BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

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IN THE MATTER OF THE PETITION OF CERTAIN MISSOULA COUNTY RESIDENTS REQUESTING A TRANSFER OF TERRITORY FROM ALEERTON JOINT HIGH SCHOOL DISTRICT NO. 2, MINERAL COUNTY TO FRENCHTOWN HIGH SCHOOL DISTRICT NO. 40, MISSOULA COUNTY	OSPI 252-95 ORDER IN SECOND APPEAL

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PROCEDURAL HISTORY OF THIS APPEAL

On Juze 23, 1992, some of the Missoula County residents living in Precinct 3131 [hereinafter referred to as "Upper Nine Mile"] filed with the Missoula County Superintendent, Rachel Vielleux, a petition to transfer Upper Nine Mile territory from Alberton Joint High School District No. 2 to Frenchtown School District No. 40. Mineral County Treasurer/Superintendent, Billye Ann Bricker, was notified because the requested change would change a joiit high school district boundary.

The two Superintendents reached conflicting decisions. The Missoula County Superintendent approved the transfer of land to Frenchtown while the Mineral Treasurer/Superintendent denied the transfer from Alberton. On August 17, 1992, they issued an Order denying the transfer. On September 16, 1992, the Upper Nine Mile residents filed a notice of appeal with this Superintendent.

On October 13, 1992, the Missoula County Superintendent prepared a post-hearing affidavit about property tax payments related to the Bonneville Power Administration lines and moved to present this as evidence after the appeal. On November 18, 1992, that motion was denied.

On March 16, 1993, this Superintendent issued a decision affirming the county Superintendents. The Upper Nine Mile residents appealed to the Fourth Judicial District, Missoula County, to set aside the order. The District Court Order rejected most *of* their arguments, holding that:

1) Section 20-5-320, MCA, is a broad grant of discretion to County Superintendents for deciding transfers of territory. Reversal on the issue of whether the Mineral County Superintendent/Treasurer improperly weighed the evidence is not permissible. March 22, 1994, Memorandum and Order, page 5.

2) Findings of Fact 17, 18, 20 and Conclusion of Law 5(a) are not clearly erroneous. March 22, 1994, Memorandum and Order, page 9.

3) The County Superintendents followed the procedure required by statute (§ 20-6-320) in reaching a joint order in this case. One superintendent's approval and the other's denial results in one joint order denying the transfer. There is no statutory authority for appointing a "disinterested third party" to resolve the impasse. March 22, 1994, Memorandum and Order, page 10.

The District Court held for the Upper Nine Mile residents on one issue, however. The Court ruled that the Missoula County Superintendent's post-hearing affidavit was evidence that should be considered by the Mineral County Superintendent/Treasurer and issued an Order remanding the March 16, 1993, decision for one purpose -- for Ms. Bricker to weigh the affidavit and reevaluate her cost/benefit analysis:

> It is this Court's opinion that it was error on the part of Ms. Xeenan to fail to acknowledge the new evidence contained in the Vielleux affidavit.
>
> . . . Because the taxation issue formed a substantial basis for Ms. Bricker's conclusion that the burden on the Alberton School District outweighed the benefits of transfer to the Upper Nine Mile residents, Keenan's rejection of the tax aspect of that conclusion without remand to the County Superintendent to reevaluate the cost/benefit analysis was error.
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> March 22, 1994, Memorandum and Order, pages 7 & 8.

This Superintendent remanded as directed by the District Court with instruction to the Mineral County Superintendent to:

> reconsider her conclusion that the burden on the Alberton School District outweighed the benefits of transfer to the Upper Nine Mile residents. She should weigh the evidence in the Missoula County Superintendent's Affidavit and issue a new order stating whether that evidence causes her to affirm *or* chance her cost/benefit analysis.
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> July 5, 1994, Order Remanding to County Superintendent, page 2.

The Mineral County Treasurer/Superintendent did so and on February 14, *1995,* she issued an new order stating in part:

> After careful consideration of this information, [the affidavit] the Mineral County Superintendent hereby affirms her original decision to deny the transfer of territory.
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> February 14, 1995, Order, page 1.

