BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

MARILYN PARKER, Appellant	)	
vs.	)	MEMORANDUM OPINION OSPI #54-83
BOARD OF TRUSTEES, YELLOWSTONE COUNTY ELEMENTARY SCHOOL DISTRICT 7-70, Respondent.	)	

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This is an appeal by Marilyn Parker, hereinafter referred to as Appellant, from the Findings of Facts, Conclusions of Law and Order entered by Wallace D. Vinnedge, Flathead County Superintendent of Schools, sitting in place of the Yellowstone County Superintendent of Schools.

The County Superintendent affirmed the decision of the Board of Trustees, Yellowstone County Elementary School District 7-70, hereinafter referred to as Respondent, who had terminated the services of Appellant.

Appellant was present at the hearing and was represented by Emilie Loring. Respondent was represented by David Hoefer, from the Yellowstone County Attorney's office. Appellant filed a Notice of Appeal with the State Superintendent on August 5, 1983. Oral argument was held on November 29, 1983, and this State Superintendent deemed this case submitted on that date.

Appellant contends that: (1) the termination was untimely and (2) that she was terminated without cause and requests that the State Superintendent order the Board of Trustees to reinstate her to her former position.

Appellant was terminated in Respondent school district and was provided the following reasons for such termination:

1. failure to follow specific directives of her immediate supervisor
2. failure to follow the state laws of Montana regarding the application of corporal punishment (transcript of hearing-T. School Board Exhibit No. 2)

Prior to the termination notice, Respondent suspended Appellant with pay for the balance of the 1982-83 school year. The suspension is not an issue before the State Superintendent and has not been raised as an issue by Appellant.

Appellant received written notice of her termination. Appellant requested a reconsideration hearing by the Respondent. Such hearing was held on April 28, 1983. Respondent reaffirmed its decision on or about May 2, 1983.

Appellant contends that the County Superintendent's Findings of Fact, Conclusions of Law and Order should be reversed because substantial rights of the Appellant have been prejudiced as the Findings of Fact, Conclusions of Law and Order are in violation of statutory provisions and clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

Appellant more specifically raises the following issues on appeal.

1. Whether Appellant's termination was untimely, therefore in violation of a statutory provision, Section 20-4-204 (1) MCA. Specific findings No. 7, No. 8, No. 12, and Conclusions of Law No. 2, of the County Superintendent's decision are claimed as erroneous.

This State Superintendent has incorporated and adopted the

standard of review as set out in Section 2-4-7-4 MCA, referred to in Rules of Procedure for all School Controversy Contested Cases Before the State Superintendent of Public Instruction, Section 10.6.125, Administrative Rules of Montana, and as prescribed by the Montana Supreme Court in Yanzick vs. Polson School District, ____Mont. ____, 641 P.2d 431 (1982).

The first issue this State Superintendent will address is whether the termination notice was timely or untimely and therefore in violation of Section 20-4-201(1).

> 1. Whenever the trustees of any district resolve to terminate the services of a tenure teacher under the provisions of 20-4-203, they shall, before April 1, notify such teacher of such termination in writing by certified or registered letter or by personal notification for which a signed receipt is returned. Such notification shall include a printed copy of this section for the teacher's information. (Section 20-4-211[1])

Appellant contends that the Respondent trustees failed to notify her in writing by "April 1" of the termination; therefore, Appellant is deemed reelected by operation of law and must be offered a contract for 1983-84. (Section 20-4-203, MCA)

The County Superintendent of Schools found in Findings of Fact that:

> 18. Respondent's decision after hearing was to suspend petitioner (Appellant) for remainder of 1982-83 school term with pay. A reconsideration meeting was held on February 22, 1983, and the Respondent reaffirmed its previous decision for suspension. (T. 62 L 1-25)
>
> 19. Respondent mailed a written termination notice to petitioner dated March 19, 1983. Said notice was mailed by certified mail through the Laurel post office. (Respondent's exhibit No. 2 and No. 1)

> 20. Respondent's certified letter to petitioner was not claimed until April 6, 1983. A final notice for certified letter was given on April 5, 1983. (Respondent's Exhibit No. 1; T. 7, 8, 9, and 10)
>
> 21. All notices and proceedings of this case appear to be in order and timely.
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> Further, the County Superintendent concluded:
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> Conclusion of Law, No. 5: According to 20-4-204 (1) MCA, the Respondent gave timely written notice of termination by certified mail to the petitioner.

