FELT MARTIN PC

Laurence R. Martin
Jeffery A. Hunnes
Jeffrey A. Weldon
Martin S. Smith
Joseph A. Soueidi
Roberta A. Berkhof
Ryan A. Stewart
Nyles G. Greer

Of Counsel:
Joel E. Guthals
Mary E. Duncan

jweldon@feltmartinlaw.com

SCHOOL EMPLOYMENT ISSUES IN MONTANA

1. INTRODUCTION

One of the most difficult tasks required of school boards is determining whether to terminate school district employees. This is one of the five essential legal functions of a board of trustees as discussed in our Boardsmanship packets, and it is certainly a weighty topic filled with traps for the unprepared. In this presentation, we strive to provide you with the background necessary to make you aware of some of the traps and their potential consequences, but by no means is this packet a substitute for legal advice tailored to the unique circumstances that present in every instance of employee discharge. As always, it is our recommendation to seek legal counsel if discharge is something being contemplated.

2. KEY CONCEPTS

2.1. Discharge of Certified Employees: Teachers and Principals

School District employees who are "certified," that is, licensed by the State of Montana as educators, have certain job protections provided to them under Montana law that many "classified" school district employees, such as custodial staff, do not. Any explanation of how to terminate an individual's employment with a school district must then begin with a review of those protections.

2.1.1. Tenure

The term "tenure" has different legal definitions. In the context of public education, generally speaking, tenure is a guarantee of due process for a tenured teacher facing dismissal charges. Tenure is not literally a guarantee of a teaching job for life; however, under Montana law it is a very involved process to terminate a tenured teacher.

"Statutes wherein specific tenure rights are attached to the position of teaching in the public schools, particularly the right to be retained in employment indefinitely, subject only to removal for certain enumerated causes and in a prescribed manner." Ballentine's Law Dictionary.

Please note that a principal is a "teacher" as defined in Montana law, so a principal earns tenure just like a classroom teacher does. However, a superintendent is not considered a teacher under

Montana law and therefore does not acquire tenure: a superintendent's employment is governed by the contract of employment entered into between the board of trustees and the superintendent.

2.1.2. Non-Renewing the Contracts of Nontenure Teachers

Before teachers have attained tenure rights, a school board can decide to simply not offer a subsequent contract of employment. This is called "nonrenewal" and allows a school board to forego the process of engaging in factfinding or holding a hearing to conclude that "good cause" or "just cause" exists to let the employment relationship expire. The statute regarding nonrenewal of nontenure teachers is found at Mont. Code Ann. §20-4-206.

Importantly, that does not mean that there is no reason to nonrenew the contract, however, because there is always a reason, and that reason can be discussed at the board meeting. The nonrenewal process is designed to simply allow a school board to end the employment relationship with a teacher prior to tenure rights attaching, thereby avoiding the due process concerns attendant to a teacher who has achieved the right of tenure, which creates a protected property interest in continued employment.

2.1.3. Terminating Teacher Contracts

2.1.3.1. Dismissal of Any Teacher Currently Under Contract

Teachers who are currently under contract, regardless of whether they have tenure, have a protected property interest in the value of their contract. As such, their contracts can only be terminated for good cause, and the process by which that recommendation comes before the board is clearly outlined in statute. The roadmap for the process is outlined in Appendix A, which has a copy of Mont. Code Ann. § 20-4-207 in it.

2.1.3.2. The Definitions of "Good Cause" or "Just Cause"

A functional, but not necessarily binding, definition of "good cause" can be found in Appendix A in the Wrongful Discharge from Employment Act. More generally, in applying the concept of good cause or just cause to a disciplinary action of an employer, many arbitrators apply the test of Professor Daugherty in *Enterprise Wire Company*, 46 LA 359 (Daugherty-1966). See, "just cause" definition in Roberts' Dictionary of Industrial Relations, Fourth Ed., p. 377-8; *Grief Bros. Cooperage Corp*., 42 LA 764, 767 (Daugherty, 1964).

Daugherty's 7-part analysis has been criticized many times, but it does provide a reasonable framework to analyze the appropriateness of a disciplinary decision. Daugherty's analysis was conceived in an industrial setting but, recognizing that the termination of a teacher often involves consideration of issues different from that of, for example, an assembly line worker, attorneys for school districts often contend, nonetheless, that arbitrators should utilize the test established by Professor Daugherty, as described in more detail below:

1. Was the employee given advance warning of the possible or probable disciplinary consequences of his conduct?
2. Was the rule or order reasonably related to the efficient and safe operation of the District?

3. Before administering discipline, did the employer make an effort to discover whether the employee did, in fact, violate a rule or order of the administration?
4. Was the school district's investigation conducted fairly and objectively?
5. Did the investigation produce substantial evidence or proof that the employee was "guilty as charged"?
6. Has the school district applied its policies and penalties without discrimination?
7. Was the degree of discipline administered reasonably related to (a) the seriousness of the employee's offense and (b) the employee's record of school district service?

2.1.3.3. Dismissal of A Tenure Teacher at Year's End

The dismissal of a tenure teacher at year's end follows a very similar process to that used to terminate a teacher mid-contract. The roadmap for the process can be found in Appendix A at Mont. Code Ann. § 20-4-204. Like with the dismissal mid-year, a dismissal of a tenure teacher at the end of the year requires a finding of good cause at a hearing before the board of trustees.