On March 15, 1995, the Upper Nine Mile residents again appealed to the State Superintendent on the grounds that the Mineral County Superintendent/Treasurer should have held a new hearing or disqualified herself.

STANDARD OF REVIEW

This is a review on remand of one finding of fact. Findings of fact ~ *r* eeviewed to determine if they are supported by substantial, credible evidence in the record. The State Superintendent may not substitute her judgment for that of a county superintendent on the weight of the evidence. A finding *is* clearly erroneous only if a "review of the record leaves the Court with the definite and firm conviction that a mistake has been committed." Wace Appeal **v.** Board of Personnel Appeals, 676 P.2d 194, 198, 208 Mont. 33, 40 (1984).

DECISION AND ORDER

There is evidence in the record to support the County Superintendent's finding. The Order is AFFIRMED.

Discussion

1. Post-hearing affidavits attached to briefs on appeal.

In the second appeal, five affidavits were attached to the briefs as the "record" of evidence to prove allegations of ex parte contact by both sides. Affidavits attached to briefs are not part of the record for review. This is based on § 20-3-107(2), MCA:

> The superintendent of public instruction shall make his decision on the basis of the transcript of the fact-finding hearing conducted by the county superintendent or county transportation committee and documents presented at the hearing. The superintendent of public instruction may require, if he deems necessary, affidavits, verified statements, or sworn testimony as to the facts in issue. (emphasis added)

Post-hearing affidavits attached to an appeal brief do not create a record for review. Affidavits are not tested for relevancy or competency and it is usually impossible for the reviewer to discern what impact the affidavit would have had on the hearings officer's findings of fact. Unless directed by a district court, this Superintendent will not accept post-hezing affidavits into the record unless she requests the affidavit, verified statements, or sworn testimony.

This Superintendent's review of county superintendent decisions **is** not a forum for taking additional evidence. Attaching affidavits is not a substitute for a hearing. if a party **believes** that procedural misconduct has occurred it has a constitutional claim -- denial of due process -- that may be raised and proved in district court.

2. Appellants issues.

The **Upper** Nine Mile appellants argue that the Mineral County Superintendent/Treasure should have either conducted a new hearing or disqualified herself as biased.

New hearing. The District Court already ruled against the Upper Nine Mile appellants on the issue of a new hearing. The District Court remanded this case for a narrow purpose -- the Mineral County Superintendent/Treasure was directed to consider the Missoula County Superintendent's post-hearing affidavit as evidence and consider it in her cost/benefit analysis. She did so and again decided the benefits of the transfer did not exceed the costs.

The District Court has already rejected the Upper Nine Mile appellants argument for a new hearing, writing:

> The standard of review on questions of fact for both the State Superintendent and the District Court is confined to whether the findings of fact are "clearly erroneous" based upon all the evidence in the record. Neither the State Superintendent nor the District Court can substitute his/her own judgment for that of the County Superintendent on the weight of the evidence on questions of fact. Given the County Superintendent's broad discretionary authority, a reversal or remand on the issue of whether the County Superintendent improperly weighed the evidence is not permissible.
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> March 22, 1994, Memorandum and Order, page 5.

This ruling was final unless appealed to the Supreme Court. Section 2-4-711 and Rule 4 M. R. **App.** P. The State Superintendent does not have the jurisdiction to set aside the District Court's ruling.

Bias. Both sides argue that tie other county's Superintendent **was** biased, particularly by alleged ex parte contact. It appears the Superintendents simply did their best according to the procedures established in § 20-6-320, MCA, for transferring territory. Section 20-6-302(8) requires two county superintendents to act "jointly" for transfers affecting two counties. Each Superintendent carried out her statutory responsibility to apply the standard of § 20-6-320 (6).

> The decision must be based on the effects that the transfer would have on those residing in the territory proposed for transfer as well as those residing in the remaining territory of the high school district.

Applying this test the two Superintendent came to different cocclusions. That does not establish bias and the decision **is** affirmed.

DATED this 29th day of January, 1996.

NANCY KEENAN

ALBRTN.052

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 6th day of February, 1996, a true and exact copy of the foregoing ORDER IN SECOND APPEAL was mailed, postage prepaid, to the following:

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