

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

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WHITE SULPHUR SPRINGS SCHOOLS     )  
  )  
                  Appellant,                    ) OSPI 326-10  
  )  
                  vs.                            ) **DECISION AND ORDER**  
  )  
MIKE AND DEBORAH EBY,                    )  
  )  
                  Respondents.                )  
  )  
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Having reviewed the record and considered the parties' briefs, the Superintendent of Public Instruction issues the following decision and order:

**DECISION AND ORDER**

The county superintendent did not err in allowing the appeal to go forward. This case is remanded to the county superintendent to proceed with the appeal process.

**PROCEDURAL HISTORY**

Respondents, Mike and Deborah Eby ("Ebys") filed a grievance with the White Sulphur Springs School District ("the District") regarding concerns about a teacher's performance.

On April 20, 2010, the District's superintendent, Andy Lind, denied Ebys' grievance.

Ebys appealed this matter to the District's board of trustees and a hearing was held on April 28, 2010. The Ebys and Superintendent Lind stated their positions, exhibits were offered, and testimony given. Following discussion, the board voted unanimously to affirm Superintendent Lind's decision to deny the Ebys' grievance.

On April 29, 2010, the Ebys filed a letter with Meagher County Superintendent, Helen Hansen, requesting review of their grievance.

On May 25, 2010, County Superintendent Hansen recused herself and requested that the Gallatin County Superintendent hear this matter. The Gallatin County Superintendent was unable to hear the matter, and on June 11, 2010, County Superintendent Hansen requested that Susan Beley, the Wheatland County Superintendent, hear the matter.

On June 30, 2010, County Superintendent Beley sent a letter to the Ebys accepting their appeal and requesting that they comply with “certain formalities,” citing ARM 10.6.105 and specifying the need for “captions, headings, statements and other criteria...” She gave the Ebys until July 14, 2010, to file the requested document.

On July 9, 2010, Meagher County Superintendent, Helen Hansen, issued a formal order stating that she had jurisdiction to hear the case, formerly recused herself, and appointed Susan Beley, Wheatland County Superintendent, to hear the Ebys' appeal.

The District filed a Motion to Dismiss Petitioner's Appeal on July 9, 2010, alleging the county superintendent lacked jurisdiction to hear the appeal because Ebys failed to file a copy of the appeal with the district within 30 days following the board's decision. On July 15, 2010, County Superintendent Beley received a formal Notice of Appeal by Ebys. The Notice of Appeal was postmarked July 14, 2010. The Notice of Appeal complied with the requirements of ARM 10.6.105 and was served on the District's attorney by mail.

On July 15, 2010, County Superintendent Beley issued an Order stating that she would set the case for hearing and proceed with the appeal process.

On July 22, 2010, the District filed its Notice of Appeal with the Superintendent of Public Instruction.

The matter has been fully briefed by both parties.

#### **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 §2-4-704, MCA and adopted by the State Superintendent in ARM 10.6.125.

The Superintendent of Public Instruction may reverse or modify a county superintendent's decision if substantial rights of the District 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. ARM 10.6.125(4).

A county superintendent's conclusion of law is reviewed to determine if the interpretation of law is correct. *Baldrige v Board of Trustees*, 264 Mont. 199, 870 P.2d 711 (1994).

### CONCLUSIONS OF LAW AND OPINION

The sole issue on appeal is whether the county superintendent erred in allowing the Ebys' appeal to go forward.

The parties do not dispute that the county superintendent received Ebys' letter requesting review of the board's decision on April 29, 2010, following an April 28, 2010, board meeting at which the Eby grievance was denied. However, the district argues that because it did not receive a copy of the appeal within 30 days of the board's decision, the appeal was not timely filed and consequently the county superintendent lacks jurisdiction to hear the appeal.

ARM 10.6.103 states that the notice of appeal is to be filed with the county superintendent and the parties, but further states: "the date of filing shall be determined to be the date the notice is delivered to the county superintendent... ."