2.1.4. The Collective Bargaining Agreement

Your district's agreement with the teachers' union may add additional procedural safeguards when dismissing a teacher. The board and administration must comply with the provisions of the CBA, as well as the statutory duties outlined above. A violation of your CBA may give rise to a grievance that could go to binding arbitration.

2.1.5. Miscellaneous Issues

2.1.5.1. June 1st Deadline to Provide Written Notice of Re-Election

By law, school districts must notify all teachers who have been reelected to their teaching positions by June 1. Any teacher who does not receive notice of reelection or termination by that date is automatically reelected. Be mindful of this in situations where there may be a recommendation to nonrenew someone's employment, as failure to do so by the deadline will grant that individual another year's contract and potentially grant tenure. More on this matter in Appendix A, at Mont. Code Ann. § 20-4-205.

2.1.5.2. Registration of Teaching Certificate

Educators are required by law to have their teaching certificates registered with the county superintendent. Sixty days after a school district has been operating during each school year, the county superintendent will notify the district of all registered certificates. If a teacher employed by the school district is not on that list, the school district is barred by law from paying that teacher until such time as their certification is properly registered. If this happens, please contact an attorney for legal advice, as this can get complicated quickly. More information on this can be found in the relevant statue in Appendix A, Mont. Code Ann. § 20-4-202.

//

2.1.5.3. Transferring from Administration Position to the Classroom

Administrators who have tenure rights established before or after they moved to an administrative position, such as a principal, may be assigned to a teaching position under certain circumstances, such as when the there is a reduction in the size of administrative staff. This process is governed by statute, found in Appendix A at Mont. Code Ann. § 20-4-208.

2.2. Terminating the Employment of Classified Staff

2.2.1. What is "Wrongful Discharge" in Montana?

In Montana if the employer "committed a wrongful discharge" an employee may be awarded lost wages and benefits for a period not to exceed 4 years from the date of discharge, together with interest on the lost wages and benefits. A discharge is "wrongful" if: (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or (3) the employer violated the express provisions of its own written personnel policy. Generally, under Montana's wrongful discharge laws, the employee must file an action within 1 year after the date of discharge.

2.2.2. What does "Good Cause" Mean?

Throughout this document, one of the repeated themes is the idea of "termination for good cause," or "termination for just cause," or even just "termination for cause." These concepts are essentially interchangeable under Montana law. In short, once somebody has a property interest in, for example, their continued employment either by having a contract of employment for a specific term or by having an open-ended contract for employment with a legally recognized expectation of renewal, the school district can only infringe on that right if it has a sufficiently good reason to do so. This can be a thorny question, and the Legislature has not provided a definition of "good cause" in Title 20 (the education statutes) to assist in the discussion.

However, there are other sources of authority that can provide some assistance in articulating what good cause means. First, "good cause" is defined elsewhere in Montana law. Montana's Wrongful Discharge from Employment Act provides a definition of "good cause" that applies to the act (though not necessarily to employment in the education context). In the WDEA, "good cause" means:

> any reasonable job-related grounds for an employee's dismissal based on:
> (a) the employee's failure to satisfactorily perform job duties;
> (b) the employee's disruption of the employer's operation;
> (c) the employee's material or repeated violation of an express provision of the employer's written policies; or
> (d) other legitimate business reasons determined by the employer while exercising the employer's reasonable business judgment. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4).

Mont. Code Ann. § 39-2-903(5). Additionally, as explained in more detail above, there are various tests that arbitrators (essentially private sector judges) use when they are called upon to

adjudicate employment disputes. Their opinions are relevant in this context because under Montana law, most litigation arising out of the school employment context ends up in front of an arbitrator, not a district court judge. In applying the concept of good cause or just cause to a disciplinary action of an employer, many arbitrators apply the test of Professor Daugherty in *Enterprise Wire Company*, 46 LA 359 (Daugherty-1966) which was explained in detail above.

Importantly, Montana's wrongful discharge from employment act does not apply to the discharge of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

2.2.4. The Collective Bargaining Agreement

If your district's classified employees are organized, the terms of their CBA will govern the grounds for dismissal and the process the board must follow to dismiss an employee. Generally, the same standard ("good cause") applies. If there is an alleged violation of the CBA, the dispute may go to arbitration.

2.2.5. Written Contract of Employment for a Specific Term

If an employee is hired for a specific period of time, then when that period of time ends, generally speaking, that employee's employment ends. For example, if you hire someone to work in your school kitchen for the term August 25, 2024, to June 10, 2025, then that person's employment ends on June 10, 2025.

The Montana Supreme Court has specifically held that, "Nothing in our law forbids the parties here from entering into such a contract where the contract is exempted from the Act. We have previously upheld the discretionary rights of employers to non-renew specific term contracts without a showing of good cause." *Farris v. Hutchinson*, 254 Mont. 334, 838 P.2d 374 (1992). As such, it is legal for an employer and employee to enter into an employment contract wherein the term of that contract is specified.

