BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
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TIM J. MASSEY, Appellant, v. CUSTER COUNTY DISTRICT HIGH SCHOOL and MILES CITY SCHOOL DISTRICT NO. 1, Respondent.	)	DECISION AND ORDER OSPI 33-82

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This is an appeal by Tim J. Massey, hereinafter referred to as Appellant, from the findings of fact, conclusions of law and order of the Custer County Superintendent of Schools dated September 14, 1982, affirming the decision of the Board of Trustees of Custer County District High School and Miles City School District No. 1, hereinafter referred to as Respondents, decision not to renew Mr. Massey's contract for 1982-83 school year.

Appellant is a tenured teacher with the Respondent school system where he was endorsed in business education and health and physical education. He was employed with the Respondent beginning in 1975 as a high school teacher where he taught in the business education department. Appellant has never been employed in the physical education department of the Respondent district. Due to a drop in enrollment, the board of trustees of the Respondent district found it necessary to reduce staff in the business education area. All business education teachers in the district, including Appellant, had acquired tenure as business education teachers.

Appellant was timely notified that his teaching contract would not be renewed for the 1982-83 school year. He requested reasons on April 5, 1982; these reasons were supplied on April 12, 1982.

While Appellant was terminated, several teachers in the physical education area were nontenured and remained employed in the school district.

The issue revolves about the retention of the non-tenured physical education teachers and the termination of Appellant who, while certified as a physical education teacher, never had any actual teaching experience in that area. Specifically for the purposes of this appeal, I consider the issue to be:

> Whether it was error for Respondent to terminate Appellant in the business education area while retaining nontenured teachers in the physical education and health area. In other words, does a Montana teacher acquire the protection and benefits of tenure for all subjects in which he was certified even though tenure was acquired only in one subject area for which he or she taught?

This cause is covered by the Montana Administrative Procedures Act and the Standards of Review found in Sections 2-4-704 MCA which provide:

> Standard of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decision 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 al-

though requested.

This case presents a fundamental issue of the interpretation of Montana's tenured teacher law as articulated by the legislature and the courts.

This Superintendent has recognized the long established definition of tenure articulated by the courts in the case of State ex rel. Saxtorph v. District Court 128 Mont. 352, 215 P2d 209 (1954). In that case tenure was defined as follows:

> A teachers' tenure is a substantial, valuable and beneficial right which cannot be taken away except for good cause.

This Superintendent has also decided recently several cases dealing with tenure, reduction in force and the comparable position issue. The recent cases of Holter v. Valley County School District No. 1, OSPI 7-81, Holter v. Valley County School District, OSPI 29-82, and Sorlie, OSPI 10-81, have discussed various aspects of tenure, comparable position and the management rights of public employers.

Section 20-4-203 MCA provides:

> Whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year or employment by a district in a position requiring teacher certification except as a district superintendent or specialist, the teacher shall be deemed to be re-elected from year to year thereafter as a tenure teacher at the same salary and in the same or comparable position of employment. as that provided by the last executed contract with such teacher, ... (emphasis supplied)

This right of course has been limited by the management rights of public employers found in Section 39-31-303 MCA which provides:

> ...public employees and their representative shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to:

1. direct employees;
2. hire, promote, transfer, assign and retain employees;
3. relieve employees from duties because of lack of work or funds, or under conditions where continuation of such work be inefficient and nonproductive;.. (emphasis supplied)

The issue of whether or not a reduction in force (RIF) was needed has not been raised by Appellant in this appeal. The only contention is that someone other than Appellant should have been relieved of his or her duties. In addition, the criteria adopted by Respondent district has not been challenged by the Appellant insofar as it focused on the business education area. Appellant contends that he should have been given priority over a nontenured teacher in the physical education area even though Appellant had no actual experience.

A brief discussion and progression of the Reduction in Force cases to date is in order. In Holter I, I recognized and directed that tenured teachers cannot be terminated in an area where they have experience and certification and be replaced by nontenured teachers. In Holter I, unlike this case, the school district had not focused on a subject area nor had it analyzed all teachers in that area with teaching experience.

In Sorlie, I held that once a teacher acquires tenure, tenure goes with the teacher as he or she is transferred to other responsibilities or positions. In other words, the comparable position protection of Section 20-4-203 goes with the teacher who is tenured if he or she is transferred to a new position. Again this was not the case in this appeal. Here, Respondent properly determined an area where a reduction in teachers was necessary. The Respondent analyzed the tenure status of all teachers involved in the subject area of business education and reduced its force in that area by terminating the teacher with least tenure.

I believe this is adequate protection of tenure for comparable position and consistent with the Montana sta-

tutes and case law. I further hold that for the purposes of interpreting the comparable position requirement of Section 20-4-203 MCA teaching experience is necessary. See Sorlie, OSPI 10-81, to the extent that this overrules the decision by a previous State Superintendent, Reynolds v. Gallatin County School District #4, rendered by my predecessor at the end of her term. That decision is expressly overruled. I believe that the good cause discussion is clarified by reference to the management rights of public employers and that a drop in enrollment is good cause for termination provided that tenured teachers are given the special consideration which they deserve under the law. Since it appears that the legal requirements of tenure have been met by Respondent in this case, the decision of the Custer County Superintendent of Schools is affirmed.

DATED February 25, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
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SCHOOL DISTRICT #9, LEWIS *AND* CLARK COUNTY, MONTANA, Appellant, -vs- MR. *AND* MRS. WILLIAM WIEDBUSCH, Respondent.	OSPI 38-83 DECISION *AND* ORDER

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This is the second appeal growing out of a controversy in Lewis and Clark County involving the Respondent Parents and the Appellant Resident School District. The controversy revolves about the minor child of the Respondent Parents (T.W.). My first decision and order in this matter was issued September 3, 1982. See Mr. & Mrs. William Weidbusch v. School District #9, Lewis & Clark County, OSPI 25-82. The Lewis and Clark County Superintendent dismissed the matter without a hearing. I found that order to be contrary to State and Federal special education law and reversed his decision. I directed that an evidentiary hearing be held on the following issues:

1. Whether the parents were afforded due process including notice of their rights, their right to request a hearing within the residential school district if they objected to the placement of the child, being informed of those rights, either actually or by written sign off. Procedural due process in special education laws includes noticing requirements of the school district to the parent and other rights outlined in the special education laws. See OCR complaint finding Juniata, Pennsylvania County School District, Feb. 18, 1983, 257:337 CRR Law Reporter.

2. Whether the parents had exhausted all of their avenues of relief within the district and other considerations, before the decision to unilaterally remove the child.

3. Whether the parents of the child followed the appropriate and explicit directions of federal and