A county superintendent does not have authority to proceed with an appeal that is not timely filed, but does have authority to determine whether any other steps in the appeal process should affect the validity of the appeal. ARM 10.6.105(4).

County Superintendent Beley accepted Ebys' letter requesting review of their grievance while stating that the notice did not fully comply with the requirements of ARM 10.6.105. County Superintendent Beley requested that Ebys resubmit their request for review of their grievance in compliance with ARM 10.6.105 by July 14, 2010. Ebys did so and served the district with a copy of the formal Notice of Appeal.

In *Denton School District v. Rebich*, OSPI 289-02 (2003), the State Superintendent discussed a similar issue regarding the distinction between "filing" and "service" as used in ARM 10.6.103.

ARM 10.6.103(2) states: "A school controversy contested case shall be commenced by *filing* a notice of appeal with the county superintendent and the parties within 30 days after the final decision of the board of trustees of the school district is made. The date of *filing* shall be

determined to be the date the notice is delivered to the county superintendent or, if mailed, the date the notice is deposited in the U.S. mail as evidenced by the postmark date. Notice of appeal shall be *served* on the parties by certified mail or personal delivery. Respondent shall *file* a written reply to the notice of appeal within 10 business days of receipt." Emphasis added.

The Rule employs two distinct concepts -- filing and serving. Both concepts are commonplace in legal proceedings.

According to Black's Law Dictionary, 5th Ed., p. 566, a "paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file as a matter of record and reference." In this case, the proper officer to whom one files a notice of appeal is a county superintendent. Therefore, to "file" a document with the other parties, who are not officials in the matter, makes no sense. However, "service" of the document on the other parties makes perfect sense. "The service of writs, summonses, etc., signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left; and, when they are so delivered, they are said to have been served." Black's Law Dictionary, 5th Ed., p. 1227.

The key function of Rule 10.6.103(2) is substantive; it outlines the steps that must be taken to vest a county superintendent with proper authority or jurisdiction to consider a controversy. If a notice of appeal is not delivered to the county superintendent (i.e., filed) within 30 days, as required by Rule 10.6.103(2), the county superintendent lacks jurisdiction to consider the matter. The other delivery requirements of Rule 10.6.103(2) are procedural; they outline to whom and by what means the notice must be delivered (i.e., served). *Denton v. Rebich*, OSPI 289-02 (2003).

In *Denton*, the appellant did not file his Notice of Appeal until the day after the statute of limitations expired and therefore the appeal was not timely filed and was correctly dismissed. In this case Ebys filed their request for review within the 30 day time limit, but did not use the appropriate format and failed to serve the District with a copy.

ARM 10.6.105(4), allows:

Failure of any party to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is grounds for such action as the county superintendent deems appropriate, which may include dismissal of the appeal.

County Superintendent Beley exercised her discretion pursuant to this administrative rule, accepted the case, and allowed Ebys to correct the formatting and address other criteria of the rule.

Cases cited by the District are distinguishable in that they involve instances where the filing of the appeal with the county superintendent was beyond the 30 day time limit.

The Superintendent of Public Instruction finds that no substantial rights of the District have been prejudiced and County Superintendent Beley's decision to accept the appeal is not (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).

### **CONCLUSION**

The Ebys' letter requesting a review of the Board's decision was timely filed with the county superintendent. This case is remanded to the county superintendent to proceed with the appeal.

DATED this 30<sup>th</sup> day of December, 2010.

/s/ Denise Juneau  
Denise Juneau,  
Superintendent of Public Instruction

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 30th day of December, 2010, I caused a true and exact copy of the foregoing DECISION AND ORDER to be mailed, postage prepaid, to the following:

**Elizabeth A. Kaleva  
Megan D. Morris  
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**Michael Kakuk  
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/s/ Beverly J. Marlow  
Beverly J. Marlow  
Paralegal