However, this caveat is now particularly important: this provision (a "term" contract) should not be used to "get rid of" a troublesome employee; unless your district uses an employment contract with a clear and specific term, it is likely a court would apply the WDEA anyway. *See*, for example, *Cromwell v. Victor School District*, 333 Mont. 1, 140 P.3d 487 (2006); in which the Court stated,

> "We agree with [the discharged employee] that § 39-2-912(2), MCA, does not apply. The School District's position contradicts the plain language of its own classified employee handbook. The classified employee handbook that the School District provided to [the discharged employee] upon hiring states that after a six-month probationary period 'the employee will attain permanent status.' According to the terms of the School District's own handbook, [the discharged employee] had attained status as a permanent employee long before she signed the first business manager document on September 16, 1999. The new classified employment handbook does not explicitly address the status of employees such as [the discharged employee]. The handbook does implicitly support the position that [the discharged employee] worked as a permanent employee, however, as it states that only employees 'hired on or after October 9, 2001 shall be employed under annual

> contracts of a specified term.' The School District hired [the discharged employee] in September of 1998. ¶ 20 The business manager documents remain ambiguous concerning the term of employment for [the discharged employee]. We interpret a contract against the party who caused the uncertainty to exist. The School District drafted the documents that do not explicitly state a specified term of employment. [The discharged employee] testified that she understood the business manager documents as mere agreements concerning her yearly salary. [The discharged employee] already had attained status as a permanent employee and the accompanying protections of the WDEA. We will not interpret the ambiguous provisions of the business manager documents to modify [the discharged employee]'s employment agreement and deprive her of the protections of the WDEA. We conclude that the business manager documents do not represent written contracts for a specified term under § 39-2-912(2), MCA. As a result, the District Court correctly determined that the School District wrong-fully discharged [the discharged employee]."

While this next point does not fall squarely within the WDEA, it may be interesting to note that there is some authority to support the proposition that if the term an employee's contract expires and the board takes no action to "terminate" or to renew, that employee likely has no appeal rights to the county superintendent. (This is not to say that the employee does not have other avenues of complaint). The State Superintendent has previously noted, "Without a decision by the board to not renew [former employee's] contract, the County Superintendent would have no jurisdiction over this matter. ARM 10.6.103 provides that appeals to the County Superintendent must come after a 'final decision of the board of trustees.'" *Vandersnick v. Gardiner Schools*, OSPI 321-09 (2010). See also *McDougall v. Troy School District*, OSPI 322-09 (2010).

2.2.6. Probationary Period

Montana law recognizes a "probationary period." During a probationary period, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or for no reason. If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time of hire, there is a probationary period set by statute, see Appendix A. District policy or your CBA will set the length of the probationary period.

Remainder of this page intentionally left blank.

Appendix A: Statutory Authorities

I. Statutes Relevant to Tenure

Mont. Code Ann. § 20-1-101. Definitions.

(1) …

(31) "Teacher" means a person, except a district superintendent, who holds a valid Montana teacher certificate that has been issued by the superintendent of public instruction under the provisions of this title and the policies adopted by the board of public education and who is employed by a district as a member of its instructional, supervisory, or administrative staff. This definition of a teacher includes a person for whom an emergency authorization of employment has been issued under the provisions of 20–4–111.

Mont. Code Ann. § 20-4-203. Teacher tenure.

(1) Except as provided in 20-4-208, whenever a teacher has been elected by the of-fer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher certification except as a district superintendent or specialist, the teacher is considered to be reelected from year to year as a tenured teacher at the same salary and in the same or a comparable position of employment as that provided by the last-executed contract with the teacher unless the trustees resolve by majority vote of their membership to terminate the services of the teacher in accordance with the provisions of 20-4-204.

(2) The tenure of a teacher with a district may not be impaired upon termination of services of the teacher if the following conditions exist:

(a) the tenure teacher is terminated because the financial condition of the district requires a reduction in the number of teachers employed; and

(b) continued employment rights are provided for in a collectively bargained contract of the district.

(3) (a) For the purposes of subsection (1), "same salary" means the daily rate of pay, excluding benefits and excluding stipends for nonteaching duties, multiplied by the number of days worked under the last-executed contract with the teacher, up to the total number of days funded by the state in the per ANB entitlements, as provided in 20-9-311, including pupil-instruction-related days. The calculation of daily rate of pay is determined by dividing the salary in the last-executed contract with the teacher for pupil-instruction and pupil-instruction-related days, excluding benefits and excluding stipends for nonteaching duties, by the total number of contracted days under the last-executed contract.

(b) The definition of same salary may be modified if negotiated and agreed to in a collective bargaining agreement executed by the district and the teacher's exclusive representative pursuant to Title 39, chapter 31, or in an individual contract between the district

and a teacher in a district in which the teachers have no exclusive representative as provided in Title 39, chapter 31.

(4) Upon receiving tenure, the employment of a teacher may be terminated for good cause.

II. Statutes Relevant to Non-Renewing Contracts of Nontenure Teachers

Mont. Code Ann. § 20-4-206. Notification of nontenure teacher reelection -- acceptance -- termination.

(1) The trustees shall provide written notice by June 1 to each nontenure teacher employed by the district regarding whether the nontenure teacher has been reelected for the ensuing school fiscal year. A teacher who does not receive written notice of reelection or termination is automatically reelected for the ensuing school fiscal year.

(2) A nontenure teacher who receives notification of reelection for the ensuing school fiscal year shall provide the trustees with written acceptance of the conditions of reelection within 20 days after the receipt of the notice of reelection. Failure to notify the trustees within 20 days constitutes conclusive evidence of the nontenure teacher's nonacceptance of the tendered position.

(3) Subject to the June 1 notice requirements in this section, the trustees may nonrenew the employment of a nontenure teacher at the conclusion of the school fiscal year with or without cause.

Remainder of this page intentionally left blank.

