BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

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HENRY PRETTY ON TOP, CHAIRMAN, BOARD OF TRUSTEES, BIG HORN COUNTY HIGH SCHOOL DISTRICT NO. 2, LODGE GRASS HIGH SCHOOL, Appellant, vs. ROBERTA SNIVELY, BIG HORN COUNTY SUPERINTENDENT OF SCHOOLS Respondent.	OSPI 185-90 DECISION AND ORDER

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STATEMENT OF THE CASE

The petitioners, the majority of the electors of the territory comprised of Elementary School District No. 1, Big Horn County, Decker, Montana ("Decker School District"), sought transfer of the territory from High School District No. 2, Big Horn County, Lodge Grass, Montana ("Lodge Grass School District") to the Hardin School District, by filing a petition on January 19, 1990, pursuant to section 20-6-320, MCA, with Roberta Snively, Big Horn County Superintendent of Schools ("County Superintendent").

After certification by the County Commissioners, filing and notice of hearing, a hearing was held before the County Superintendent on February 16, 1990. Testimony was received and exhibits were introduced into evidence. On April 17, 1990, the County Superintendent issued her Findings of Fact, Conclusions of

Law and Order in which she ordered the transfer of the territory.

On May 17, 1990, Henry Pretty On Top, Chairman of the Lodge Grass School District, appealed the order of the County Superintendent to this Superintendent pursuant to section 20-6-320(4), MCA.

The issues on appeal are:

1. Whether the County Superintendent properly denied the motion to postpone the hearing.

2. Whether the County Superintendent properly denied the motion to disqualify herself.

3. Whether the County Superintendent properly denied the motion to submit additional evidence.

4. Whether the County Superintendent erred in concluding that the transfer was advisable and in the best interests of the residents of the territory.

DECISION AND ORDER

This Superintendent has considered the complete record of the County Superintendent's hearing, briefs filed and oral argument heard. There is substantial and reliable evidence on the record to support the findings of fact of the County Superintendent and her conclusion that the transfer is advisable and in the best interests of the residents of the territory. The order of the County Superintendent is affirmed.

MEMORANDUM OPINION

Standard of Review

The standard of review by the State Superintendent is set forth in section 10.6.125, ARM, which reads as follows:

(1) The state superintendent of public instruction may use the standard of review as set forth below and shall be confined to the record unless otherwise decided.

(2) In cases of alleged irregularities in procedure before the county superintendent not shown on the record, proof thereof may be taken by the state superintendent.

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

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

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;

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

This rule was modeled upon section 2-4-704, MCA, and the Montana Supreme Court has interpreted the statute and the rule to mean that agency (County Superintendent) findings of fact are subject to a clearly erroneous standard of review and that conclusions of law are subject to an abuse of discretion standard of review. Harris v. Bauer, 230 Mont. 207, 749 P.2d 1068, at 1071, 45 St. Rptr. 147, at 151 (1988); City of Billings v. Billings Firefighters Local No. 521, 200 Mont. 421, at 430, 651

P.2d 627, at 632 (1982). Further, the petitioner for review bears the burden of showing that they have been prejudiced by a clearly erroneous ruling. Terry v. Board of Regents of Higher Education, 220 Mont. 214, at 217, 714 P.2d 151, at 153 (1986), citing Carruthers v. Board of Horse Racing of Department of Commerce, 216 Mont. 184, 700 P.2d 179, at 181, 42 St. Rptr. 729, at 732 (1985). Findings are binding on the court and not "clearly erroneous" if supported by "substantial credible evidence in the record." Id. This has been further clarified to mean that a finding is clearly erroneous if a "review of the record leaves the court with the definite and firm conviction that a mistake has been committed." Wage Appeal of Montana State Highway Patrol Officers v. Board of Personnel Appeals, 208 Mont. 33, 676 P.2d 194, at 198 (1984). A conclusion of law is controlling if it is neither arbitrary nor capricious. City of Billings, 651 P.2d at 632.

Motion to Postpone

On February 14, 1990, Lodge Grass filed a motion to postpone. The motion was denied by the County Superintendent who found that it "was not presented on a timely basis".

The notice of the hearing, dated February 1, 1990, scheduled the hearing for February 16, 1990. Section 20-6-320(3)(c), MCA, requires that the County Superintendent set a hearing not more than forty (40) days after receipt of the petition. The petition was received on January 19, allowing until February 28 for a

hearing.

Appellant's motion to postpone filed February 14, 1990, was predicated upon a pending declaratory judgment action in state district court. Although the outcome of this action may have provided the County Superintendent with additional information upon which to base her decision, it was not dispositive of the issue before her. In addition, the action was filed December 29, 1989, prior to the date notice of hearing was issued, and a resolution could not reasonably be expected within the amount of time allowed for the hearing on the matter before the County Superintendent.

The County Superintendent did not abuse her discretion in denying a motion to postpone filed only two days prior to the scheduled hearing.

Motion to Disqualify

Lodge Grass moved to disqualify the County Superintendent as the hearing officer based on section 20-3-211, MCA. The motion was denied by the County Superintendent on the basis that the matter did not "arise as a result of the decisions of the trustees of any district in Big Horn County." The peremptory disqualification statute, section 20-3-211, MCA, is applicable only to matters of controversy pursuant to section 20-3-210, MCA, arising as a result of decisions of the trustees.

The proceedings under section 20-6-320, MCA, are of a special nature. One must look to the Montana Administrative Procedure

Act for guidance on disqualification of a hearing officer. Section 2-4-611, MCA. Lodge Grass failed to comply with the time restrictions of that statute. Therefore, the County Superintendent's denial of the motion was appropriate.

Motion to Submit Additional Evidence

On March 26, 1990, Lodge Grass filed a motion to submit additional evidence and affidavits. The motion was denied by the County Superintendent. The motion was filed more than a month after the hearing was completed. The materials offered are not subject to cross-examination and are of questionable significance. The hearing before the County Superintendent was thorough and provided ample opportunity for presentation of evidence necessary to the determination to be made. The County Superintendent correctly used her discretion when denying the motion.

The materials included in briefs before this Superintendent which are not part of the record below are not proper for determination upon review. Frazer School District No. 2 v. Flynn, 225 Mont. 299, 732 P.2d 409, 44 St. Rptr. 248 (1987).

Advisable and in the Best Interests

The County Superintendent is required to grant the petition and order the boundaries changed if she considers it advisable and in the best interests of the residents of the territory. Section 20-6-320(4), MCA. In making that determination, she must consider both the interests of the residents of the territory to

be transferred and of those in the remaining territory. Gunderson v. Board of County Commissioners of Cascade County, 183 Mont. 317, 599 P.2d 359 (1979).

A review of the findings and the record clearly shows that the County Superintendent thoroughly considered the evidence before her and the impacts of the transfer on both territories. Based upon her considerations, she then exercised the discretion allowed her by the statute and ordered the transfer of the territory. The record shows that there is substantial credible evidence to support the decision of the County Superintendent. Appellant has failed to show that the actions of the County Superintendent were either arbitrary or capricious or affected by a clearly erroneous ruling.

DATED this 26 day of October, 1990.

Nancy Keenan

NANCY KEENAN

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 26th day of October, 1990, a true and exact copy of the foregoing DECISION AND ORDER was mailed, postage prepaid, to the following:

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