[Cite as *In re Request for Transfer of Territory from Franklin City School Dist., Warren Cty., to Middletown City School Dist., Butler & Warren Counties, Pursuant to R.C. 3311.06.*, 2009-Ohio-2505.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
The Request for Transfer of Territory from the Franklin City School District, Warren County, to the Middletown City School District, Butler and Warren Counties, Pursuant to Section 3311.06 of the Revised Code,	:	No. 08AP-871 (C.P.C. No. 08CVF03-3404)
	:	(REGULAR CALENDAR)
(Middletown City School District, Appellant).	:	

D E C I S I O N

Rendered on May 28, 2009

Frost Brown Todd LLC, Thomas B. Allen and *Michael K. Yarbrough*, for appellant.

Richard Cordray, Attorney General, and *Christa T. Metzger*, for Ohio State Board of Education.

Kimberly Hall, for Department of Education.

Ennis, Roberts & Fischer LPA, C. Bronston McCord III, and *Jeremy J. Neff*, for Franklin City School District.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Pursuant to R.C. 119.12, the Middletown City School District ("Middletown") appeals from a decision of the Franklin County Court of Common Pleas

which affirmed a decision of the Ohio State Board of Education ("State Board"), denying its request for a transfer of territory pursuant to R.C. 3311.06.

{¶2} On September 23, 2005, Middletown filed with the State Board a request for a school territory transfer under R.C. 3311.06. It included six tracts of land currently within the Franklin City School District ("Franklin"). R.C. 3311.06 provides for such a transfer of territory between school districts after territory has first been annexed for municipal purposes, but such a transfer requires approval of the State Board unless the district in which the territory is located was a party to the annexation agreement.

{¶3} After Middletown sent the request to the State Board, the two school districts made a good-faith effort to negotiate terms of the transfer as required by R.C. 3311.06(C)(2). The negotiations failed to produce an agreement. The Department of Education then sent both school districts 17 questions as set forth in Ohio Adm.Code 3301-89-02(B).[1] (State's Ex. 16 and 17.) A referee[2] appointed by the State Board conducted a hearing and recommended that the transfer be denied. The State Board accepted the recommendation and denied Middletown's request for transfer. Middletown filed an appeal pursuant to R.C. 119.12 to the Franklin County Court of Common Pleas, which found the State Board's decision was in accordance with law and supported by reliable, probative, and substantial evidence and affirmed the decision.

{¶4} Middletown filed a notice of appeal and raised the following assignment of error:

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[1] The current version of Ohio Adm.Code 3301-89-02(B), effective February 27, 2007, provides 25 questions to be answered.

[2] The relevant Administrative Code sections use both "referee" and "hearing officer" to refer to the person conducting the hearing. We refer to "referee" since the person issued a "referee's report and recommendation."

> The trial court abused its discretion by affirming the board's decision to deny the transfer of territory because the board's rulings were not supported by substantial, reliable, and probative evidence.

{¶5} By the assignment of error, Middletown contends that the trial court erred by affirming the State Board's decision to deny the transfer because the decision was not supported by substantial, reliable, and probative evidence. The parties argue over our standard of review; however, the Supreme Court of Ohio recently clarified the standards of review in *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, as follows:

> R.C. 119.12 provides the standard of review for the common pleas court:
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> "The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law."
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> Thus, R.C. 119.12 requires a reviewing common pleas court to conduct two inquiries: a hybrid factual/legal inquiry and a purely legal inquiry. As to the first inquiry, "the common pleas court must give deference to the agency's resolution of evidentiary conflicts, but 'the findings of the agency are by no means conclusive.' * * * 'Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate, or modify the administrative order.' " *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 470-471, 613 N.E.2d 591, quoting *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111, 17 O.O.3d 65, 407 N.E.2d 1265. "We take this precedent to mean that an agency's findings of fact are

presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Ohio Historical Soc.*, 66 Ohio St.3d at 471, 613 N.E.2d 591; *VFW Post 8586 v. Ohio Liquor Control Comm.* (1998), 83 Ohio St.3d 79, 81, 697 N.E.2d 655.

As to the second, legal part of the common pleas court's inquiry, "An agency adjudication is like a trial, and while the reviewing court must defer to the lower tribunal's findings of fact, it must construe the law on its own." *Ohio Historical Soc.,* 66 Ohio St.3d at 471, 613 N.E.2d 591; see *VFW Post 8586*, 83 Ohio St.3d at 82, 697 N.E.2d 655 (common pleas court exercises independent judgment as to purely legal questions).

We have defined "reliable, probative, and substantial evidence": "(1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) 'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) 'Substantial' evidence is evidence with some weight; it must have importance and value." (Footnotes omitted.) *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303.

