

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

GARY SCHAEFFER,
Plaintiff,

vs.

**MICK LOUGHRAN, CHERRY COUNTY
SUPERINTENDENT OF SCHOOLS,**
Defendant.

Case No. CI99-49

JUDGMENT

DATE OF HEARING: December 17, 1999.

DATE OF DECISION: January 27, 2000.

APPEARANCES:

For plaintiff: Warren R. Arganbright with plaintiff.
For defendant: Steve Williams with defendant's successor in office, William W. "Bill" Rogers.

SUBJECT OF ORDER: Plaintiff's petition in error.

FINDINGS: The court finds and concludes that:

1. Pursuant to NEB. REV. STAT. § 79-498 (Reissue 1996), the Cherry County Superintendent of Schools dissolved Cherry County School District No. 136. The statute was formerly codified at § 79-420.

2. The county superintendent attached the dissolved district's territory to other neighboring school districts. He attached part of the former district to Cherry County School District No. 101 and part to Cherry County School District No. 127. The plaintiff in error brings this appeal pursuant to § 79-498. Because the statute provides no procedure for appeal, plaintiff properly brought the appeal as a petition in error. NEB. REV. STAT. § 25-1937 (Reissue 1995); *McDonald v. Rentfrow*, 171 Neb. 479, 106 N.W.2d 682 (1960).

3. Although § 79-498 was amended in 1999, the amendment specifies an operative date of July 1, 2000. Consequently, the statute published in the 1996 Reissue controls this proceeding.

4. The decision in *McDonald v. Rentfrow, supra*, essentially controls the decision in this case. *McDonald* clearly holds that, under this statute, the county superintendent exercises legislative power properly delegated by the Legislature. See also *In re Dissolution of School Dist. No. 22*, 216 Neb. 89, 341 N.W.2d 918 (1983); *School Dist. No. 39 v. Farber*, 215 Neb. 791, 341 N.W.2d 320 (1983).

5. As the Supreme Court differentiated in *Nickel v. School Board of Axtell*, 157 Neb. 813, 825-26, 61 N.W.2d 566, ___ (1953):

Questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in the boundaries thereof, are, in the first instance, of purely legislative cognizance and, when delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitutions. [citations omitted.]

But when, as a condition to their creation or change, the public body to which such authority is delegated must find certain facts to exist upon which the Legislature has said depends its authority to declare such subdivision, or any change therein, to exist then the questions presented are of a quasi-judicial character.

6. Consequently, in determining the existence or non-existence of the conditions specified in subsections (1) or (2)(a) or (2)(b) of § 79-498, the county superintendent acts quasi-judicially. Such determinations are properly reviewed by this court upon a petition in error. However, once the county superintendent properly determines the existence of one or more of such conditions, he or she exercises properly delegated legislative power in dissolving the district and “attaching the territory of such district to one or more neighboring school districts.” NEB. REV. STAT. § 79-498 (Reissue 1996). See also *KN Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 447 N.W.2d 227 (1989).

7. Paragraph 9A of the petition asserts that the superintendent exceeded the authority granted by statute. The record does not support the plaintiff’s claim.

8. Paragraph 9B of the petition asserts that the superintendent failed to follow the procedures required by the statute. The record does not support this contention.

9. Paragraph 9C of the petition asserts that the decision was not supported by competent, material, and substantial evidence. In reviewing a decision based on a petition in error, an appellate court

determines whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient relevant evidence. *Luet, Inc. v. City of Omaha*, 247 Neb. 831, 530 N.W.2d 633 (1995). As to the existence of the condition necessary for the superintendent to exercise the statutory authority, not only is the decision supported by sufficient relevant evidence, there exists *no* contrary evidence. The plaintiff does not seriously contend that the conditions did not exist which would mandate the dissolution of District No. 136. The plaintiff quarrels with the decision made regarding which district or districts the territory should be attached. That decision exercises properly delegated legislative power not subject to review by this court.

10. Paragraphs 9F and 9G of the petition assert that the superintendent failed to make required findings. While the form of the written order might have been better drafted to make such findings explicitly, such matters were not disputed in the evidence and entry of the order dissolving the district implicitly makes such findings.

11. Paragraphs 9L, 9M, and 9N of the petition assert claimed errors regarding the failure to notify or involve the Thomas County Superintendent of Schools. Section 79-498 requires only that “[d]issolutions involving the transfer of territory across county lines shall be acted upon jointly by the county superintendents of the counties concerned.” NEB. REV. STAT. § 79-498 (Reissue 1996). All of the territory of District No. 136 was located within Cherry County. None of the territory was transferred to any county outside of Cherry County. The quoted sentence of the statute does not apply in this situation. The mere existence of a neighboring school district across a county line, to which no property is transferred, does not make the dissolution one “involving the transfer of territory across county lines.” The fact that some of the residents of the dissolved district preferred a transfer across a county line does not change the legal situation.

12. Paragraphs 9N and 9P of the petition claim error concerning the notice given. The record shows that the required notice was given to those persons which the statute required, i.e., to “each legal resident of the district.” *Id.* No other notice was required by law. The plaintiff's claims lack merit.

13. Paragraph 9O of the petition claims that the superintendent erroneously failed to find that “the dissolution will create extreme hardships . . .” *Id.* The plaintiff misreads the statute. The statute does

not require any such finding before the exercise of the delegated legislative power. The statute allows the State Board of Education to waive the statutory requirement of dissolution by the superintendent “on application by the school board . . . of the district and the recommendation of the county superintendent” *Id.* The record fails to show that any such application was ever made. It therefore becomes unnecessary to consider whether the superintendent has discretion in making any such recommendation.

14. Paragraph 9Q of the petition alleges that the decision was arbitrary and capricious. This claim lacks merit.

15. The remainder of the plaintiff’s claims essentially assert that the superintendent should have transferred, or considered transferring, all or part of the territory to other neighboring districts. Such claims lack any legal merit. *In re Dissolution of School Dist. No. 22, supra; McDonald v. Rentfrow, supra.*

16. The county superintendent acted within his jurisdiction and his decision is supported by sufficient relevant evidence. Consequently, the order must be affirmed and the plaintiff’s petition in error must be dismissed at plaintiff’s cost.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The order of the county superintendent dissolving Cherry County School District No. 136 is affirmed.
2. The plaintiff’s petition in error is dismissed with prejudice at plaintiff’s cost.

Entered: January 27, 2000.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20____ by _____.
- Enter judgment on the judgment record.
Done on _____, 20____ by _____.
- Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20____ by _____.
- Note the decision on the trial docket as: 1/27/99 Signed “Judgment” entered affirming order of county superintendent and dismissing petition in error with prejudice at plaintiff’s cost.
Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge