BEFORE NANCY XEENAN, 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 ALBERTON JOINT HIGH SCHOOL DISTRICT NO. 2, MINERAL COUNTY TO FRENCHTOWN HIGH SCHOOL DISTRICT NO. 40, MISSOULA COUNTY

OSPI 214-92

DECISION AND ORDER

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PROCEDURAL HISTORY OF THIS APPEAL

On June 23, 1992, the petitioners/appellants (hereinafter the "Upper Nine Mile Appellants"), petitioned to transfer Precinct 3181, the Upper Nine Mile, from Alberton Joint nigh School District No. 2 to Frenchtown School District No. 40. As required by § 20-6-320, MCA, the petition was filed with the Missoula County Superintendent, Rachel Vielleux. Because the proposed transfer would affect the boundary of an existing joint nigh school district, the Missoula County Superintendent notified the Mineral County Treasurer/Superintendent, Billye Ann Bricker.

The Missoula County Commissioners certified the petition met the requirements of § 20-6-320 (1) and (2), MCA. After proper notice, a hearing was held July 21, 1992. The Alberton Joint High School District Board of Trustees (hereinafter the "Alberton Respondents") appeared, through counsel, in opposition. Testimony and exhibits were admitted and a record was made.

On August 17, 1992, the Missoula County Superintendent and

the Mineral County Treasurer/Superintendent issued separate findings and conclusions and one order denying the transfer. In memorandum opinions the Missoula County Superintendent stated she would grant the transfer and the Mineral County Treasurer/Superintendent stated she would deny the transfer. The Superintendents jointly concluded this resulted in a denial.

On August 18, 1992, after the Superintendents' order was issued, the Upper Nine Mile Appellants submitted "alternative motions" that the Mineral County Treasurer/Superintendent disqualify herself and withdraw her findings and conclusions or that a disinterested third party be called in. Attached to this motion was a document marked "Exhibit A" and described as a contract between the Mineral County commissioners and the Missoula County Superintendent of Schools. On August 19, 1992, the Superintendents jointly denied this motion.

On September 14, 1992, the Upper Nine Mile Appellants filed a notice of appeal with this Superintendent and on September 16, 1992, filed an amended notice of appeal. The issues stated in the notice of appeal are:

> "1. County Superintendent Billye Ann Bricker lacked the qualifications to serve as Hearings Officer and should have disqualified herself.
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> 2. County Superintendent Billye Ann Bricker was without jurisdiction to serve as Hearings Officer.
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> 3. County Superintendent Billye Ann Bricker, in Conclusions of Law No. 5 and in her Memorandum, placed improper emphasis on one factor, increased taxes, while disregarding the statutory requirement of balancing the

likely effects on the remaining territory and the territory to be transferred. The other factors noted by County Superintendent Billye Ann Bricker are speculative.

4. The County Superintendents reached differing opinions as to whether to grant or deny the Petition and denied the Petition. This denial was unlawful procedure.

5. The Findings of Fact, Conclusions of Law, and Order of County Superintendent Billye Ann Bricker are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

6. The Findings of Fact, Conclusions of Law, and Order of County Superintendent Billye Ann Bricker are arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

As provided in ARM 10.6.121, the parties had the opportunity to file briefs and present an oral argument. This Superintendent received briefs from the Upper Nine Mile Appellants and the Alberton Respondents. The parties chose to forego oral argument.

This Superintendent also received a motion and brief to consider an affidavit of Rachel Vielleux and a brief in opposition. On November 18, 1992, that motion was denied.

DECISION AND ORDER

The State Superintendent has jurisdiction over this matter under § 20-6-320, MCA. This Superintendent has considered the complete record of the County Superintendents' hearing, the order of August 17, 1992, the six issues raised on appeal, and the legal arguments stated in briefs. There is substantial, credible evidence on the record to support the findings of fact. The

conclusions of law are correct. The order is AFFIRMED.

STANDARD OF REVIEW

The State Superintendent'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 this Superintendent in ARM 10.6.125. The Montana Supreme Court has repeatedly stated that findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed under an abuse of discretion standard. See, for example, Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy Keenan, 241 Mont. 274, 786 P.2d 1164 (1990). The petitioner bears the burden of showing there is a clearly erroneous ruling. Terry v. Board of Regents, 220 Mont. 214, 714 P.2d 151 (1986).

The State Superintendent may not substitute her judgment for that of a County Superintendent as to the weight of the evidence on questions of fact. Findings are upheld if supported by substantial, credible evidence in the record. 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." Wage Appeal v. Board of Personnel Appeals, 208 Mont. 33, at 40, 676 P.2d 194, at 198 (1984).

Conclusions of law are subject to more stringent review. The Montana Supreme Court has held that conclusions of law are reviewed to determine if the agency's interpretation of the law

is correct. Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, at 174, 803 P.2d at 603 (1990).

