BEFORE DENISE JUNEAU, SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

JAMES D. WHEALON, Appellant, -vs- ANACONDA PUBLIC SCHOOLS, BOARD OF TRUSTEES OF ANACONDA SCHOOL DISTRICT NO. 10, Respondents.	)	OSPI 320-09 DECISION AND ORDER

Having reviewed the record and considered the parties' briefs, the Superintendent of Public Instruction issues the following decision and order:

PROCEDURAL HISTORYAND STATEMENT OF FACTS

James D. Whealon ("Whealon") was employed by the Board of Trustees of the Anaconda School District ("Anaconda Board" or "Board") as Superintendent from July 1, 2000 through August 15, 2008 under a series of nearly identical contracts. When Whealon retired he was paid for 63 days of accrued vacation, although he asserts he is entitled to 182 days of vacation leave. Whealon also claims he is entitled to health insurance benefits paid to age 65, but was denied this claim as well. Whealon followed the District's written grievance procedure and on October 3, 2008, the new superintendent, Tom Darnell ("Darnell") formally denied Whealon's claims. Whealon appealed Darnell's decision to the Anaconda Board. The Board heard the appeal on November 12, 2008 and issued its decision on January 7, 2009, denying all claims.

Whealon appealed the Board's decision to the Deer Lodge County Superintendent on January 23, 2009. Following two substitutions of county superintendents requested by the Anaconda Board, Missoula County Superintendent, Rachel Vielleux, assumed jurisdiction over the matter and set a prehearing schedule. Briefs were submitted, including additional briefing on jurisdiction, the appropriateness of an award of attorney's fees and a Motion for Summary Judgment. On July 22, 2009, County Superintendent Vielleux issued Findings of Fact, Conclusions of Law, and an Order stating Whealon's appeal was denied.

Whealon filed his notice of appeal with this office on August 14, 2009.

The Superintendent of Public Instruction issued a Notice and Briefing Schedule. The parties then submitted briefs and oral argument was heard on March 4, 2010.

ISSUES ON APPEAL

1. Is summary judgment appropriate in this matter?

2. Did the County Superintendent have jurisdiction to hear and issue a decision on Whealon's claim for health insurance benefits to age 65?

3. Did the County Superintendent err in finding "Petitioner was entitled to health insurance only while employed by the district?"

4. Does the County Superintendent have jurisdiction to hear and issue a decision on Whealon's claim for additional vacation days?

5. Did the County Superintendent err in failing to award attorneys fees?

6. Was Whealon unduly prejudiced by the Anaconda District's disqualification of two county superintendents in this matter?

STANDARD OF REVIEW AND AUTHORITY

The Superintendent of Public Instruction's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. § 2-4-704 and adopted by the Superintendent in Admin. R. Mont. 10.6.125.

The Superintendent of Public Instruction may reverse or modify the County Superintendent's decision if Whealon's substantial rights have been prejudiced because the conclusions of law and order are (a) in violation of constitutional or statutory provision; (b) in excess of the statutory authority; (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) affected because findings of fact upon issues essential to the decision were not made although requested. Admin. R. Mont. 10.6.125(4).

CONCLUSIONS OF LAW

The County Superintendent's decision seems to combine summary judgment and jurisdiction without clarity. This decision will attempt to tease out the issues raised and relevant

to resolution, and provide guidance to the hearing officer upon remand of some issues.

Issue No. 1. Is summary judgment appropriate in this matter?

No. A motion for summary judgment was before the County Superintendent, but it is not clear that the decision addressed the issue of summary judgment. The County Superintendent concludes "the Hearing Officer has no jurisdiction to hear and decide this matter." She also found there were no findings of fact in dispute. Regardless, summary judgment is not an appropriate disposition of these issues.

A previous decision by the Superintendent of Public Instruction concluded "summary judgment is an inappropriate disposition of an appeal under Title 10, chapter 6 of the Administrative Rules of Montana." *Dorsch v. Bozeman School District #7 Board of Trustees,* OSPI 300-05 (2005). The *Dorsch* decision further stated: "Chapter 6 of Title 10 of the Administrative Rules of Montana is very specific about the procedures to be followed by the County Superintendent in conducting an appeal. Nowhere in Chapter 6 does it authorize the County Superintendent to dispose of an appeal by granting a Motion for Summary Judgment. The County Superintendent is required to hold a hearing and take testimony to determine the facts.