III. Statutes Relevant to the Dismissal of Any Teacher (Tenure or Non-Tenure) Currently Under Contract

Mont. Code Ann. § 20-4-207. Dismissal of teacher under contract.

(1) The trustees of any district may dismiss a teacher before the expiration of the teacher's employment contract for good cause.
(2) (a) The following persons may recommend the dismissal of a teacher for cause under subsection (1):

(i) a district superintendent;
(ii) in a district without a district superintendent, a principal; or
(iii) in a district without a district superintendent or a principal, the county superintendent or a trustee of the district.

(b) A person listed in subsection (2)(a) who recommends dismissal of a teacher shall give notice of the recommendation in writing to each trustee of the district and to the teacher.
(c) The notice must state clearly and explicitly the specific reason or reasons that led to the recommendation for dismissal.
(3) (a) Whenever the trustees of any district receive a recommendation for dismissal, the trustees shall notify the teacher of the right to a hearing before the trustees either by certified letter or by personal notification for which a signed receipt must be returned. The teacher may in writing waive the right to a hearing. Unless the teacher waives the right to a hearing, the teacher and trustees shall agree on a hearing date not less than 10 days or more than 20 days from the notice of intent to recommend dismissal.
(b) The trustees shall conduct a hearing on the recommendation and resolve at the conclusion of the hearing to dismiss the teacher or to reject the recommendation for dismissal.

(4) With the exception of a county superintendent, a person who recommends dis-missal pursuant to subsection (2) may suspend the teacher from active performance of duty with pay pending the hearing date if the teacher's behavior or acts that led to the recommendation for dismissal are contrary to the welfare of the students or the effective operation of the school district.

(5) Any teacher who has been dismissed may in writing within 20 days appeal the dismissal under the guidelines set forth in 20-4-204. The teacher may appeal a decision to terminate an employment contract to the county superintendent if the teacher's employment is not covered by a collective bargaining agreement pursuant to Title 39, chapter 31. If the employment of the teacher is covered by a collective bargaining agreement, a teacher shall appeal a decision to terminate an employment contract to an arbitrator.

Remainder of this page intentionally left blank.

IV. Statute Governing the Dismissal of a Tenure Teacher at Year's End

Mont. Code Ann. § 20-4-204. Termination of tenure teacher services.

(1) (a) The following persons may make a recommendation in writing to the trustees of the district for termination of the services of a tenure teacher:

(i) a district superintendent;

(ii) in a district without a district superintendent, a principal;

(iii) in a district without a district superintendent or a principal, the county superintendent or a trustee of the district.

(b) The recommendation must state clearly and explicitly the specific reason or reasons leading to the recommendation for termination.

(2) Whenever the trustees of a district receive a recommendation for termination, the trustees shall notify the teacher of the recommendation for termination and of the teacher's right to a hearing on the recommendation. The notification must be delivered by certified letter or by personal notification for which a signed receipt is returned. The notification must include:

(a) the statement of the reason or reasons that led to the recommendation for termination; and

(b) a printed copy of this section for the teacher's information.

(3) The teacher may, in writing, waive the right to a hearing. Unless the teacher waives the right to a hearing, the trustees shall set a hearing date, giving consideration to the convenience of the teacher, not less than 10 days or more than 20 days from receipt of the notice of recommendation for termination.

(4) The trustees shall:

(a) conduct the hearing on the recommendation at a regularly scheduled or special meeting of the board of trustees and in accordance with 2-3-203; and

(b) resolve at the conclusion of the hearing to terminate the teacher or to reject the recommendation for termination.

(5) The tenure teacher may appeal a decision to terminate an employment contract to the county superintendent if the teacher's employment is not covered by a collective bargaining agreement pursuant to Title 39, chapter 31, who may appoint a qualified attorney as a legal adviser who shall assist the superintendent in pre-paring findings of fact and conclusions of law. If the employment of the teacher is covered by a collective bargaining agreement pursuant to Title 39, chapter 31, a tenure teacher shall appeal a decision to terminate an employment contract to an arbitrator agreed upon by the district and the teacher's exclusive representative. If the exclusive representative has declined to represent the teacher, the teacher or the district may request that the board of personnel appeals provide a list of arbitrators from which the teacher and the district shall, after the toss of a coin to determine the order of striking, alternately strike names from the list until one arbitrator is selected and appointed. By mutual agreement between the parties, the county superintendent of schools may be appointed as the arbitrator.

(6) In a termination involving a teacher whose employment is not covered by a collective bargaining agreement pursuant to Title 39, chapter 31, either the teacher or the trustees may appeal to the district court of the county in which the teach-er was employed. The proceedings

must be commenced no later than 60 days after the date of the decision of the county superintendent.

(7) In a termination involving a teacher whose employment is covered by a collective bargaining agreement pursuant to Title 39, chapter 31, a request for arbitration must be made within 20 days from the date of termination unless an alternative time period is provided by the terms of a collective bargaining agreement.

(8) The decision of the arbitrator is final and binding. Each party shall pay one-half of an arbitrator's charges unless a different cost allocation arrangement is agreed upon by the parties.

(9) An arbitrator may order a school district to reinstate a teacher who has been terminated without good cause and to provide compensation, with interest, to a teacher for lost wages and fringe benefits from the date of termination to the date that the teacher is offered reinstatement to the same or a comparable position. Interim earnings, including the amount that the teacher could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, reasonable amounts spent by a teacher in searching for, obtaining, or relocating to new employment must be deducted from interim earnings.