MEMORANDUM OPINION

The Upper Nine Mile Appellants' six issues on appeal were ?resented as two arguments in their brief:

> A. The findings and conclusions of County Superintendent Bricker are clearly erroneous and placed undue emphasis on only one factor while disregarding the mandate of § 20-6-320; [Brief, p. 4] and
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> B. The Decision of the Missoula County Superintendent in favor of the transfer should have governed over the decision of the Mineral County Superintendent to deny the transfer. [Brief, p. 2]

A. The Findings and Conclusions are not clearly erroneous or based on one factor.

1. A review of the record does not support the Upper Nine Mile Appellants' argument that the Mineral County Superintendent/ Treasurer's findings are clearly erroneous or that undue emphasis das placed on one factor. The Superintendents took a great deal of evidence for and against the transfer. At the hearing 10 witnesses testified for the petition and 14 testified in opposition. Many exhibits were accepted. The record was kept open one week to accept written testimony and numerous letters for and against were received.

Evidence was given on a number of factors -- taxbase, curriculum, community impact, parent preference, transportation, etc.. This Superintendent's review of the proceedings below and the resulting Order shows that the County Superintendents weighed

all the evidence presented and based their findings on evidence in the record. Their findings are similar and both considered a number of factors, not just one.

Some of the findings of fact of both Superintendents might be more accurately described as a reiteration of evidence presented. Both Superintendents' conclusions of law are a mixture of ultimate findings, based on that evidence, and conclusions of law. Both Superintendents decided that the transfer was in the best interests of the Upper Nine Mile area residents and taxpayers [Order p. 9 paragraph 4 and p. 16 paragraph 4]. This was based on parent preference, taxpayer savings, unification of the Upper and Lower Nine Mile areas and convenience.

Both Superintendents also decided that the transfer was not in the best interests of the Alberton School District residents and taxpayers [Order p. 9, paragraph 4 and p. 17, paragraph 5]. This was based on a loss of students, loss of taxable value and possible decline in the quality of the school program. The Mineral County Superintendent/Treasurer's decision was also based the possibility of less extra-curricular activities.

Evidence in the record supports the reasons for finding that the transfer was not in the best interests of the Alberton School District. The petition itself establishes there will be fewer students. Exhibit 9 (Tr. pp. 92-96) establishes the loss of taxable value. The possible decline in the quality of the school

was testified to by Gary Webber, Superintendent of Alberton Joint District No. 2, and Frank Kibbie, President of the Alberton Education Association. Parents testified about the possible detrimental impact of less extra-curricular activities. (See, for example, Tr. p. 21).

As correctly noted by Superintendent Vielleux (Tr. p. 133), the ultimate finding on the transfer had to 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." Section 20-6-320(6), MCA. This is a balancing test. The Superintendents had to weigh the benefits and burdens both areas would experience because of the transfer.

Both Superintendents agreed that the evidence established the transfer would benefit the Upper Nine Mile area and burden the Alberton area. The Mineral County Superintendent/Treasurer concluded that the burdens to Alberton outweighed the benefits to the Upper Nine Mile. Her decision is not clearly erroneous or arbitrary or capricious; there is ample evidence in the record supporting the detriment to Alberton. This State Superintendent may not substitute her judgment for that of the hearing examiner on the weight to give substantial, credible evidence in the record. The consequence of conflicting decisions by the two Superintendents is discussed below.

2. The Mineral County Superintendent/Treasurer also based

her decision on: "The recent probability of continued BPA protested taxes will again strain the Alberton School District Budget" [Order p. 10, 1. 7]. Nothing in the record supports this statement and it is rejected on review. However, as stated above, there is ample other evidence to support a finding that the transfer would adversely affect the Alberton School District.

3. The Upper Nine Mile Appellants argue there is error in the Mineral County Superintendent/Treasurer's Finding No. 20 [Order p. 20] that loss of 40 students could affect the quality of Alberton's education programs. Appellants argue that because of Finding No. 18 [Order p. 7] that 22 of the Upper Nine Mile students may attend Frenchtown School District. "Finding of Fact No. 20 and Conclusion of Law No. 5(A) are clearly erroneous in that County Superintendent Bricker based her decision on a loss of 40 students when, in reality, the loss found by both Superintendents was only 18 students." [Brief, p. 5]

This Superintendent disagrees. Finding No. 20 and Conclusion No. 5(a) do not establish clear error. Finding No. 18 and Finding No. 20 are both correct, do not conflict, and are both supported by evidence in the record. Affidavits and testimony in the record do "indicate . . . . approximately 22 of the 40 students would be attending Frenchtown School District" [F.F. No. 18]. These affidavits, however, do not compel the students to attend Frenchtown. The petition states there are 11 high school and 29 elementary school students residing in the

Jpper Nine Mile -- 40 students. There is no error in the superintendent referring to the loss of 40 students [F.F. No. 20], not 18, as the impact of transfer.

