BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
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PRYOR SCHOOL DISTRICT NOS. 2 AND 3, BIG HORN COUNTY, MONTANA Appellant,	)	OSPI 42-83
vs. BRUCE R. YOUNGQUIST, Respondent.	)	DECISION AND ORDER

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This is an appeal by School District Nos. 2 and 3, Big Horn County, Appellant, from the findings of fact, conclusions of law and order entered on February 18, 1983, by the County Superintendent of Schools, Yellowstone County, Montana.

The Big Horn County Superintendent of Schools was disqualified pursuant to Section 20-3-211, MCA, 1982. The Yellowstone County Superintendent was appointed as hearing officer. Bruce R. Youngquist, Respondent, appeared in person and through his attorney, Doris M. Poppler. The Appellant appeared through their District Superintendent and their attorney, Jock B. West.

Respondent was employed by Appellant School District as an elementary school principal, commencing on August 10, 1981. The following year, Respondent was employed as the elementary and high school principal for Appellant School District.

Respondent was under contract for the school term for a period of ten months. On January 3, 1983, Appellant Board of Trustees dismissed Respondent from the contract as a result of recommendations received from the District Superintendent. The alleged reasons given for the dis-missal include:

1. During the morning of December 14, 1982, you were unable to control your temper, lost your composure and were insubordinate to the Super-intendent during your discussion with the Super-

intendent concerning the handling of the concession stand and gate proceeds of the Lodge Grass basketball game which was played in Laurel during the preceding week. As a result of your inability to control you (sic) temper and maintain your composure as elementary and high school principal, you publically (sic) shouted obscenities at the Superintendent. Said obscenities were done in a public area within the hearing and observation of the high school students which you supervise and set and (sic) example for.

2. That, on December 14, 1982, while in another fit of anger, you used language that is not morally proper nor acceptable for an individual in your position of trust and authority, in the classroom, in the presence of the Senior class. Such language should not be used with impressionable students.
3. That, on December 14, 1982, during a fit of rage and anger, you disregarded the personal safety of a female student by striking said student with your closed fist, in the face, and resultantly bruising and injuring the girl and further, by physically forcing said girl to her knees and holding her there.
4. That during the Fall of 1981, you inflicted bodily harm on a kindergarten student. That, when questioned by the Superintendent you angrily denied that this event happened. In your anger you purposely and deceitfully misled the Superintendent in that you later admitted the incident did happen.

On January 11, 1983, Appellant Board of Trustees conducted a hearing. At the conclusion of the hearing a motion was made to dismiss Respondent for cause based upon

the evidence and testimony which was presented at the hearing. The motion was unanimously passed and Respondent was dismissed pursuant to Section 20-4-207, MCA. Respondent filed a Notice of Appeal pursuant to Secton 20-4-207, MCA, with the County Superintendent of Schools for Big Horn County on January 17, 1983.

Respondent disqualified the Big Horn County Superintendent of Schools pursuant to Section 20-3-211, MCA. The disqualified Big Horn County Superintendent requested that the Yellowstone County Superintendent hear such appeal. The Yellowstone County Superintendent assumed jurisdiction. The hearing was held on January 25, 1983. Following the hearing, the County Superintendent pursuant to Section 20-4-270(2), MCA, found that the dismissal was made without good cause and ordered Appellant Board of Trustees to reinstate Respondent and to compensate him for his contract amount and the time lost during the pendency of this appeal. Appellant Board of Trustees appealed to this State Superintendent.

The facts in this case are exhaustive, as evidenced by a 433-page transcript.

From the record the following facts by way of introduction are revealed. On December 11, 1982, Respondent took a group of teachers and students to a ball game held at the school gymnasium at Laurel, Montana. According to the record, Respondent's duties were checking and accounting for the tickets sold at the gate, the concession stands and their workers, and general supervision for the school. The District Superintendent also attended the game but assumed no responsibility for these matters. On the return trip back to Pryor, Respondent was involved in an automobile accident in Billings which totaled his vehicle. Respondent suffered broken ribs, a broken hand, damage to his teeth, was bruised severely and was sent to the emergency room. Respondent reported such action to the Superintendent and that he would be absent from school on Monday.

