of the District and holding the Board’s actions were well within their statutory authority; the positions of principal and teacher are comparable as used in § 20-4-203, MCA; and the county superintendent did not have authority to order payment of attorney’s fees

and costs.

King appealed the county superintendent's decision by Notice of Appeal dated December 8, 2009.

The parties have filed their briefs, oral argument was held on June 29, 2010, and this matter is now at issue.

ISSUES ON APPEAL

The issues on appeal are as follows:

1. Did the county superintendent err in her decision affirming the Hays/Lodge Pole board of trustees' transfer of Norma Jean King from a position as high school principal to an elementary teaching position?
2. Does a county superintendent of schools have authority to award attorney's fees and costs?

STANDARD OF REVIEW AND AUTHORITY

The 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 § 2-4-704, MCA, and adopted by the Superintendent in Admin. R. M. 10.6.125.

The Superintendent of Public Instruction may reverse or modify the county superintendent's decision if King's substantial rights 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. M. 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

- 1. Did the county superintendent err in her decision affirming the Hays/Lodge Pole Board of Trustees transfer of Norma Jean King from a position as high school principal to**

an elementary teaching position?

No. The county superintendent correctly concluded the District did not violate Montana law when reassigning King from a principal position to an elementary teaching position.

This appeal is not about King's job performance. She was not terminated from her employment with the District. There was no allegation of financial constraints for the District, nor was there a reduction in administrative staff. There was no reduction in King's salary.

County Superintendent Isbell incorporated the parties stipulated facts in her Final Order dated November 12, 2009. Relevant facts as stipulated are:

[2.] Ms. King is a tenured teacher who has been continuously employed by Hays-Lodge Pole School District since 1975. Tenure acquired as a teacher carries over to an administrative position which required teacher certification.

[8.] The principal position held by Ms King in the 2008-2009 school year was filled by another person for the 2009-2010 school year at an annual salary of \$58,000.

[9.] The School Board did not provide written notice of reelection or termination to Ms. King by June 1, 2009 pursuant to Section 20-4-205, MCA. As a consequence she was automatically reelected for the ensuing school fiscal year.

[10.] The school board did not provide written notice of its intended action or provide a formal hearing in accordance with Section 2-4-204, MCA before reassigning Ms King to an elementary teaching position on June 1, 2009.

[11.] The School Board does not assert any wrongdoing on the part of Ms. King and does not ask the County Superintendent to determine if its decision to reassign her to a teaching position was based on good cause.

Based on the stipulated facts, the county superintendent correctly concluded King was automatically reelected to her position as principal because she did not receive written notice to the contrary by June 1, 2009. Section 20-4-205, MCA, states:

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

The parties argue about the relevance of this date and whether King was reelected or reemployed. The distinction, however, is not dispositive or particularly relevant.

Tenured teachers in Montana have specific rights. Unless terminated from employment, a teacher with tenure has a position with their employer district whether or not they received

notice by June 1. The most significant impact of § 20-4-205, MCA, is subsection (2) requiring a reelected teacher to accept an employment contract with the district within 20 days of “receipt of the notice of reelection . . .” Such occurrence is not at issue in this case. This decision hinges more appropriately on an interpretation of § 20-4-203, MCA.

Section 20-4-203, MCA, details teacher tenure rights. Tenure laws in Montana are intended to provide those teachers who have achieved tenure status economic and job security.

20-4-203. Teacher tenure. (1) Except as provided in [20-4-208](#), whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher certification except as a district superintendent or specialist, the teacher is considered to be reelected from year to year as a tenured teacher at the same salary and in the same or a comparable position of employment as that provided by the last-executed contract with the teacher unless the trustees resolve by majority vote of their membership to terminate the services of the teacher in accordance with the provisions of [20-4-204](#).

The county superintendent relied upon *Sorlie v. School District No. 2*, 667 P.2d 410 (1983) in concluding that as a matter of law, the District was legally correct in reassigning King from principal to elementary teacher. The *Sorlie* decision interpreted § 20-4-203, MCA, and upheld the transfer of an administrator to a teaching position when done so for legitimate financial reasons. The Court rejected Sorlie’s contention that her tenure rights required the school district to reemploy her in the same capacity at the same salary, stating:

We conclude that tenure acquired as a teacher applies to a subsequent administrative position. Section 20-1-101(20) MCA, clearly provides that a teacher and administrator are comparable positions for the purpose of acquiring tenure. * * * While the two positions involved here are comparable for purposes of acquiring tenure they are functionally dissimilar. However, we conclude that reassignment, without reduction in salary, for legitimate financial constraints, is justifiable and not contrary to tenure laws. *Id.* 667 P.2d at 403

While there is no dispute regarding King’s acquiring tenure or being transferred for financial reasons, and *Sorlie* is distinguishable from the facts of this case, the decision nonetheless supports the conclusion that a tenured teacher may be reassigned from an administrative position to a functionally dissimilar position.

