BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

NANCY KEENAN

* * * * * * * * * * * * * * *

JOHN PICKART, Appellant, vs. DAWSON COUNTY (MONTANA) HIGH SCHOOL DISTRICT, by and through its Board of Trustees, Respondent.	)	OSPI 264-96 (2nd appeal) **DECISION AND ORDER**

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PROCEDURAL HISTORY

The Trustees of Dawson County High School (hereinafter "the District") terminated John Pickart, a tenured teacher, on March 15, 1993, for sexual harassment of students, making harassing, late night telephone calls to the District Superintendent and insubordination. Pickart appealed his termination to Acting Dawson County Superintendent of Schools, Buzz Christiansen, who held a hearing in September 1993, and issued a decision on April 21, 1994. Superintendent Christiansen found that Pickart had engaged in the conduct alleged by the District and that good cause existed to terminate him. Pickart appealed that decision to the State Superintendent.

On May 31, 1995, this Superintendent issued an Order that substantial, credible evidence supported the County Superintendent's findings and that good cause existed to terminate Pickart. The matter was remanded, however, for a factual determination on one procedural issue. The

County Superintendent was instructed to review the record to determine whether the District gave Pickart an explanation of its evidence against him prior to his March 15, 1993, pre-termination hearing. The County Superintendent was also directed to:

2. Review Conclusion of Law No. 10 and modify it to reflect Finding of Fact No. 39.

3. Conclusion of Law No. 19 states that "conduct interfered with the students' academic performance." This is a finding of fact, not a conclusion of law. No substantial credible evidence supports it and the statement should be struck.

4. Modify Conclusion of Law 17. The publications describe behavior which constitutes sexual harassment; it makes no reference to Pickart's conduct.

Decision and Order of State Superintendent, OSPI 238-94, pp. 3-4 (5/31/95).

On July 28, 1995, Pickart petitioned for judicial review in the First Judicial District and this Superintendent transmitted the record to the District Court. The parties later stayed the District Court proceeding. The record in support of the original Order was not returned to the County Superintendent; it remains at the District Court.

The Acting Dawson County Superintendent who heard the original case retired. A new acting Dawson County Superintendent, Darlene Carter, accepted briefs from both parties and issued an Order on April 4, 1996, finding that, prior to the March 15, 1993, pre-termination hearing, the District gave Pickart an explanation of its evidence against him. She also modified Conclusions of Law 10, 17 and 19.

Pickart appealed on the grounds that 1) The District did not, in fact, give him an explanation of its evidence against him prior to his pre-termination hearing, and 2) the County Superintendent did not follow the instructions on remand concerning Conclusions of Law 10, 17 and 19. Having received briefs from both parties, this Superintendent issues the following Order.

STANDARD OF REVIEW

This Superintendent's review of County Superintendents' Orders 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. Harris v. Trustees, Cascade County School Districts No. 6 and F, 241 Mont. 274, 786 P.2d 1164 (1990). Baldridge v. Rosebud County School District 19, 264 Mont. 199, 870 P.2d at 714 (1994). 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, 208 Mont. 33, 40, 676 P.2d 194, 198 (1984). State Compensation Mutual Insurance Fund v. Lee Rost Logging, 252 Mont. 97, 102, 827 P.2d 85, 88 (1992).

Conclusions of law are reviewed to determine if the agency's interpretation of the law is correct. Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990). Baldridge v. Rosebud County School District 19, 264 Mont. 199, 870 P.2d at 714 and 715 (1994).

DECISION AND ORDER

The Acting County Superintendent's finding that the District gave Pickart an oral or written explanation of its evidence prior to his March 15, 1993, pre-termination hearing is affirmed. The Acting County Superintendent adequately followed the instructions of this

Superintendent regarding Conclusions of Law No.10 and 19. Conclusion of Law 17 is struck.

DISCUSSION

Issue one. Does substantial, credible evidence support the County Superintendent's finding that the District gave Pickart an explanation of its evidence against him prior to the pre-termination hearing?

Pickart was terminated for three reasons:

1. His conduct toward high school students was found to be sexual harassment.
2. He made harassing, late night telephone calls calls to the home of the District Superintendent.
3. He refused to meet with Superintendent Dan Martin, who conducted a portion of the sexual harassment investigation. The District characterized this behavior as insubordination and the County Superintendent agreed.

This Superintendent's earlier review of the record of the September 1994 hearing showed that substantial, credible evidence supported the County Superintendent's findings that Pickart did, in fact, engage in the conduct for which he was terminated. The totality of the circumstances in this case established good cause.