Appellant contends that Respondent resolved on February 22, 1983 to terminate Appellant at the end of the 1982-83 academic year. Written notice of this decision was not prepared until March 29, 1983, when school district Exhibit 2 was typed and delivered to the post office. The U.S. Postmaster testified that an attempt to deliver the certified letter was made on March 30, 1983. Appellant was not home and testified that no notice of attempted delivery was left in her mail box or at her home. Appellant claims that she did not receive a notice of the attempted delivery until April 5, 1983, and the following day she picked up the certified letter at the post office. The record reveals that Appellant was given actual notice by her representative on February 13, 1983 that she was suspended with pay for the balance of the 1982-83 school year and terminated at the end of the 1982-83 school year. (T. P.188, L.24-25; P.189, L.1-17) Appellant was given written notice on March 29, 1983 by certified mail of her termination by Respondent as of the end of the 1982-83 school year. (T. P.14, L. 5-22) Respondent contends that it gave notification in accordance with the statute by sending the termination notice by certified mail

on March 29, 1983 and the postal service attempted delivery at Appellant's home on March 30, 1983. (T. P.8, L.18-20) Respondent argues that Appellant frustrated the delivery by her absence from home on March 30, 1983, before 5:00 p.m. Appellant cites several cases regarding the sufficiency of notice with regard to an automatic statutory reemployment of the teacher. Appellant admits that there is a split of authority as to the sufficiency of notice. (See 92ALR 2d 751)

There is sufficient evidence in the record to indicate that Appellant had actual notice of the school board's decision to terminate her services at the end of the 1982-83 school year. Appellant admitted that although she did not attend the school board meeting of February 12, 1983, by her own choice, having been given notice of her right to appear, she was made aware of the school board's decision by her representative the next day by a telephone call. (T. P.188, L.24-25; P.189, L.1-25; and P.190, L.1-5)

Respondent sent a certified letter on March 29, 1983, giving notice of the termination and including the necessary printed copy of the statutory section. Appellant argues that the meaning of the statute is that the letter must not merely be mailed by certified mail by April 1, but actually received by the Appellant before April 1.

The Laurel postmaster testified that the written notice of termination was received by his post office from the school district on March 29, 1983. The Laurel post office certified the letter on that same day. The postal service attempted

delivery of the certified mail termination notice on March 29, 1983, and left notice of attempted delivery of certified mail in Appellant's post box at her home on March 30, 1983. (T. p.7, L.25; p.8, L.1-20) For some reason, Appellant did not actually pick up the certified letter from the post office or the notice from the post office that a letter was delivered. Respondent argues that the school district cannot be placed in a position to ensure that Appellant actually picks up the certified mail.

This State Superintendent finds that Respondent school district had satisfied its statutory obligation by mailing the notice in a timely manner and assuring itself that the postal service attempted home delivery in a timely manner before April 1. The record reveals clearly that the school district attempted such in this case. Once the district decided to use certified mail, it had complied with the law.

Both parties indicate that there are no Montana cases that deal with this time issue. The issue that this State Superintendent must determine is whether notification by the statute is sufficient upon deposit to the post office as occurred in this case or is it essential that the notice comes into the hands of one sought to be served to be effective, as Appellant argues and cites School District No. 6 of Pima County, v. Barber, 85 Ariz. 95, 332 P.2d 496 (1958).

This State Superintendent finds the law set forth in Ledbetter v. School District No. 8, 428 P.2d 912 (1967) to be the proper precedent in this case. In Ledbetter, a school district gave written notice of termination by registered mail

on April 11, under a statute similar to Montana's. Colorado statute requires written notice by April 15. In Ledbetter, the notice was first misdirected by the post office, but it was rerouted by the post office to the correct address on April 13. There, the teacher was not at home, as was in this case. The notice of attempted delivery was left at the teacher's home by the post office on April 13. The notice left at the teacher's home instructed the addressee to call at the post office to pick up the mail. The teacher did not pick up the mail until April 18. In this case, Appellant did not pick up the letter until April 6, 1983, after the postal service gave final notice on April 5, 1983. (T. P.152, L. 12-17)

In both cases, the postal service left notice of attempted delivery at the teacher's home two days before the statutory notice date. In adopting this case, this State Superintendent recognizes that a notice was delivered to the Appellant teacher. What Appellant teacher does with such notice is beyond the control of the school district and effectively could circumvent the statute by simply losing the notice or being absent from the home. There was no evidence of bad faith on the part of the school district in notifying the school teacher. Appellant's absence from her home frustrated delivery of the certified mail. It was Appellant's act, not Respondent's, that prevented delivery of the notice. Respondent points out that Section 2-4-106 provides a general rule on service and administrative agency proceedings. The general rule under that statute is that

service shall be as proscribed for civil actions in the district court. Rule 5(b) of the Montana Rules of Civil Procedure provide that "service by mail is complete upon mailing." The rule does not require receipt of notice, but instead it requires mailing of the notice by a certain date.