We described an appellate court's standard of review in this situation in *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 590 N.E.2d 1240. There, we stated:

" 'In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a trial court reviewing the same order. It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the trial court has abused its discretion. An abuse of discretion "implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.' " *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191, 193, 22 OBR 275, 277, 489 N.E.2d 288, 290. Absent an abuse of

> discretion on the part of the trial court, a court of appeals must affirm the trial court's judgment. See *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 52 O.O.2d 376, 262 N.E.2d 685.
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> " 'The fact that the court of appeals * * * might have arrived at a different conclusion than did the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.' " *Rossford Exempted Village School Dist.*, 63 Ohio St.3d at 707, 590 N.E.2d 1240, quoting *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260-261, 533 N.E.2d 264.
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> An appellate court's scope of review on issues of law is plenary, including the issue of whether the common pleas court applied the proper standard of review. See *Univ. Hosp. Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343, 587 N.E.2d 835.

Id. at ¶35-43.

{¶6} Middletown argues that the State Board incorrectly weighed and applied the factors it was required to consider. Middletown contends that the State Board first erred in finding that there was insufficient evidence that the proposed transfer was in the best and ultimate good of the pupils concerned; secondly, that the State Board erred by giving too much weight to the tax grab factor; and finally, that the State Board incorrectly found that Middletown unduly delayed its request to transfer territory.

{¶7} The referee explicitly considered the factors in Ohio Adm.Code 3301-89-02(B) and 3301-89-03(B). In fact, the Ohio Administrative Code sections were amended in February 2007 and the referee considered the additional factors. Many of the factors he found did not affect whether or not the transfer should be made; however, he found

the most compelling factors to be that the request could be considered a tax grab and that Middletown unduly delayed its request to transfer territory.

{¶8} The area requested to be transferred included six areas that were annexed to the city at different times. The first was 181.69 acres called the Manchester Road area annexation and the ordinance was adopted June 15, 1993. (Chapter 119 Hearing Tr. 309.) The second was the Finkelman annexation including 125.3692 acres which were annexed into the city of Middletown in March of 1995. (Chapter 119 Hearing Tr. 311-12.) The third included 1,126.05 acres known as Commerce Drive annexation in April 1997. (Chapter 119 Hearing Tr. 312.) Another annexation containing 97.010 acres known as the Fenwick occurred in June 2002. (Chapter 199 Hearing Tr. 312-13.) Another annexation of 53.62 acres occurred in August 2005. And finally, the annexation of 14.065 acres occurred in August 2005. (Chapter 119 Hearing Tr. 313.) Thus, the annexations started in 1993 and ended in 2005, with the bulk of the acres annexed by 1997. The request for transfer of school territory was filed in September 2005.

{¶9} Middletown argued that it had many reasons why it filed its request to transfer the territory so many years after the annexation by the city. First, it argued that Ohio school districts continue to fight funding battles, and as a result, the school districts must spend their limited resources carefully. Thus, until the students were living in the area and became part of the Middletown community, it did not make sense to spend resources for the territory transfer. Middletown argues that it acted responsibly in its limited use of taxpayer dollars. Secondly, Middletown argues that it is more prudent and a responsible use of taxpayer dollars to wait to transfer territory after a string of

annexations is completed. The third reason Middletown argues for waiting is that in 1997 the State Board approved a split from Middletown and created Monroe School District that was effective in 2001 and took almost 20 percent of its valuation, and it needed all its financial resources to adjust to the loss. Finally, Middletown argues that during the late 1990s and early 2000s, most schools did not have the resources to litigate a land transfer case.

{¶10} Franklin argues that it was the economic growth in the area that had occurred that caused Middletown to make the transfer request when it did. When Middletown's superintendent was asked concerning the timing of the request, he answered that the request was based on population projections and that the Middletown Regional Hospital (or Atrium Medical Center) was moving there so the timing was appropriate. (Chapter 119 Hearing Tr. 92.) Franklin argues that the record demonstrates that the city of Middletown was still making annexation requests, yet this request for transfer of school territory occurred before all annexations were completed. (Chapter 119 hearing Tr. 180-81.) Franklin also points out that the Ohio Revised Code and Ohio Adm.Code do not provide reasons for undue delay such as financial difficulty or purposes of efficiency. Middletown failed to provide evidence in the record other than assertion such as meeting minutes, that these reasons were the reasons for such delays.

{¶11} The referee relied upon *Fairborn City School Dist. v. State Bd. of Educ.* (Oct. 24, 1996), 10th Dist. No. 96APE04-416, to find there was an undue delay by Middletown in filing its request for transfer. In *Fairborn*, three parcels of real estate were at issue, one annexed in 1978, one annexed in 1987, and one annexed in 1989. The

transfer request was filed in 1990. The court recognized that in *Bellefontaine City School Dist. v. Benjamin Logan Loc. School Dist.* (June 16, 1992), 10th Dist. No. 91AP-1277, that for purposes of measuring undue delay pursuant to Ohio Adm.Code 3301-89-03(B)(4), the State Board was not permitted to give effect to alleged delay occurring prior to February 1, 1987, the effective date of Ohio Adm.Code 3301-89-03(B)(4). Thus, in *Fairborn*, the State Board determined that the shortest delay (one year) involved the least valuable parcel, and the longest delay (three years) involved the most valuable parcel, but collectively these delays constituted "undue delay" within the meaning of Ohio Adm.Code 3301-89-03(B)(4).