The following day, the Superintendent and Respondent met in the Superintendent's office where a confrontation took place over the money deposited in the Security Bank on Friday night. Angry words were exchanged. Such confrontation occurred immediately prior to a teachers' meeting held at 8:05 a.m. to 8:25 a.m.

Later, at the teachers' meeting, Miss Schumacher, senior student advisor, told the principal that she was resigning her position as senior advisor because of a complete lack of responsibility on the part of most of the senior class in helping with the senior fund-raising projects. Respondent called the meeting of the senior class to discuss this problem. One female student remarked to Miss Schumacher, just as she entered the meeting, that she would like to "punch Mr. Youngquist." The meeting was held between Respondent and the seniors to discuss their general attitude.

During the discussion, Miss Schumacher was asked to step in to state her reasons for resigning. One of the boys was rude to her and she left the room in tears. Respondent then scolded the seniors and used the word "losers" in his lecture. A female student jumped to her feet, yelled an obscene term at Respondent as she rushed towards him. There was a confrontation. The student struck the principal in the face, knocking his glasses off and breaking them. Respondent physically grabbed her, and testimony in the record indicates that Respondent struck her face once either with his open or closed hand to restrain her and protect his previous injuries. The entire incident took less than three minutes.

Later, the Superintendent suspended Respondent from the school, called the Board of Trustees and recommended dismissal under contract.

Appellant raises two issues on appeal before this State Superintendent. The issues are found in Appellant's brief presented to the State Superintendent:

1. Whether the record of this case should be supplemented by affidavits as to facts and issues or, in the alternative, if the case should be remanded for further proceedings.
2. Whether the decision of the County Superintendent should be reversed on the grounds that substantial rights of the Appellant have been prejudiced by the County Superintendent's findings of facts and conclusions of law.

This State Superintendent has jurisdiction to decide the present controversy pursuant to Section 20-3-107, MCA.

> "The Superintendent of Public Instruction shall make his decision on the basis of the transcript of the fact-finding hearing, conducted by the county superintendent...and documents presented at the hearing. The Superintendent of Public Instruction may require, if he deems necessary, affidavits, verified statements or sworn testimony as to the facts and issues..."

Appellant argues that the State Superintendent of Public Instruction is required to make the decision based on the above referred to evidence, and is not bound by a decision or determination made by the County Superintendent. This State Superintendent disagrees in part.

Pursuant to Section 20-7-107 and the mandates of the Montana Supreme Court in Yanzick v. School District #23, _____ Mont. _____, 641 P.2d 431 (1982), this State Superintendent adopted the Rules of School Controversy. Within the Rules of School Controversy this State Superintendent formulated the Standards of Review for appeals such as this case. Section 10.6.125 states in its entirety:

> 10.6.125 APPELLATE PROCEDURE - STANDARD OF REVIEW
> (1) The state superintendent of public instruction may use the standard of review as set forth below and shall be confined to the record unless otherwise decided.
> (2) In cases of alleged irregularities in procedure before the county superintendent not shown on

the record, proof thereof may be taken by the state superintendent.

(3) Upon request, the state superintendent shall hear oral arguments and receive written briefs.

(4) The state superintendent may not substitute his judgment for that of the county superintendent as to the weight of the evidence on questions of fact. The state superintendent may affirm the decision of the county superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the state superintendent fails to retain proper jurisdiction on the matter. The state superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order 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;

(g) because findings of fact upon issues essential to the decision were not made although requested.