Appellant's next issue raises specific findings of fact and conclusions of law as erroneous. This State Superintendent will address them one at a time. This State Superintendent will not substitute his judgment for that of the county superintendent as to the weight of the evidence on questions of fact. This State Superintendent will reverse or modify the decision only if substantial rights of the Appellant have been violated because Findings of Fact, Conclusions of Law and Order are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

Appellant contends that Finding of Fact No. 7 is not supported by the evidence. Finding of Fact No. 7:

> 7. Petitioner continued to physically abuse students and in late April, 1982, tore the skin of Leo Kamp's son in a classroom incident. (T.26-L.10-25, T. 121-L.17-25, T. 122-L.1-6)

Appellant argues that there was no testimony that Appellant "tore the skin of" this particular child. Appellant does concede that she did take hold of him by the arm and put him back in his seat. Appellant claims that testimony relating to blood was after the actual event, the boy made no complaint about blood at the time, and there was no testimony by other children or adults who had seen blood.

The record reveals otherwise. Leo Kamp, the father of the minor child, testified that Appellant grabbed his son and broke the skin. (T.p.122, L.1-25) The County Superintendent chose to use the words "tore the skin" as opposed to "breaking the skin." This State Superintendent sees no error in technical terminology. Finding of Fact No. 7 is supported by probative evidence and this State Superintendent finds no error.

Appellant next raises Finding of Fact No. 8. Appellant argues that such does not constitute "physical abuse" as a matter of fact nor as a conclusion of law. Finding of Fact No. 8 states:

> 8. Petitioner committed further acts of physical abuse of students in her fourth grade class in direct disobedience of the January, 1982 written directive from Gordon Forster, in which she was instructed not to touch students either in friendship or because of discipline during the fall of 1982 and early winter of 1983. (T.27-L.18-25, T.28-L.1-13, T.28-L.1-8, T.129-L.3-8, T.130-L.5-18, T.98-L.18-25).

Appellant argues that she did not physically abuse children. She denied hitting or hurting them. She argues that she attempted to maintain discipline in a classroom in which children could learn. She argues that in order to maintain a classroom environment in which students could learn, it was necessary to touch children who were trouble-makers.

This State Superintendent acknowledges the need and has, on prior occasions, upheld the right of a school teacher to administer corporal punishment when it is necessary to maintain discipline in a school district. (See Pryor School Districts No. 2 and 3, Big Horn County, Montana, vs. Bruce R. Youngquist, OSPI No. 42-83).

The record reveals in this case that there was more than mere touching or the proper administration of corporal punishment. Appellant attempts to paint an image of proper maintenance of discipline in school by the mere touching of hands on school children. This State Superintendent concurs with the County Superintendent's findings that the touching was not touching but was, at several times, blows inflicted upon school children, severe enough to constitute physical abuse. Appellant admitted "touching" or in an instance "spanking with a wood paddle." The severity and the number of times that this infliction occurred requires any responsible school official to take a second look. There was sufficient and ample testimony before the County Superintendent to describe the severity of the blows Appellant inflicted on fourth grade children.

It must be understood that these children are fourth graders, nine-, or ten-year-old children. Appellant hit Joe Lorenzen in the school lunchroom. That incident was reported by a monitor aide of the South School where Appellant taught. Several witnesses testified to such. The County Superintendent also believed a second witness, John Sorenson. John Sorenson testified that Appellant had struck him on several occasions, sometimes across the face. Appellant also administered a spanking in her office and commented that she had been waiting for this all year. The testimony revealed that the spanking had occurred with a wooden paddle. There is sufficient testimony in the record to reveal that the children were struck and beaten. This State Superintendent finds probative and substantial evidence on the record to support such findings.

Further, Appellant was clearly instructed not to touch the children. The record reveals that these cases were not isolated or single cases. There was a history of striking, spanking, slapping on the head or slapping in the face. There were numerous witnesses who testified to this point; the school administration had received complaints from a number of parents with regard to these incidents. The school administration acted properly in directing Appellant not to touch the children or to administer corporal punishment. Further, the Montana Legislature has provided a direction on how to administer corporal punishment. Section 20-4-302, states:

> Power of teacher or principal over pupils -- undue punishment. (1) Any teacher or principal shall have the authority to hold any pupil to a strict accountability for any disorderly conduct in school, on the way to or from school, or during the intermission or recess. Whenever a principal shall deem it necessary to inflict corporal punishment in order to maintain orderly conduct of a pupil, he shall administer such corporal punishment without undue anger and only in the presence of a witness. Before any corporal punishment is administered, the parent or guardian shall be notified of the principal's intention to so punish his child; except that in the cases of open and flagrant defiance of the teacher, principal, or of the authority of the school, the teacher or principal may administer corporal punishment without giving such notice.

