BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

NANCY KEENAN

STATE OF MONTANA

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DUANE VANATTA, Appellant, v. TRUSTEES, MCCONE COUNTY, SCHOOL DISTRICT NO. 1, Respondents.	OSPI 166-89 DECISION AND ORDER

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STATEMENT OF THE CASE

This is an appeal to the Superintendent of Public Instruction pursuant to Section 20-3-107, MCA, from the March 22, 1989 (amended April 4, 1989) Findings of Fact, Conclusions of Law and Order of the McCone County Superintendent.

VanAtta appealed his dismissal as a nontenured teacher to the MCCone County Superintendent on May 18, 1988. The decision of the superintendent issued May 26, 1988, without hearing, was appealed to then Superintendent Argenbright. On December 29, 1988, Superintendent Argenbright remanded the matter to the County Superintendent with instructions to allow briefing of the legal issues present.

MEMORANDUM OPINION

Appellant was a nontenured teacher employed by Respondent Trustees in the Circle school system. He was notified of

nonrenewal and requested reasons for the nonrenewal. He was provided a letter with the following reasons for nonrenewal:

> 1. Because of continued association with alleged drug users after having been previously warned. This creates a bad image of the school and faculty and sets a poor example for students.
>
> 2. As a teacher and coach you have failed to live up to the expectations of the community in that you voluntarily placed yourself in a position that has resulted in criticism and suspicion to the detriment of the school system.

The U.S. Supreme Court, the Montana courts and this Superintendent have rejected the notion that nontenured status alone creates any cognizable property or liberty interest in continued employment. Only in special circumstances where nonrenewal action is tied to a statutory or contract entitlement, or to an infringement of a constitutional right of the nontenured teacher do such objections avail.

Among the unenumerated fundamental rights recognized by the Supreme Court is the "right to engage in any common occupation of life....and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men." Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 2706, 33 L. Ed.2d 548 (1972). Protection of a teacher's good name and reputation, whether tenured or not, is an element

of Fourteenth Amendment "liberty", but stigmatization in the constitutional sense does not arise from every unfavorable reference to one's reputation, or from every uncomplimentary criticism, reprimand or action that adversely affects an employee. The question is whether any stigmatization rises to the level of constitutional stigmatization. This is a question of fact with the burden of proof resting squarely on the teacher. The teacher must prove as well as allege that the official action which he challenges is sufficiently publicly disclosed and known to the public or his profession to injure his personal and professional community status and job opportunities. A charge regarding teacher fitness that is admitted or proven to be true, when made to protect legitimate school interests will not rise to a level of constitutional stigmatization. Education Law, Public and Private, Valente, 1985.

Where legally stigmatizing charges are raised against a teacher, that person is entitled to a due process fact-finding hearing in order to provide him an opportunity to clear his name, except where the truth or fairness of the stigmatizing charge is admitted or not disputed by the employee. McGhee v. Draper, 564 F2d 902 (10th Cir 1977); Doe v. Department of Justice, 753 F.2d 1092,(D.C.Cir. 1985)

A hearing in a case of nonrenewal of a nontenured teacher asserting infringement of constitutional rights is not unprecedented in Montana. In Maud Morrison vs. Cascade County

School District #5, Centerville Public Schools, et al, 32 St. Rptr. 467, (D.Mont. 1975), an appeal to the county superintendent afforded Morrison a full evidentiary hearing. The case was in turn appealed to the State Superintendent and subsequently brought in federal district court. Judge Russell Smith found that Morrison's exercise of first amendment rights were inextricably entwined in the school board's refusal to renew and was an unconstitutional abridgment of those rights.

Judge Smith states in Morrison, supra at 470,

> When a refusal to grant a contract to a nontenured teacher is based in whole (Perry v. Sindermann, 408 U.S., 593 (1972) or in substantial part (Starsky v. Williams, 353 F.Supp.900 (D.Ariz. 1972), aff'd ___F.2d___(9th Cir.No. 73-1520), Feb, 1975)) upon the teacher's exercise of protected rights, the refusal is unlawful and the teacher has a remedy.

The principal issue is what types of actions by school officials damage a teacher employee's good name, reputation and professional image sufficiently to impose a "stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Roth, supra. Basic to the issues are what kinds of conduct fall within the zone of fundamental privacy, and what degree of offensiveness to the community will justify intereference with a fundamental privacy interest, i.e. when does private conduct show unfitness to work effectively in the school.

The issue becomes one of disruptive impact, a question of fact and of proof. The cases set forth a standard under which determinations must be made:

a. Was the teacher's activity protected by the First or Fourteenth Amendment?

b. Was that protected activity in substantial part the cause of the teacher's nonrenewal?

c. If that activity is protected by a liberty interest, did any infringement result in a stigmatization?

d. If that activity is protected by a privacy right, was there an unprivileged public disclosure made?

e. If the above are answered affirmatively, what remedy is appropriate?

"First Amendment Rights of Non-tenured Teachers," Richard Parish, 37 Mont. Law Rev. 217 (1976); Valente, infra.

Upon remand, Superintendent Argenbright ordered that the County Superintendent "conduct a prehearing with the attorneys for the submission of briefs strictly limited to the legal issues presented." Although briefed at both the county and state level by both parties, the constitutional issue was not addressed in any findings or order of either superintendent. The County Superintendent and Superintendent Argenbright reviewed this matter solely within the parameters of Bridger and did not address any question of the abridgement of a constitutional right. Bridger Education Assn. v. Board of Trustees, 3 Ed Law 99, 678 P.2d 659 (1984).

It is the opinion of this Superintendent that the reasons alleged for nonrenewal of Appellant give rise to the question of whether those reasons and the nonrenewal action are tied to an infringement of Appellant's constitutional rights of privacy and association. To date there has been no fact-finding hearing to determine if a constitutional right exists, and if so, if it has been abridged. The burden of proof rests squarely on Appellant to show that his activities are constitutionally protected. The County Superintendent must hold a hearing and make findings of fact and conclusions of law within the framework of the standards set forth above.

DATED this 2 day of November, 1989.

Nancy Keenan

NANCY KEENAN

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of November, 1989, a true and exact copy of the foregoing Decision and Order was mailed postage prepaid, to the following:

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