Admin. R. Mont. 10.6.104(3) provides:

(3) The county superintendent may determine that he/she does not have jurisdiction or the power to act over a particular matter. In this event, the county superintendent shall enter an order dismissing the appeal for lack of jurisdiction. The county superintendent, after making the determination that the matter is a contested case pursuant to the provisions of this chapter and that he/she has jurisdiction, **shall hear the appeal and take testimony in order to determine the facts related to the contested case**. (Emphasis added.)

This decision reaffirms the conclusion that summary judgment is not appropriate in a contested case hearing before the County Superintendent pursuant to Title 10, Chapter 6 of the Administrative Rules of Montana.

Issue No. 2. Did the County Superintendent have jurisdiction to hear and issue a decision on Whealon's claim for health insurance benefits to age 65?

Yes. The county superintendent has jurisdiction to consider Whealon's appeal of the Anaconda Board's denial of Whealon's insurance benefits to age 65.

The County Superintendent concluded "[a]s a matter of law, the Hearing Officer has no jurisdiction to hear and decide this matter." Conclusions of law are reviewed to determine if the interpretation of the law is correct. *Steer, Inc. v. Dept. of Revenue,* 245 Mont. 470, 474, 803 P.2d 601, 603 (1990); *Baldridge v. Bd. of Trs.*, 264 Mont. 199, 205, 870 P.2d 711, 714 (1994).

The county superintendent's authority to consider matters of controversy or disputes is derived from Montana statutory and administrative law. Montana Code Annotated § 20-3-210 delineates county superintendents' jurisdiction over appeals and hearings.

> **Controversy appeals and hearings.** (1) Except for disputes arising under the terms of a collective bargaining agreement or as provided under 20-3-211 or 20-4-208, the county superintendent shall hear and decide all matters of controversy arising in the county as a result of decisions of the trustees of a district in the county. . . .

In a similar case, *Throssell v. Board of Trustees of Gallatin County*, 232 Mont. 497, 757 P.2d 348, the Montana Supreme Court held:

> Throssell is a retired school administrator with a claim that his contract with the school district entitles him to the identical retirement benefits afforded teachers through the new school district retirement plan. This is distinguishable from an action by an outside supplier on a contract with the school district and thus is a 'controversy arising as a result of decisions of the trustees of a district…' fully contemplated within the meaning of §20-3-210, MCA. Therefore the County Superintendent improperly abandoned jurisdiction over the matter. The District Court, then, had no jurisdiction to hear the case. *Throssell*, supra, at 350.

In this case Whealon is a retired school administrator with a claim that his contract entitles him to the health insurance benefits afforded other administrators. Whealon was not a party to a collective bargaining agreement nor do the issues presented fall under §§20-3-211, or 20-4-208, MCA. This is a controversy which arose as a result of a decision of the Anaconda Board. Therefore the County Superintendent erred as a matter of law in her conclusion that "the Hearing Officer has no jurisdiction to hear and decide this matter." This issue is remanded to the County Superintendent for a hearing.

Issue No. 3. Did the County Superintendent err in finding "Petitioner was entitled to health insurance only while employed by the district?"

Yes. The finding of fact was made prematurely without the benefit of a hearing on the matter and is clearly erroneous in view of the whole record before the Superintendent.

Whealon alleges that pursuant to his employment contract he was entitled to the same health insurance benefits after retirement and until age 65 as other administrative personnel of the district. Whealon's employment contract was renewed several times over the term of his employment with the district, but the pertinent language regarding insurance benefits remained the same. Paragraph 11 of Whealon's employment contract with the Anaconda District provides:

> During the term of this Agreement, the District shall pay the premium for coverage for group health for the SUPERINTENDENT and dependents in accordance with the

District's plan of insurance on the same basis as other administrative employees of the District.

At the time Whealon started his employment with the Anaconda District, the district's plan on insurance for other administrative employees of the district contained in the district's Management Team Agreement stated:

1. TERMS AND CONDITIONS OF EMPLOYMENT
   ***
   C. Salary and Benefits
   ***
   Anaconda administrators receive the following benefits:
   ***
   2) Those provided by Agreement
   a) Health Insurance: 100% of the premium necessary to maintain existing and continuous benefits.
   ***
   f) Continuation of Insurance during retirement: The District shall assume the District's cost of health insurance for early retirees, until such administrators become eligible for Medicare benefits.
   ***

When Whealon retired in 2008, the Agreement had added language in f) requiring administrators hired after June 30, 2001 to have worked twelve years for the district and be at least 50 years old to qualify for the benefit. It excludes administrators hired after July 1, 2006.

The Anaconda Board argues for a denial of Whealon's claim based on two theories. First, it argues the wording "[d]uring the term of this agreement" precluded any payment after his employment terminated and second, the Management Team Agreement which contained the insurance language specifically excludes the superintendent.

On the first theory, the question is whether the Anaconda Board's obligation to pay for Whealon's insurance extended beyond the date of Whealon's termination from employment as a result of the language in paragraph 11 of his contract coupled with the language in the Management Team Agreement.

The Anaconda Board argues when interpreting a written contract the meaning must be determined from the contract language itself, if possible, and no evidence of the intent of the parties or any extrinsic evidence is admissible. However, without reviewing the extrinsic evidence of the referenced Management Agreement, and the intent and extent of the phrases "District's plan of insurance" and "on the same basis as other administrative employee of the District," the meaning of the Superintendent's contract cannot be determined.

The language in Whealon's employment contract takes the issue of health insurance outside the four corners of the document. The Board agrees that the language goes beyond the contract itself, but claims the diversion to the Management Team Agreement goes only as far as Section 1.C.2.a. Of that document. The Board asserts that it is clear from reading Whealon's contract the District is required to only pay 100% of Whealon's insurance premiums while he was employed by the District, but argues there is no obligation to continue to pay premiums until age 65 as provided for the other administrative employees of the district.

Whealon's employment contract doesn't even specifically name the Management Team Agreement, to which it refers. Nor does it cite a specific section within that Agreement. It is certainly not clear if the language contained in Whealon's employment contract intended to include payment of insurance premiums after his retirement from the district. The language in Whealon's employment contract is ambiguous.

When language is ambiguous, extrinsic or parole evidence may be necessary to understand the meaning of the contract language. The Montana legislature recognizes this principle in § 28-2-905, MCA.

> **When extrinsic evidence concerning a written agreement may be considered.**
> * * *
> (2) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates as described in 1-4-102, or other evidence to explain an extrinsic ambiguity or to establish illegality between parties.

§ 1-4-102, MCA clarifies:

> **Consideration of circumstances surrounding execution.** For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown so that the judge is placed in the position of those whose language the judge is to interpret.

And when interpreting ambiguous language, 28-3-306, MCA provides:

> **Interpretation of terms that are ambiguous or intended in different sense by different parties.** (1) If the terms of a promise are in any respect ambiguous or uncertain, the promise must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.
> (2) When the terms of an agreement have been intended in a different sense by different parties to the agreement, that sense is to prevail against either party in which the party supposed the other party understood it. If different constructions of a provision are otherwise equally proper, that construction is to be taken that is most favorable to the party in whose favor the provision was made.

The Montana Supreme Court has applied this principle in its decisions related to ambiguous contract language. Under the circumstance of ambiguity in contract language, parole

evidence can be used to determine the parties' intent. *Carelli V. Hall,* 279 Mont 202, 926P.2d 756 (1985), *Estate of Pruyn v. Axmen Propane, Inc*., 2009 MT 448 ¶ 47, 354 Mont. 208, 223 P.2 845. This principle is applicable to the ambiguous language contained in Whealon's employment contract.

The District's second theory for denying post-employment insurance benefits is the argument that the Management Team Agreement specifically excludes the superintendent, thereby prohibiting him from receiving insurance benefits until age 65. Since the case is being remanded for a hearing, this argument will be addressed.

As discussed above, a similar case was considered by the Montana Supreme Court in *Throssell v. Board of Trustees of Gallatin County (Throssell II)*, 248 Mont. 392, 812 P.2d 767. In that case, Throssell's contract provided he "receive fringe benefits the same as 'all other benefits equal to those offered to other certified employees of the District…" The "other certified employees of the district" were covered under the terms of a collective bargaining agreement between the Bozeman District and the Bozeman education system. The collective bargaining agreement defined teacher and specifically excluded the superintendent, assistant superintendents, principals and assistant principals.

The Supreme Court held:

> The District Court's reference to the Collective Bargaining Agreement's definition of teacher was correct. However, it must also consider Mr. Throssell's individual contract which allows 'all other equal benefits'. We therefore reverse the District Court's conclusion that Mr. Throssell is not entitled to benefits under the Career Option Plan.

Likewise, in this case, Whealon's employment contract incorporates by reference some provisions of the Management Team Agreement, even though the Management Team Agreement states the superintendent is excluded from that Agreement. The Board cannot include reference to provisions contained in a document outside of the contract at issue, and then argue that the language referred to does not apply because the other document was drafted for a different group of employees. This issue is remanded to the County Superintendent for hearing.

Issue No. 4. Does the County Superintendent have jurisdiction to hear and issue a decision on Whealon's claim for additional vacation days?

No. The County Superintendent is correct in her determination that she has no jurisdiction over controversies where a state agency has been granted primary jurisdiction.

Although Whealon may have a controversy as a result of a decision of the Anaconda Board, not all board decisions are appealable to the County Superintendent.

Mont. Code Ann. Title 39, Chapter 3, part 2 contains provisions for payment of wages by employers to employees as well as procedures for filing a complaint for unpaid wages and penalties for failure to timely pay wages due.

The Montana Supreme Court has previously determined that "vacation pay which has been earned … must be considered in the same category as wages and is collectable in the same manner and under the same statutes as are wages. *Langager v. Crazy Creek Products, Inc.*, 1998 MT 44, ¶ 24, 954 P.2d 1169.

In *Stanley v. Holms*, 267 Mont. 316, 883 P.2d 837, 840, the Montana Supreme Court determined that a "wage claimant … may either seek administrative remedies through the Department of Labor and Industry or file his or her claim directly in district court." There is no provision for a person employed by a school district to file their wage claim with the County Superintendent.

The County Superintendent properly determined that she does not have jurisdiction to hear Whealon's claim for additional vacation pay. Notwithstanding that determination, the County Superintendent issued a finding of fact on this issue, stating: "Petitioner was entitled to days off with pay on the holidays listed in MCA 20-1-305 and sick and vacation pay under the provisions of MCA 2-18-601 *et.seq.*" Because there is no jurisdiction to make a finding of fact related to Whealon's vacation days, this finding is vacated.

Issue No. 5. Did the County Superintendent err in her determination that there is no statutory provision allowing a county superintendent to award attorneys fees?

No. The County Superintendent is correct in concluding that attorney fees may not be awarded at this stage of the proceedings.

Whealon relies on *Talon Plumbing and Heating v. Montana Department of Labor and Industry*, 2008 MT 76, 198 P.3d 213 for authority to award attorney's fees, stating that he "does not have the option to take his case into District Court other than on judicial review." The holding in Talon, however supports that conclusion that an award of attorney fees is not allowed.

> Attorney fees are allowable only when provided for by contract or statute. *Chagnon v. Hardy Const. Co.*, 208 Mont. 420, 424, 680 P.2d 932, 934 (1984). Talon correctly asserts that attorney fees are not awarded at the agency level. In *Chagnon*, we held that an administrative hearing is not a "suit at law" and that a "determination" made by an administrative agency is not a judgment. *Chagnon*, 208 Mont. at 425, 680 P.2d at 934. A district court's review of an administrative decision on a wage claim *is* a "suit at law" within the meaning of § 39-3-214(1), MCA, that provides for attorney fees whenever such a suit is necessary to recover

wages due. *Huber v. Com'r of Labor and Industry,* 220 Mont. 335, 337, 715 P.2d 440, 442 (1986).

There is no provision for attorney's fees in Whealon's employment contract nor is there a statute under which the County Superintendent has jurisdiction, i.e. Title 20, providing for the payment of attorney's fees. As stated in Talon, attorney's fees are not awarded at the agency level.

The County Superintendent was correct in her determination that there is no statutory authority for an award of attorney fees at this level.

Issue No. 6. Was Whealon unduly prejudiced by the Anaconda Board's disqualification of two county superintendents in this matter?

Montana law provides for the disqualification of a county superintendent in§ 20-3-211, MCA.

> **Disqualification of county superintendent.** A county superintendent may not hear or decide matters of controversy pursuant to 20-3-210 when: … (3) either party to the controversy makes and files with the county superintendent of schools an affidavit that the party has reason to believe and does believe that the party cannot have a fair and impartial hearing before the county superintendent by reason of the bias or prejudice of the county superintendent;

The law contains no restriction on how many times either party may move to disqualify a county superintendent. Any changes to the provision for disqualification of county superintendents will need to be made by the Montana legislature. This matter is therefore dismissed.

DECISION AND ORDER

The decision of the County Superintendent is affirmed in part, reversed in part, vacated in part, and remanded for a hearing consistent with this decision.

DATED this 26th day of March, 2010.

/s/ Denise Juneau
Denise Juneau
Superintendent of Public Instruction

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 26th day of March, 2010, I caused a true and exact copy of the foregoing DECISION AND ORDER to be mailed, postage prepaid, to the following:

Debra A. Silk
Tony C. Koenig
Montana School Boards Association
863 Great Northern Blvd, Suite 301
Helena, Montana 59601

Brenda Wahler
P.O. Box 1455
Helena, MT 59624

Rachel A. Vielleux, Hearing Officer
Missoula County Superintendent of Schools
438 West Spruce
Missoula, MT 59802-4150

/s/ Beverly J. Marlow
Beverly J. Marlow