4. This Superintendent also finds no support for the Upper iine Mile Appellants' claim that "County Superintendent Bricker smphasizes the financial impact on the remaining taxpayers all aut of proportion to other considerations." The financial impact an taxpayers is an important consideration in a transfer and was properly given considerable weight by both Superintendents. It is not the exclusive factor, however, and neither Superintendent limited her analysis to that.

County Superintendent/Treasurer Bricker did not base her decision solely on taxes. For example, her findings show she weighed the impact of the transfer on both areas' sense of community, the quality of education, and parental convenience. tier consideration of financial impact is not reversible error.

B. There is no reason the decision of the Missoula County Superintendent should govern over the decision of the Mineral County Superintendent/Treasurer.

1.(i) Motion to disqualify. The Upper Nine Mile Appellants' motion to disqualify the Mineral County Superintendent/Treasurer was made after the order was issued and is not timely.

While not precisely applicable to this appeal, Montana statute does establish a procedure for disqualifying a County Superintendent from hearing some cases [§ 20-3-107, MCA]. What is relevant to this appeal is an Attorney General Opinion

concerning when disqualification should occur:

> The county superintendent can exercise some control over the timeliness of an affidavit of disqualification. While the statute is silent on a time requirement for the affidavit, a judicial officer typically has the discretion to require timely submission of motions for the orderly disposition of the matters before it. It would not be unreasonable for the county superintendent to require either party to file a disqualification affidavit by a certain date or forgo that right.

[42 A.G. Op. 86 (1988)]

The County Superintendents jointly decided to deny the notion to disqualify the Mineral County Superintendent/Treasurer. On review, this Superintendent has not been presented with any legal grounds for setting aside that decision and would not reach the merits of an untimely motion.

It is also noted that much of the arguments on this issue are based on the meaning of a document marked "Exhibit A" that was attached as part of the brief in support of the motion to disqualify. Evidence is made part of a record when it is offered and accepted in a hearing. An attorney stapling a document to a brief does not create an exhibit on the record. The relevance or credibility of the document is not established through testimony of affidavits. On review, this Superintendent will not speculate on the meaning of a document not properly in the record.

(ii) Mineral County Superintendent/Treasurer's jurisdiction to hear this matter. The Upper Nine Mile Appellants argue that the Mineral county Superintendent/Treasurer should have

disqualified herself before the hearing because she is not a certified teacher and, therefore, could not act as Hearings Officer on this matter, but offer no case law in support of their theory. This Superintendent agrees with the County Superintendents that: "A county superintendent who is conducting a hearing on a territory transfer under MCA Title *20*, chapter *6* is not required by statute to have the qualifications necessary for hearing a controversy matter contemplated under MCA Title *20*, chapter 3." [August 19, 1992, Order, p. 2]

There is no question that § *20-3-201* (3), MCA, requires Mineral County to contract with a qualified person to perform the duties described in §§ *20-3-207* and *20-3-210*, MCA, but such a duty is not at issue here. Duties that require the special expertise of a certified teacher -- "advising and directing teachers on instruction, pupil discipline, and other duties of the teacher" ([§ *20-3-107* (3), MCA], for example, must be performed by a certified teacher). Hearing and deciding a transfer that would affect the boundary of an existing joint high school district, as required under § *20-6-320* (8), MCA, is not such a duty.

2. Section *20-6-320*, MCA, provides the mechanism for transferring territory from one school district to another. Section *20-6-320* (8), MCA, requires two county superintendents to hear disputes affecting "the boundary of any existing joint high school district," but it does not set forth the procedure to be

followed when the superintendents disagree.

While this case presents the unusual situation of separate Findings and conclusions issued by two County Superintendents weighing the same evidence, both sets of findings are relatively similar. Also, both Superintendents issued one order denying the transfer; conflicting orders are not at issue in this case. The Superintendents were aware of their divergent view of the facts. Their mutual conclusion was that in these circumstances a petition to transfer fails. This Superintendent agrees.

While not entirely analogous, the situation here is similar to conflicting decisions by two County Commissions concerning the transfer of school districts. In Gunderson v. Board of County Commission, 183 Mont. 317, 599 P.2d 359 (1979), the denial of a transfer in such a situation was upheld. A similar principle can be seen in that a tie vote in a legislative body does not result in the passage of a bill. See, for example, State ex rel. Easbey v. Highway Patrol Board, 140 Mont. 383, 372 P.2d 930 (1962).

DATED this 16 day of March, 1993.

Nancy Keenan

NANCY KEENAN

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 16th day of March, **1993**, a true and exact copy of the foregoing Decision and Order was nailed, postage prepaid, to the following:

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