In the Youngquist case, this State Superintendent found an open and flagrant defiance of a pupil and in that instance upheld the teacher's authority to administer corporal punishment. In that particular case, a teacher was confronted by a defiant student and, as such, administered corporal punishment without advance notice to parent or guardian.

In this case, this State Superintendent is unable to find an open and flagrant defiance of school authority. This State Superintendent is also impressed by the fact that the administration had forewarned Appellant, in several instances, not to touch the students because of the numerous complaints received by the school district. Corporal punishment and the means of discipline in school is of serious concern to this State Superintendent. However, the abuse of corporal punishment is just as dangerous as the administration of corporal punishment where, in an instance, a particular teacher abuses the right and/or administers corporal punishment when a school administration has specifically instructed the teacher not do so.

It is clear from the record, and the testimony supports the findings of the County Superintendent, that Appellant was terminated because she refused to follow express written directives of the school district and because she physically abused her students in violation of Montana law as to corporal punishment. The record reveals these allegations to be true. There is substantive, probative and substantial evidence in the record. Where a teacher has on numerous occasions administered corporal punishment, where such corporal punishment has been administered arbitrarily and without consultation of the principal and the parent, where numerous parents have complained to the school administration and board of trustees, where such corporal punishment and striking of children continue against the explicit and specific directive not to do so by school officials, and where there was no evidence of open and flagrant

defiance of the teacher's authority, I find that the County Superintendent's finding in this instance to be correct.

Appellant also contends that Finding of Fact No. 12 relating to an inadvertent error in a special education student's record did not constitute good cause for the termination of a tenured teacher. Finding of Fact No. 12 states:

> Petitioner did not follow the policy guidelines and failed to list grades as so indicated for a resource student. On December 9, 1982, petitioner received a letter regarding a meeting about the above problem. (Respondent's exhibit No. 4; T.33-34, L.5-25)

The record reveals that Appellant did not comply with special education student record policy in the administration of an "F" grade. Appellant disobeyed this directive and made a unilateral decision. Appellant contends that this was the basis for the second reason for termination of a tenured teacher. That insubordination by itself may not have constituted sufficient grounds for the termination of a tenured teacher. However, when this particular directive and the other directives in which Appellant was insubordinate are taken together, and not as isolated cases, this State Superintendent finds sufficient evidence to warrant the termination of a tenured teacher. (See In the Matter of the Appeal of Louis Kisling, OSPI No. 14-81.) In that case, I recognized tenure as a substantial, valuable and beneficial right. In Kisling, as well as here, the teacher was aware of problems. She had a specific directive. She knew what her status was at all times. The insubordination was continuous. The school district was upfront

in its directives to the school teacher, but the teacher disregarded written and oral directives.

Appellant contends that Conclusion of Law No. 2, finding that Appellant administered corporal punishment in violation of the statute, was not supported by the evidence nor by the County Superintendent's own Findings of Fact. Conclusion of Law No. 2 states in its entirety:

> 2. Petitioner administered corporal punishment to children in her class without giving notice to the parent or guardian in cases where no open or flagrant defiance was exhibited by the children. This in violation of 20-4-302 MCA. Petitioner admitted she was aware of the statute.

The testimony of several witnesses indicated clearly that Appellant went ahead and administered corporal punishment without the principal's presence or without the authorization or notification of the parent or guardian. In this particular school district, there is a school principal in the building. There was no evidence of open and flagrant defiance to warrant an immediate spanking of a child. Further, the Appellant had been given a written directive by her principal nearly one year earlier not to touch students in friendship or discipline manner. This directive was given to Appellant because of prior physical discipline problems. The principal was in the building. The student had sat for nearly 45 minutes passively in or near his room. Appellant spanked the student with a wooden paddle with full knowledge that the principal was available, without consultation with the child's parents. There was no evidence whatever of open and flagrant defiance of the teacher by the child. The conclusion of law is proper.

It is clear from the record that Appellant has demonstrated that she cannot control her temper, that she uses unduly harsh methods of discipline, that because of such she has struck fear into some of the youngsters in the classroom, that she has upset the community and parents with the numerous complaints requesting that something be done. It is clear that Appellant had violated adopted policies of the school district trustees. These acts of Appellant constitute good and/or just cause for non-renewal.

Further, this State Superintendent wants to compliment the County Superintendent for a proper hearing on a difficult matter. The record was complete. The transcripts allowed this reviewing officer to weigh the evidence, to establish whether there was sufficient reliable, probative and substantial evidence in the record.

County Superintendent's decision is affirmed.

DATED this 30th day of January, 1984.