The matter was remanded for a determination of one procedural question. The County Superintendent was directed to determine whether the District informed Pickart of its evidence against him prior to the pre-termination hearing. The remand was based on the plain language of the United State Supreme Court, which has written that, prior to termination:

> The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. (Emphasis added.)

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 1495 (1985)

The Montana Supreme Court has applied this language in state employee terminations to

mean:

> [D]ue process simply required oral or written notice to the employee with an explanation of the employer's evidence and the opportunity for the employee to respond in 'something less' than a full evidentiary hearing before termination, coupled with a full post-termination hearing 'at a meaningful time.' (Emphasis added.)

Boreen v. Christenson, 267 Mont. 405, 410-411, 884 P.2d 761 (1984)

This Superintendent applied Loudermill to tenured teacher terminations as follows:

> All permanent public employees have constitutional protections in termination proceedings and tenured teachers in Montana have additional statutory protections. A tenured teacher's property interest in continuing public employment is subject to the procedural protections guaranteed by the Due Process clause of the constitution. [Citing Loudermill]
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> . . .
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> Although the County Superintendent cites the Loudermill decision in Conclusion of Law No. 7, he failed to make any finding of fact on whether the District explained its evidence to Mr. Pickart prior to his pre-termination hearing. The County Superintendent found that the documents provided to Mr. Pickart "more than provided him with adequate 'notice' of the charges against him" which is correct -- the notice met the requirements of 20-4-207.
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> In order to decide if Pickart received sufficient due process under Loudermill, however, the County Superintendent must determine whether or not Mr. Pickart received "an explanation of the employer's evidence." This case is being remanded for that determination to be made.

Decision and Order of State Superintendent, OSPI 238-94, pp. 9-10 (5/31/95).

The above quote from the Superintendent's May 31, 1995, Order is a conclusion of law which the District is, of course, free to take exception with and challenge in District Court. The District, however, reargued this Superintendent's legal interpretation of Loudermill on remand to the County Superintendent, stating that:

> The State Superintendent has ruled that Pickart was entitled to "an explanation of the employer's evidence" prior to his pretermination hearing. (Decision, p. 10) In this respect the State Superintendent has exaggerated the holding of the United States Supreme Court in Cleveland Board of Education v.

> Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the seminal case on pretermination due process rights. Where a post-termination hearing is afforded, Loudermill requires, at the pretermination level, only an "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story". Id. At 1495.
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> . . .
>
> The State Superintendent, however, is requiring not only notice and an opportunity to respond, but a full evidentiary pretermination hearing, in addition to the full post-termination hearing allowed by law. Where the employee is provided such a hearing before termination, with the right to discovery and cross-examination of witnesses, as well as a post-termination hearing, he has been deprived of nothing under Loudermill. The pretermination hearing itself meets the "explanation and opportunity to respond" requirements of Loudermill; two sets of "explanations" of the charges at the pretermination state are not required.

School District's Initial Brief before Acting County Superintendent Darlene Carter, pp. 3-5 (12/12/95).

And, in its answer brief to this Superintendent the District stated:

> The State Superintendent, however, in her previous decision, implies that, not only does due process require notice and an opportunity to respond, but a full evidentiary pre-termination hearing, in addition to the full post-termination hearing allowed by law.

Respondent's Answer Brief on Appeal before the State Superintendent, OSPI 264-96, p. 6 (7/12/96)

The District's argument to the County Superintendent that the State Superintendent is requiring a full evidentiary pre-termination hearing is incorrect. Loudermill does not require a full evidentiary pre-termination hearing and this Superintendent has not implied otherwise; a hearing by a Board of Trustees satisfies the pre-termination hearing required by Loudermill.

Loudermill does require that a tenured teacher receive "an explanation of the employer's evidence" prior to the pre-termination hearing before the Board. Both the U. S. and the Montana Supreme Courts have held that due process entitles a public employee to notice, an explanation of the employer's evidence and "an opportunity to present his side of the story" (Loudermill) or "the

opportunity for the employee to respond in 'something less' than a full evidentiary hearing" (Boreen) before termination. Due process is satisfied with an informal meeting but the due process right to the meeting is only meaningful if the employee is told the causes for termination and the employer's evidence before the meeting. He has to know what the employer's evidence is in order to have a meaningful opportunity to present his side of the story at the meeting.

The County Superintendent was directed to review the record and determine, based on the evidence, whether the District gave Pickart an explanation of the employer's evidence prior to the pre-termination hearing. That was the only question properly before the County Superintendent on remand. The legal interpretation of Loudermill was not, and properly could not have been, before the County Superintendent on remand.

The District maintains that the record shows it provided Pickart with a sufficient explanation of its evidence. Pickart argues that the District's explanations of its evidence against him prior to March 15, 1993, were insufficient because it did not provide him with a copy of the report prepared by the attorney hired by the District to investigate the allegations of Title IX violations until six months after the March 15, 1993, hearing.

County Superintendents 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.'" Baldridge v. Rosebud County School District 19, 264 Mont. 199, 870 P.2d 711, 715, 51 St.Rep 166, 13 Ed.Law 18 (1994). On remand in this case the County Superintendent wrote:

> It is the finding of this County Superintendent that the District gave Pickart an explanation of evidence against him before the hearing, and therefore he is not entitled to compensation from March 15, 1993, until April 21, 1994.

> The court, in the case of Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985) wrote ". . . all the process that is due is provided by a pre-termination opportunity to respond, coupled with post-termination administrative procedures. . . " Loudermill at 547. In this case, Pickart was given a pre-termination opportunity to respond.
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> Pickart received written "explanation" of the evidence and oral explanations were made available to him. These "explanations" Are set out in the school district's initial brief, at page 6 and are follows: . . .

Amended Findings of Fact, Conclusions of Law and Order by Acting County Superintendent Darlene Carter, p 3, (4/4/96).

The County Superintendent goes on to quote verbatim page 6 of the District's December 12, 1995, initial brief. This Superintendent assumes the County Superintendent did, in fact, review the record that she refers to in her Order at pages 3 and 4 by quoting the District's brief. This Superintendent has reviewed the record on file with the District Court for the evidence cited by the District and finds that it exists. That evidence established to the County Superintendent's satisfaction that the District informed Pickart of the evidence against him prior to the pre-termination hearing. Substantial, credible evidence exists to support the County Superintendent's finding. While Pickart is correct that the District did not provide him with a copy of the report prepared by the attorney hired by the District to investigate the allegations of Title IX prior to the March 15, 1993, hearing, the County Superintendent considered what evidence the District did provide him and found that it met the Loudermill standard.

Issue two. Instructions regarding Conclusions of Law 10, 17 and 19.

A. Conclusion of Law No. 10.

In the Order remanding this matter to the County Superintendent, this Superintendent noted that the statement in Conclusion of Law 10 that a Title IX policy existed directly conflicted with the statement in Finding of Fact 39, that a Title IX policy did not exist. The Order directed

the County Superintendent to review this and correct the finding or the conclusion based on the evidence. The County Superintendent struck the statement in Conclusion of Law 10 that a Title IX policy existed. This decision is supported by the record and cures any inconsistency between the findings and conclusions.

B. Conclusion of Law No. 19.

Concerning the County Superintendent's Conclusion of Law 19, that Pickart's "conduct interfered with the students' academic performance," this Superintendent stated that "This is a finding of fact, not a conclusion of law. No substantial credible evidence supports it and the statement should be struck." The County Superintendent's new Conclusion of Law 19 removed the statement and complies with this Superintendent's instructions.

C. Conclusion of Law No. 17.

The original Conclusion of Law No. 17 stated:

> The publications of Mr. Pickart's union also concluded that much of his conduct constituted sexual harassment and was the proper basis for disciplinary action.

On review, the County Superintendent replaced this with new Conclusion of Law No. 17:

> 17. The publications of the Montana Education Association described many forms of conduct that could be construed by students, other teachers, or administrators, in a particular setting of sexual harassment. Pickart engaged in many of the actions identified in the publications of Pickart's union, the Montana Education Association, as sexually harassing.

The first sentence in the conclusion does not make sense. The County Superintendent does not cite to evidence or exhibits in the record that support the second sentence or explain what relevance MEA publications had in the District's decision to terminate Pickart. This Superintendent agrees with Pickart that the County Superintendent did not follow instructions on remand concerning this conclusion of law. The conclusion is not relevant to the outcome,

however, and remanding this matter for a further explanation of this conclusion would serve no purpose.

Conclusion

The Acting County Superintendent of Schools found that the District gave Pickart an explanation of its evidence against him prior to his March 15, 1993, pre-termination hearing. There is substantial, credible evidence in the record to support that finding. The Acting County Superintendent adequately followed the instructions of this Superintendent regarding Conclusions of Law 10 and 19. Conclusion of Law 17 is not supported with cites to the record or with reasoning as to how it effects the outcome of this dispute. This is harmless error, however, because the Conclusion of Law is not necessary to the decision. The Order is affirmed.

DATED this 21st day of November, 1997.

Nancy Keenan

NANCY KEENAN
Superintendent of Public Instruction

PICKART.264

CERTIFICATE OF SERVICE

This is to certify that on this 24th day of November, 1997, a true and exact copy of the foregoing document was mailed, postage prepaid, to:

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