(10) Except as provided in this section, an arbitrator may not order a school district to provide compensation for punitive damages, pain and suffering, emotional distress, compensatory damages, attorney fees, or any other form of damages.

(11) Upon submission of the termination decision to an arbitrator, the teacher or the teacher's exclusive representative may not file an action against the district for reinstatement or compensation of lost wages and fringe benefits.

(12) As used in this section, the following definitions apply:

(a) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability or life insurance plan, or pension benefit in effect on the date of termination.

(b) "Lost wages" means the gross amount of wages that would have been re-ported to the internal revenue service on form W-2 and includes any compensation deferred at the option of the employee.

Remainder of this page intentionally left blank.

V. Statute Regarding the Notification of Teachers of Reelection

Mont. Code Ann. § 20-4-205. Notification of teacher reelection -- acceptance.

(1) The trustees shall provide written notice by June 1 to all teachers who have been reelected. Any teacher who does not receive notice of reelection or termination is automatically reelected for the ensuing school fiscal year.

(2) Any teacher who receives notification of reelection for the ensuing school fiscal year shall provide the trustees with written acceptance of the conditions of the reelection within 20 days after the receipt of the notice of reelection, and failure to notify the trustees within 20 days constitutes conclusive evidence of the teacher's nonacceptance of the tendered position.

Remainder of this page intentionally left blank.

VI. Statute Regarding the Registration of Teaching Certificates

Mont. Code Ann. § 20-4-202. Teacher and specialist certification registration.

(1) Any person employed as a teacher, specialist, principal, or district superintendent shall register the person's certificate or the district shall register its emergency authorization of employment for a teacher with the county superintendent of the county in which the person is employed in order to validate the person's employment status and permit payment under the employment contract. If a teach-er or specialist does not register the person's certificate with the county superintendent within 60 calendar days after the person begins to perform services, the person is not eligible to receive any further compensation under the contract of employment until the person has registered the certificate. After the schools of a district have been open for 60 calendar days in the current school fiscal year, the county superintendent shall notify each district of the county of each teacher or specialist who has registered a current valid certificate, and the district may not pay any teacher who has not registered the person's certificate until the county superintendent does notify the district of the registration.

(2) A teacher or specialist employed by a joint district shall register the person's certificate with the county superintendent of the county in which the person is working. A teacher or specialist employed by a special education cooperative shall register the person's certificate with the county superintendent of the county in which the special education cooperative is based.

Remainder of this page intentionally left blank.

VII. Statute Regarding Transferring Someone from an Administration Position into the Classroom

Mont. Code Ann. § 20-4-208. Transfer from administrative position.

(1) A tenure teacher serving in an administrative position may be assigned to a teaching position with a reduction in salary when the district reduces the size of its administrative staff. The salary for the new position must be the same as the salary that the teacher would have received if the teacher had been continuously employed in the new position rather than in the administrative position.

(2) If a board policy or a collective bargaining agreement provides seniority rights for teachers, a district that assigns a tenure teacher serving in an administrative position to a teaching position shall recognize for seniority purposes the tenure teacher's time of service in the administrative position.

(3) As used in this section, the term "administrative position" means a position that the trustees of a district designate as administrative or supervisory in nature, not including the position of district superintendent.

(4) A tenure teacher who is transferred to a teaching position under this section must be offered the next comparable administrative position for which the tenure teacher is endorsed that becomes available in the district.

Remainder of this page intentionally left blank.

VIII. The Wrongful Discharge from Employment Act

Mont. Code Ann. § 39-2-901. Short title.

This part may be cited as the "Wrongful Discharge From Employment Act".

Mont. Code Ann. § 39-2-902. Purpose.

This part sets forth certain rights and remedies with respect to wrongful discharge. Except as provided in 39-2-912, this part provides the exclusive remedy for a wrongful discharge from employment.

Mont. Code Ann. § 39-2-903. Definitions.

In this part, the following definitions apply:

(1) “Constructive discharge” means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.
(2) “Discharge” includes a constructive discharge as defined in subsection (1) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.
(3) “Employee” means a person who works for another for hire. The term does not include a person who is an independent contractor.
(4) “Fringe benefits” means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.
(5) “Good cause” means any reasonable job-related grounds for an employee's dismissal based on:

> (a) the employee's failure to satisfactorily perform job duties;
> (b) the employee's disruption of the employer's operation;
> (c) the employee's material or repeated violation of an express provision of the employer's written policies; or
> (d) other legitimate business reasons determined by the employer while exercising the employer's reasonable business judgment. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4).

Mont. Code Ann. § 39-2-904. Elements of wrongful discharge.

(1) A discharge is wrongful only if:

> (a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;
> (b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment;

(c) the employer materially violated an express provision of its own written personnel policy prior to the discharge, and the violation deprived the employee of a fair and reasonable opportunity to remain in a position of employment with the employer; or
(d) the employer terminated the employee solely based on the employee's legal expression of free speech, including but not limited to statements made on social media.

(2) During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or for no reason.
(3) The employer has the broadest discretion when making a decision to discharge any managerial or supervisory employee.

Mont. Code Ann. § 39-2-905. Remedies.