An administrative position as principal is comparable to a teacher position under the definition of principal in § 20-1-101(15), MCA: “. . . For the purpose of this title, any reference to a teacher must be construed as including a principal.” Likewise, the definition of “teacher” in § 20-1-101(26), MCA, states: “Teacher means a person, except a district superintendent, who

holds a valid Montana teacher certificate that has been issued by the superintendent of public instruction under provisions of this title and the policies adopted by the board of public education and who is employed by a district as a member of its instructional, supervisory, **or administrative staff.**” (Emphasis added.)

The terms “teacher” and “principal” are virtually interchangeable when interpreting Montana tenure law, and the Montana Supreme Court has repeatedly held that the positions of teacher and principal are comparable when a tenured teacher or principal transfers into (or “bumps”) a non-tenured teaching position, as in *Holmes v. Board of Trustees*, 243 Mont. 263, 792 P.2d 10 (1990) and *Massey v. Argenbright*, 211 Mont. 331, 683 P.2d 1332 (1984). This interpretation is consistent with the intent of tenure laws: economic and job security.

A former state superintendent addressed a similar issue in *Michunovich v. Laurel*, OSPI 291-02 (2003). In that case, the board transferred a tenured high school principal to the position of director of support services. The *Michunovich* decision analyzed the principal’s reassignment in light of the language in § 20-4-203(1), MCA, and remanded the case to evaluate comparability of the positions. The decision affirmed the conclusion that transfer of a tenured teacher to another comparable position is legally acceptable under Montana tenure statutes, whether the transfer occurs before or after June 1. Further, “[t]he Montana Supreme Court has held that a public employee does **not** have a property interest in a particular position.” *Id.* at 21, citing *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996). Nor is there a requirement that a due process proceeding be provided before such a transfer. *Id.* at 23.

Michunovich quotes the U.S. Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), recognizing that management has the option to reassign employees and work assignments in the interests of maintaining efficiency. In Montana’s public education system, management is the local school board. Under Montana Constitution Article X, Section 8 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.”

King argues the language in § 20-4-203, MCA: “. . . the teacher is considered to be reelected from year to year as a tenured teacher at the same salary and in the same or a comparable position of employment as that provided by the last-executed contract” dictates the meaning of “comparable position.” It is undisputed that King’s last executed contract was for a principal position. As discussed above, however, King is not entitled to demand her same

position, even when “reelected.” King’s last executed contract was comparable to her current elementary teacher position for the purposes recognized by Montana tenure laws.

“Comparable,” under the tenure laws, means she retains her tenure status and salary.

Michunovich was remanded for comparison of the job duties associated with the two positions. Such analysis is not required if both positions are otherwise comparable for the purpose of tenure and the teacher is appropriately endorsed for the position. Specific job duties need not be compared when analyzing compliance with § 20-4-203, MCA. The job duties and responsibilities of a high school principal and an elementary teacher are clearly distinct and separate, and are not comparable in that regard. However, it would unduly restrict the prerogative of a local school board’s management of their district to require a side-by-side comparison of specific job duties prior to a position transfer. Insofar as that aspect of the *Michunovich* analysis and decision conflicts with this holding, it is overruled.

King was appropriately transferred under Montana’s tenure laws, not because a nearly exact position was offered, but because her tenure rights were protected with an offer of a position within the District that allowed her to keep her tenure at the same salary.

2. Does a county superintendent of schools have authority to award attorney’s fees and costs?

No. The county superintendent is correct in concluding that attorney fees may not be awarded at this stage of the proceedings.

In *Talon Plumbing and Heating v. Montana Department of Labor and Industry*, 2008 MT 76, 198 P.3d 213 the Supreme Court held:

Attorney fees are allowable only when provided for by contract or statute. *Chagnon v. Hardy Const. Co.*, 208 Mont. 420, 424, 680 P.2d 932, 934 (1984). Talon correctly asserts that attorney fees are not awarded at the agency level. In *Chagnon*, we held that an administrative hearing is not a “suit at law” and that a “determination” made by an administrative agency is not a judgment. *Chagnon*, 208 Mont. at 425, 680 P.2d at 934. A district court’s review of an administrative decision on a wage claim is a “suit at law” within the meaning of § 39-3-214(1), MCA, that provides for attorney fees whenever such a suit is necessary to recover wages due. *Huber v. Com’r of Labor and Industry*, 220 Mont. 335, 337, 715 P.2d 440, 442 (1986).

There is no provision for attorney's fees in King’s 2008-2009 employment contract, nor is there a statute under which the county superintendent has jurisdiction, i.e. Title 20, providing for the payment of attorney's fees. As stated in *Talon*, attorney's fees are not awarded at the agency

level.

The county superintendent was correct in her determination that there is no statutory authority for an award of attorney fees at this level.

The decision of the county superintendent is affirmed.

DATED this 2nd day of July, 2010.

/s/ Denise Juneau
Denise Juneau,
Superintendent of Public Instruction

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 2nd day of July, 2010, I caused a true and exact copy of the foregoing DECISION AND ORDER to be mailed, postage prepaid, to the following:

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