{¶12} Given that this court found a three-year delay in *Fairborn* to be an undue delay, it was not an abuse of discretion for the trial court to find that there was substantial, reliable evidence that there was undue delay in this case. The bulk of the land was transferred by April 1997 (1,433 acres), with 97 acres annexed into the city in 2002 and the other 67.685 acres annexed into the city in 2005. Middletown's request was filed in 2005; thus, the majority of the acres had been annexed at least eight years prior to the request. The record supports a finding that there is a delay of at least eight years, which can be a finding of undue delay, and such a finding of undue delay cannot be considered an abuse of discretion given the *Fairborn* decision.

{¶13} Middletown contends that the trial court abused its discretion in affirming the State Board's decision because the referee gave too much weight to the "tax grab" factor. Ohio Adm.Code 3301-89-02(B)(11) provides that one of the factors that the referee considers is whether the "property wealth in the affected area [is] such that the motivation for the request could be considered a tax grab?" The new Atrium Medical

Center Hospital complex was being built at the intersection of Interstate 75 and State Route 122 within this requested area and to be completed by December 2007. Over the prior two years, there was substantial growth in the vicinity of that intersection, with commercial valuation rising from $389,500 in 2004 to $3,060,930 in 2006. The total property valuation in the territory proposed for transfer in 2004 amounted to $6,662,550; in 2006 the total property valuation increased to $15,414,340.

{¶14} While agricultural property valuation dropped from $1,165,820 in 2004 to $674,080 in 2006, the residential property valuation increased from $5,107,230 in 2004 to $11,679,330 in 2006. From 2004 to 2006 the total valuation of the territory proposed for transfer increased from $7,009,420 to $15,791,890. (Franklin's Ex. CC.)

{¶15} Franklin argued that the very high per-pupil valuation found in the territory indicated that the request was a tax grab. There were 49 students who lived in the territory proposed for transfer. When the valuation of the property was divided by 49 students, a per-pupil valuation was $322,283, much higher than in either Franklin ($144,916, Franklin Ex. RR) or Middletown ($147,446, Franklin Ex. SS). Even Middletown's superintendent testified that that the timing of the request was based on the population projections and that the Middletown Regional Hospital (or Atrium Medical Center) was moving there so the timing was appropriate. (Chapter 119 Hearing Tr. 92.)

{¶16} Thus, the referee determined that since Middletown waited more that eight years to request the transfer, after the land had developed and increased greatly in value and plans for the construction of a major hospital complex were announced, the request could be viewed as a tax grab. Given this evidence, there is substantial, reliable, and probative evidence to support the State Board's order that the request

could be viewed as a tax grab, and the trial court did not abuse its discretion in affirming the order on such basis.

{¶17} Finally, Middletown contends that the State Board erred in finding that there was insufficient evidence that the proposed transfer was in the best and ultimate good of the pupils concerned. Ohio Adm.Code 3301-89-01(F) provides that "[a] request for transfer of territory will be considered upon its merit with primary consideration given to the present and ultimate good of the pupils concerned." "Consequently, it is appropriate for the state board 'to consider both the social and educational needs of *all* affected students, as well as the potential financial implications of a transfer. When a transfer of school districts is proposed, a balancing must take place between many competing factors in order to achieve the desired result of achieving what is in the best interests of the students concerned.' " (Emphasis sic.) *Bartchy*, supra, at ¶51, quoting *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1990), 62 Ohio App.3d 308, 323. The inquiry is not limited to considering how present students are affected, but also extends to considering future students. *Bartchy*, at 216.

{¶18} In *Bartchy*, the Supreme Court of Ohio cited several Tenth District cases which stated that the petitioner in a territorial transfer proceeding has the burden of proof that the transfer should be approved. *Bartchy,* at ¶49, quoted *Youngstown Sheet & Tube Co. v. Maynard* (1984), 22 Ohio App.3d 3, 8, for the proposition that "it is generally held that, absent a statutory provision which specifically places the burden of proof, such burden in an administrative action is upon the party asserting the affirmative issue."

{¶19} Middletown asks us to reweigh the factors and find that the transfer will serve "the present and ultimate good of the pupils concerned." It is for the State Board, not this court, to weigh the facts and arguments and determine what will serve "the present and ultimate good of the pupils concerned." See *Garfield Hts.*, at 323; *Fairborn*, supra. The referee considered the factors and found that the transfer was not in the present and ultimate good of the pupils involved. There is substantial, reliable, and probative evidence to support the State Board's order, and the trial court did not abuse its discretion in affirming the order. Middletown's assignment of error is not well-taken.

{¶20} For the foregoing reasons, Middletown's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.

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