(1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest on the lost wages and fringe benefits. The employee's interim earnings, derived from any new kind, nature, or type of work, hire, contractor status, or employment that did not exist at the time of discharge, including amounts the employee could have earned with reasonable diligence from the work, hire, contractor status, or employment, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment.
(2) Following any verdict or award in favor of the discharged employee, the district court shall consider any monetary payments, compensation, or benefits the employee received arising from or related to the discharge, including unemployment compensation or benefits and early retirement pay, and shall deduct those payments, compensation, and benefits from the amount awarded for lost wages before entering judgment.
(3) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-2-904(1)(a).
(4) There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages, except as provided for in subsections (1) and (2).

Mont. Code Ann. § 39-2-910. Probationary period.

(1) If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time the employee begins work, there is a probationary period of 12 months commencing on the date the employee begins work.
(2) An employer may extend a probationary period prior to the expiration of a probationary period, but the original probationary period together with any periods of extension may not exceed 18 months.
(3) If an employee has one or more leaves of absence during the original probationary period or any extension of the probationary period, the time of each leave of absence may not be a part of the probationary period unless the employer affirmatively elects to include each leave of absence as part of the probationary period.

Mont. Code Ann. § 39-2-911. Limitation of actions.

(1) An action under this part must be filed within 1 year after the date of discharge.
(2) If an employer maintains written internal procedures, other than those specified in 39-2-912, under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part. The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under this part. If the employer's internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the employee may file an action under this part and for purposes of this subsection the employer's internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subsection (1) more than 120 days.
(3) If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 14 days of the date of the discharge notify the discharged employee in writing or electronically of the existence of the internal procedures. The timeframe for the employee to initiate the procedures, if any, begins to run from the date the employer sends or provides a copy of the internal procedures in writing or electronically. A copy of the procedures must be considered provided to the employee if the employer sends a copy of the procedures to the employee's last-known postal mailing address or electronic mailing address or the employee's attorney. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2).
(4) If a plaintiff commences a civil action for wrongful discharge under this part, the plaintiff shall make service of process no later than 6 months after filing the complaint. If the plaintiff fails to make service of process within the 6-month period, the court, on motion or on its own initiative, shall dismiss the action without prejudice as to a defendant unless that defendant has made an appearance in the civil action. If the plaintiff fails to make service of process within the 6-month period, the remaining 1-year period of limitations for a civil action under this part resumes regardless of whether the civil action is dismissed.

Mont. Code Ann. § 39-2-912. Exemptions.

(1) This part does not apply to a discharge:
(a) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, as defined in 1-1-201, age, disability, creed, religion, political belief, color, marital status, and other similar grounds.
(b) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.
(2) For the purposes of this section, a contract for a specific term may contain a probationary period as provided for in 39-2-910 and may contain an automatic renewal clause that automatically renews the contract of employment for one or more successive terms.

Mont. Code Ann. § 39-2-913. Preemption of common-law remedies.

Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.

Mont. Code Ann. § 39-2-914. Arbitration.

(1) A party may make a written offer to arbitrate a dispute that otherwise could be adjudicated under this part.

(2) An offer to arbitrate must be in writing and contain the following provisions:

(a) A neutral arbitrator must be selected by mutual agreement or, in the absence of agreement, as provided in 27-5-211.

(b) The arbitration must be governed by the Uniform Arbitration Act, Title 27, chapter 5. If there is a conflict between the Uniform Arbitration Act and this part, this part applies.

(c) The arbitrator is bound by this part.

(3) If a complaint is filed under this part, the offer to arbitrate must be made within 60 days after service of the complaint and must be accepted in writing within 30 days after the date the offer is made.

(4) A discharged employee who makes a valid offer to arbitrate that is accepted by the employer and who prevails in such arbitration is entitled to have the arbitrator's fee and all costs of arbitration paid by the employer.

(5) If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a lawsuit under this part. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act.

Mont. Code Ann. § 39-2-915. Effect of rejection of offer to arbitrate.

A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer.

IX. Statute Regarding Marijuana Usage

Mont. Code Ann. § 39-2-313. Discrimination prohibited for use of lawful product during nonworking hours -- exceptions.

(1) For purposes of this section, "lawful product" means a product that is legally consumed, used, or enjoyed and includes food, beverages, tobacco, and marijuana.

(2) Except as provided in subsections (3) and (4), an employer may not refuse to employ or license and may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally uses a lawful product off the employer's premises during nonworking hours.

(3) Subsection (2) does not apply to:

(a) use of a lawful product, that:

(i) affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees; or

(ii) conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment;

(b) an individual who, on a personal basis, has a professional service contract with an employer and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products; or

(c) an employer that is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.

(4) An employer does not violate this section if the employer takes action based on the belief that the employer's actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement.

(5) An employer may offer, impose, or have in effect a health, disability, or life insurance policy that makes distinctions between employees for the type or price of coverage based on the employees' use of a product if:

(a) differential rates assessed against employees reflect actuarially justified differences in providing employee benefits;

(b) the employer provides an employee with written notice delineating the differential rates used by the employer's insurance carriers; and

(c) the distinctions in the type or price of coverage are not used to expand, limit, or curtail the rights or liabilities of a party in a civil cause of action.

Appendix B: Case Notes

I. Case Notes Related to Teacher Tenure

***Small v. Board of Trustees, Glacier County School District*, 306 Mont. 199, 31 P.3d 358 (2001).** The Court: "Montana's teacher tenure statute is not ambiguous." In this case, an assistant superintendent (Small) challenged the non-renewal of his contract. "Small held a valid teacher certificate, was not a district superintendent, and was employed by the district as a member of its supervisory and administrative staff. Therefore, Small was entitled to tenure."

***Booth v. Argenbright*, 225 Mont. 272, 731 P.2d 1318 (1987**). Among several other issues, the Supreme Court determined that a "School Board did not need to formally accept the resignation [of a teacher] because it had already decided to terminate [the teacher] and made the offer to spare her formal termination proceedings."

II. Case Notes Related to Non-Renewal of Nontenure Teacher Contracts

***Roos v. Kircher Public School Board*, 320 Mont. 128, 86 P.3d 39 (2004).** Montana Supreme Court: "As the School District points out, an aggrieved person must be able to identify a legal right to contest a school board's decision; absent a statutory or constitutional right to a hearing, a county superintendent does not have jurisdiction to hear a matter. In Bland v. Libby School District (1993) (OSPI 205-92, 12 Ed. Law 76), the State Superintendent stated, 'To be appealable to the County Superintendent the policy decision at issue must be governed by a statute that grants an administrative hearing or an interest constitutionally protected by due process must be at stake.... When the Legislature intends to provide contested case proceedings it enacts a statute stating that there is a right to a hearing." The State Superintendent further stated in Bland: 'Simply because a disagreement occurs in a school does not mean the school district, the county

or the state must provide a contested case hearing to resolve it. Just as there must be a cause of action in District Court, there must be a constitutional interest at stake or a statutory right to a hearing before the dispute rises to the level of contested case.'"

***Irving v. School District No. 1-1A*, 248 Mont. 460, 813 P.2d 417 (1991).** The Court upheld the State Superintendent's decision that a teacher denied contract renewal did not have the right to appeal. The Court: "Nowhere in ... the statutes or the [CBA] is [the teacher] given a right to appeal her non-renewal. Moreover, as a non-tenured teacher she has no legally recognized property right in a new contract. Therefore, she was not entitled to constitutional due process and did not have a legally cognizable claim under Montana law."

***Bland v. Board of Trustees, Libby*, OSPI 205-92 (1993)**. The State Superintendent: "To be appealable to the County Superintendent the policy decision at issue must be governed by a statute that grants an administrative hearing or an interest constitutionally protect-ed by due process must be at stake [note: apparently relying on Irving as authority]. * * * When the Legislature intends to provide contested case proceedings it enacts a statute stating that there is a right to a hearing. * * * Simply because a disagreement occurs in a school does not mean the school district, the county or the state must provide a con-tested case hearing to resolve it. Just as there must be a cause of action in District Court, there must be a constitutional interest at stake or a statutory right to a hearing before the dispute rises to the level of a contested case."

***Flammang v. Gardiner Schools*, OSPI 324-10 (2010)**. A nontenured teacher (in this case, a principal) does not have a constitutional or statutory right to a hearing before the county superintendent on the renewal of her contract.

***King v. Hays/Lodge Pole Schools*, 2011 WL 3652424, 2011 MT 200 (2011).** This case pertains to the transfer of a principal to a classroom teaching position. High school principal sought judicial review of State Superintendent's decision affirming school board's reassignment of principal to elementary school teaching position. The District Court reversed the superintendent's ruling, and school board appealed. The Supreme Court held that: (1) in a matter of first impression, positions of teacher and principal were comparable positions of employment under statutory provision that allowed school board of trustees to reassign a tenured principal into a comparable teaching position, even though reassignment occurred for a non-financial reason; (2) statutory provision that entitled, upon reelection by school district, an employee to the "same position of employment as pro-vided by the last-executed contract" did not preclude school board from reassigning principal to a teaching position; and (3) school board of trustee's failure to provide principal with advance written notice of reassignment to a teacher position, and an opportunity for a hearing to challenge her reassignment, did not violate principal's due process rights.

III. Case Notes Related to Terminating Teacher Contracts

***Debar v. Trustees, Yellowstone County Elementary District No. 2*, 244 Mont. 297, 796 P.2d 1081 (1990).** What is a "dismissal" in the context of §207? A 2 ½ day suspension without pay is not dismissal that triggers the procedural safeguards of §207. In this case, three teachers were seen drinking alcoholic beverages on a school bus on their way home from a mandatory staff field trip. The district suspended the teachers without pay for 2 ½ days. The District Court differentiated between "dismissals" and "temporary suspensions." It concluded that while the above statute explicitly deals with permanent dismissals, there is nothing to suggest any

legislative intent that it applies to temporary suspensions. Therefore, the district court held that "it is not a violation of that statute for a short-term disciplinary suspension to be imposed by school district central administrative personnel, without Board action." The Supreme Court agreed and held that 2 1/2 day disciplinary suspensions imposed by administrative personnel do not constitute dismissals which come under the provisions of §207. The District Court further concluded that temporary suspensions are issues covered by the collective bargaining agreement which should be pursued through the contractual grievance/arbitration process provided in that agreement. The District Court then concluded that issues surrounding short-term disciplinary suspensions are grievable issues under the collective bargaining agreement, and therefore were not proper for consideration by the District Court. The Supreme Court agreed with that conclusion, too.

So, at what point does a suspension without pay become a dismissal covered by §207? Apparently sometime between 2 ½ days and 21 days. Consider *Ivey.*

***Lame Deer Elementary District v. Ivey*, OSPI 315-07 (2008).** The State Superintendent was asked to review the suspension of a non-tenured principal in this case. In April, the board voted to not renew the principal's contract. The principal was subsequently involved in a strip search of students, and the superintendent suspended her with pay on May 9th for the rest of the school year. On May 17th, the board voted to suspend the principal for the remainder of the year. The principal was therefore suspended without pay from May 9th to June 7th, when the school year ended, which was a period of 21 days. The State Superintendent noted that in Debar the Supreme Court "drew a distinction between a short-term, two-and-a-half-day disciplinary suspension and a dismissal." The Superintendent commented that "labeling a month-long removal without pay a 'suspension' is not in keeping with the purposes and protections provided by Montana law." The 21 day suspension without pay "was, constructively, a dismissal from employment." The district should have followed the procedures spelled out in §207, the State Superintendent concluded.

IV. Case Notes Related to Terminating Teacher Contracts at Year's End

***Yanzick v. School District No. 23, Lake County*, 196 Mont. 375, 614 P.2d 431 (1982**). From Stansberry: "A recent Montana case provides us with precedent which gives us guidance on this issue. In [Yanzick], a tenured school teacher's contract was not renewed because he had allegedly demonstrated a lack of fitness by: (1) cohabitating with a female teach-er; (2) using human fetuses in the classroom when discussing abortion; and (3) making statements to his classroom regarding his living arrangements with the teacher and the subject of abortion. The opinion pointed out that the record must show good cause for the termination of a teacher's tenure and that in addition the conduct of the teacher, including a characterization that it is immoral, must be such as to directly affect the performance by the teacher of his duties as a teacher."

***Scobey School District v. Radakovich*, 332 Mont. 9, 135 P.3d 778 (2006).** The Court: "'A teacher's tenure is a substantial, valuable and beneficial right, which cannot be taken away except for good cause.' However, it is also clear that the tenure right 'must be balanced against the school board's 'requisite authority to manage the school district in a financially responsible manner. This includes eliminating certain programs and activities, and thereby terminating or reassigning personnel.'¶ 19 In its revised findings of fact and conclusions of law, the County Superintendent determined that the District's undisputed reduction in general fund revenue constituted 'good cause' for the RIF. This conclusion followed from Sorlie, where a school district, because of a failure in state and federal funding, cut an administrative position within the

district which had recently been awarded to a teacher, and reassigned the teacher. Implicit within Sorlie's holding is the principle that a reduction in funding will constitute 'good cause' for an RIF. ¶ 20 In re-versing the decision of the County Superintendent, the District Court concluded that the County Superintendent's determination that there was good cause for Radakovich's termination was 'erroneous,' and in violation of § 20-4-203, MCA (1993), despite the undisputed fact that the district's reduced funding required staff reductions. It is apparent that the District Court's analysis conflated the 'good cause' requirement with the application of §§ 20-4-203 and 20-4-204, MCA (1993). ¶ 21 'Good cause' must be established as a threshold requirement before a district may dismiss a tenured teacher. If 'good cause' to dismiss a tenured teacher exists, then a district must follow the procedures outlined in §§ 20-4-203 and 20-4-204, MCA (1993), to effectuate the teacher's dismissal. As dis-cussed above, we held in Sorlie that a reduction in funding constitutes "good cause" for a RIF. The District Court, however, found fault with the County Superintendent's "good cause" determination by reasoning that the RIF violated § 20-4-203, MCA (1993). This was incorrect. While § 20-4-203, MCA (1993), concerns tenure and how it is earned, it says nothing about what constitutes 'good cause.'" (Citations omitted.)

V. Case Note Related to Transferring from Administration to the Classroom

***King v. Hays/Lodge Pole Schools*, 2011 WL 3652424, 2011 MT 200 (Aug 17.2011**). This case pertains to the transfer of a principal to a classroom teaching position. High school principal sought judicial review of State Superintendent's decision affirming school board's reassignment of principal to elementary school teaching position. The District Court reversed the superintendent's ruling, and school board appealed. The Supreme Court held that: (1) in a matter of first impression, positions of teacher and principal were comparable positions of employment under statutory provision that allowed school board of trustees to reassign a tenured principal into a comparable teaching position, even though reassignment occurred for a non-financial reason; (2) statutory provision that entitled, upon reelection by school district, an employee to the "same position of employment as provided by the last-executed contract" did not preclude school board from reassigning principal to a teaching position; and (3) school board of trustee's failure to provide principal with advance written notice of reassignment to a teacher position, and an opportunity for a hearing to challenge her reassignment, did not violate principal's due process rights.

VI. Case Note Related to Written Contracts of Employment for a Specific Term

***Brown v. Yellowstone Club Operations*, LLC, 361 Mont. 124, 255 P.3d 205 (June 28, 2011**). A "term" contract with an at-will termination provision may create a problem for the employer. In a recent case, an employee, whose employer had terminated without cause, filed a claim against employer under the Wrongful Discharge from Employment Act. Employer filed motion to dismiss because there was an employment contract. The District Court granted motion. Employee appealed. The Supreme Court, Mike McGrath, C.J., held that in a matter of first impression, employment agreement setting forth three-year term of employment, but that also allowed employer to terminate employee at will, for no cause, was not a "written contract for a specific term," to which the Wrongful Discharge from Employment Act did not apply. "Construing the employment agreement in this case as one for a specific term would remove the discharge from the Act; could effectively reinstate at-will employment in Montana and would leave the dis-charged employee arguably without remedy. He would not be able to bring an action under the Act, and at the same time would be subject to the employer's contractual right to

discharge at will. Such a result would be contrary to the weight of authority and would undermine the purposes of the Act."