This State Superintendent may not substitute his judgment for that of the County Superintendent as to the weight of the evidence on questions of fact. See In the Matter of the Appeal of Kisling v. School District No. 2A(C), Phillips County, OSPI 14-81; Dawn Hanson v. Scobey School District #1, OSPI 21-82; and Yanzick, _____ Mont. _____, 641 P.2d 431 (1982). This State Superintendent may affirm the decision of the County Superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the State Superintendent fails to retain proper jurisdiction on the matter. The State Superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced based on those criteria listed in Section 10.6.125, ARM.

The Montana Supreme Court further noted that Section 2-3-210, MCA, requires the County Superintendent to hear and decide controversies of the Yanzick type and to make the decision based upon the facts established at the hearing. In effect, this requires a hearing de novo before the County Superintendent. The hearing provisions which apply to the County Superintendent are set forth in the Montana Administrative Procedures Act, Section 20-4-612.

> The foregoing statutes contain the procedure to be followed by the county superintendent in the de novo hearing before her. The statutes do not contain a limitation on the decision-making power of the county superintendent. Yanzick pages 196-198.

The Supreme Court also ruled that MAPA provisions of Section 2-4-623, MCA, require that the findings of fact be based exclusively on the evidence and the conclusions of law be supported by authority which is applicable to the State Superintendent as well as the County Superintendent. The State Superintendent as well as the District Court may not substitute its judgment for that of the County Superintendent as to the weight of evidence on questions of fact. Yanzick, p. 200.

The Appellant School District argues that the State Superintendent is under a mandate to accept supplemental affidavits as to facts and issues. Appellant argues that the County Superintendent did not have the benefit of information as contained in Appellant's affidavits. Further Appellant argues that in view of the statements which were made by Respondent on December 14, 1982, the Appellant had no way to foresee the "new version" of testimony and thereby have rebuttal witnesses available.

If the County Superintendent based his decision on facts before him in the record, the State Superintendent must review the record to determine first if the procedure was properly followed and the school district rights protected and not prejudiced and, second, whether the County Superintendent's decision was based on reliable, probative and substantial evidence on the whole record.

A review of the transcript of the hearing reveals that the hearing was conducted in compliance with Section 10.6.116, Administrative Rules of Montana. Each party had a full opportunity to conduct cross examination for the full and free disclosure of the facts, including the right to cross examine the authority of any documents prepared by or on behalf of or for the use of all parties and offered into evidence. All testimony was given under oath. The final order prepared by the County Superintendent included findings of fact and conclusions of law separately stated. Each finding was accompanied by a concise and explicit statement of the underlying facts supporting the finding. These findings were based on the evidence and on officially noted matters. Conclusions were supported by a reasoned opinion as required by Section 10.6.119, ARM. The County Superintendent had the assistance of a legal advisor of the County Attorney of Big Horn County. The parties were represented by legal counsel and the rules of evidence were followed. A proper courtroom atmosphere was maintained throughout the hearing.

The State Superintendent's role in deciding matters of controversy is clearly set out in the Administrative Rules of Montana as well as the Supreme Court decision in Yanzick and the Montana Administrative Procedures Act. The aggrieved party is entitled to appellate review by the State Superintendent who makes his decision based on the record established at the County Superintendent hearing and by reviewing the findings of facts, conclusions and order.

A review of the affidavits submitted to this State Superintendent for consideration reveals that the opposing party did not have an opportunity for cross examination in these matters, nor were they subject to the bright light of cross examination. Witnesses were presented on both sides on all major issues and subjects supplemented by affidavits to this State Superintendent. Many of the affidavits themselves are questionably presented. Several

of the affidavits have writing on them different from the typewriting. Others were cut and pasted together, statements are pasted over prior statements. Affidavits were done in haste with liquid whiteout deleting sections of the affidavits. This State Superintendent will not permit this administrative appeal process to be burdened by nonsupportive affidavits submitted after the de novo hearing. The discretion to submit additional affidavits or additional material is left totally within the discretion of this State Superintendent. See Section 20-3-107, MCA. The State Superintendent, after reviewing the extensive and exhaustive hearing transcript and the documents and exhibits which were introduced at the hearing, finds that it is not necessary to supplement the hearing or the record with additional affidavits and statements where opposing counsel does not have the opportunity to question the same. The Motion to this State Superintendent to accept additional evidence by way of affidavits is denied and Appellant's first issue is dismissed.

The second issue presented for review by the Appellant is that the State Superintendent should reverse the decision of the County Superintendent on the grounds that substantial rights of the Appellant have been prejudiced due to several findings of fact and conclusions of law.

Appellant School Board argues that the State Superintendent should reverse the decision because substantial rights of Appellant have been prejudiced because the findings of fact and conclusion of law and order are "in excess of the statutory authority of the agency," and "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." See Notice of Appeal filed March 21, 1983 to the State Superintendent of Public Instruction.

Appellant argues that the Board of Trustees in exercising its discretion, citing the Yanzick case and Kisling v. School District #2(A), OSPI 14-81, wrestled with the

question as to whether the conduct of Respondent fell within the four enumerated cases of Section 2-4-207, MCA. Appellant argues that it was within its discretion to rule that Respondent's actions established that he was unfit to hold the position of principal.

One specific finding of fact that Appellant School Board of Trustees allege is in error and not supported by the evidence is that the administration of corporal punishment was done without undue anger and in violation of Section 20-4-302 (2), MCA. Appellant claims that testimony presented before the County Superintendent and the Board of Trustees established the actions of Respondent were done in anger.

The incident regarding the female pupil was described in exhaustive testimony by many parties. After examination and cross examination, the two principal parties to the altercations, the pupil and Respondent, gave consistent testimony. Their description of the incident coincided very closely. The other witnesses also testified to the best of their ability, and the County Superintendent as the trier of fact spent fourteen hours listening to this testimony. His findings, again, clearly set out his reasons for his decision.

This State Superintendent will not substitute his judgment for that of the trier of fact. The evidence presented in the record of testimony of over four hundred and thirty pages reveals that the County Superintendent had full opportunity to hear the witnesses and believe or disbelieve the testimony.

Findings of fact number eight and number nine, are supported by substantial evidence in the record. Findings of fact number ten, eleven and twelve indicate correctly the evidence that supports those findings. The State Superintendent finds no error.

Appellant contends that finding of fact number seven was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Appellant

disagrees with the finding that the discussion between the Respondent and the District Superintendent was not a private confrontation not heard by anyone giving testimony. Appellant presented a particular witness who testified otherwise.

Appellant selects portions of the transcript and alleges that these portions should be considered by this State Superintendent in reversing the decision of the County Superintendent. Alternatively, Respondent raises areas in the transcript which support the County Superintendent's findings of fact. The issue of the use of obscenities also concerned the Appellant School District. The trier of fact had an opportunity to view the witness, discover the truth, listen to examination and cross examination and determine findings supported by the evidence in the record. The record allows support of the County Superintendent's findings. Those issues are dismissed.

The final issue this State Superintendent reviewed and will address in particular is finding of fact number thirteen. Appellant argues that there is evidence that supports the facts that a spanking of a kindergarten child occurred and that Respondent had lied or misled the County Superintendent. Finding of fact number thirteen states:

> In regard to the spanking of a kindergarten student, the teacher of the student herself testified she had no knowledge of this happening. The meetings arranged between the parent, teacher and principal were never held because the parent did not attend. The only testimony indicating that the incident occurred was testimony of a former secretary of Mr. Youngquist. She indicated that Mr. Youngquist mentioned to her that he had spanked the child and that he would probably hear about it. Youngquist denied using any force on D.W. There was no incident report in any of the school district's records in regard to this incident and there was no evidence produced by the child that was to have received the spanking nor was there testimony that possible corporal punishment if meted out as described by witness Lande was elevated to bodily harm.

Appellant alleges that there is testimony in the

record that proves that a spanking occurred; that it occurred in anger; that it is relevant to the unfitness charge raised by Appellant School District against Respondent. The alleged incident occurred nearly a year earlier. The record reveals there was no infliction of bodily harm on a kindergarten student.

The County Superintendent found that allegation to be untrue. Respondent denied using any force on the kindergarten student. There was no report in any of the school district records in regard to this incident. There was no evidence produced by the child who was to have received the spanking nor was there testimony that possible corporal punishment, if meted out as described by witness Lane, was elevated to bodily harm. The Respondent was rehired for the subsequent year. The only substantive testimony came from a former secretary of Respondent. The County Superintendent chose not to believe this testimony. Further, Appellant argues the mother of the child testified Respondent had spanked the child. On cross examination the mother revealed some boys who were in school told her oldest son, and he came from school to tell her about it. "And I questioned "P" then." (P the kindergarden child.)

"So it was on hearsay from a couple of boys to your son, your older son, then. What did P-did P indicate Mr. Youngquist had spanked him? Answer: Yes.

There was conflicting testimony at the hearing. The County Superintendent chose to believe one version and dismiss this testimony because such was not reliable to the trier of fact.

Appellant voted to dismiss Respondent for cause pursuant to Section 20-4-207, MCA. Appellant indicated that the four incidents set forth in the letter of January 3, 1983 constituted unfitness.

Appellant School District has the ability to maintain control of the district pursuant to its duties to screen teachers as to their fitness to maintain the integrity of

schools. I have supported this right on several prior cases, see Kisling v. School District No. 2A(C), Phillips County, OSPI 14-81; and Dawn Hanson v. Scobey School District #1, OSPI 21-82. The County Superintendent on January 25, 1983 ruled that there was not good cause for the dismissal of Respondent. Appellant now attempts to submit additional affidavits unverified, not subject to the bright light of cross examination, intending that the State Superintendent must receive such information and enter a different ruling. Legally the State Superintendent is bound to uphold the County Superintendent unless for some reason the case was substantially prejudiced because specific finding was not supported by creditable, reliable evidence in the record. This State Superintendent has exhaustively gone over the entire transcript and the exhibits within the confines of the law and finds no error on the part of the County Superintendent that allows a reversal or remand under the Standards of Review controlling this reviewing official. The Appellant rights were not prejudiced by the County Superintendent's decision.

Respondent requested that the State Superintendent, in addition to the order maintained by the County Superintendent, order the payment of attorney fees and costs in defending this action. Such attorney fees request is denied and the County Superintendent's decision is affirmed.

DATED this 28th day of September, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
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EMILY A. GEHRING, Appellant, -vs- SCHOOL DISTRICT #27, LIBERTY COUNTY, MONTANA Respondent.	)))))	OSPI 23-82 DECISION AND ORDER

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This is an appeal by Emily A. Gehring, hereinafter referred to as Appellant. Appellant is a nontenured teacher. Appellant's teaching contract was not renewed for the 1982-83 school year by the Liberty County School District #27 Board of Trustees, hereinafter referred to as the Board. The Board gave Appellant timely notice pursuant to Section 20-4-206 MCA that they would not renew her teaching contract. Appellant requested reasons for her nonrenewal, and the Board stated the reasons in writing.

Appellant disputed the nonrenewal and requested a hearing before the Liberty County Superintendent of Schools. The County Superintendent of Schools requested that written briefs be submitted by the parties to clarify whether the County Superintendent could assume jurisdiction in the matter and hold a hearing. Briefs were submitted.

On June 24, 1982, an Order was issued by the County Superintendent denying the hearing because "Petitioner has not alleged any violation of any law, duty or rule applying to the trustees. Therefore, it is the opinion of the undersigned (County Superintendent) that no legal controversy has been established for which a hearing can be held."

The County Superintendent denied a hearing to the nontenured teacher's nonrenewal of her contract. It is from that Order that Appellant appeals her case to this State Superintendent.