COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3249

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MADISON METROPOLITAN SCHOOL DISTRICT,

PETITIONER-RESPONDENT,

v.

SCHOOL DISTRICT BOUNDARY APPEAL BOARD,

RESPONDENT,

MIDDLETON-CROSS PLAINS AREA SCHOOL DISTRICT,

APPELLANT,

TOWN OF MIDDLETON,

CO-APPELLANT.

APPEAL from an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Reversed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

ROGGENSACK, J. Middleton-Cross Plains School District (Middleton District) and the Town of Middleton (Middleton) appeal from an order of the circuit court reversing a decision of the School District Boundary Appeal Board (SDBAB) regarding the detachment of annexed property (the Property) from the Middleton District and the attachment of the Property to the Madison Metropolitan School District (Madison District). The circuit court concluded that the SDBAB "failed to engage in a rational process of winnowing and sifting the evidence with respect to the 'socioeconomic level and racial composition,'" as required by § 117.15(6), STATS., and relied on inappropriate factors in its consideration of the proposed school district reorganization. We conclude that the SDBAB, a legislative policy-making board, acted within its jurisdiction and came to a reasoable conclusion based on § 117.15, STATS. Therefore, we reverse the order of the circuit court.

BACKGROUND

In 1995, the City of Madison annexed approximately 317 acres of undeveloped property from Middleton. The Property remained part of the Middleton District because annexed property does not automatically become part of the annexing municipality's school district. The Madison District subsequently initiated the statutory procedures for detaching the Property from the Middleton District and attaching it to the Madison District.

On July 22, 1996, the Madison District convened and formally approved the attachment. The Middleton District, however, denied the proposal for detachment and submitted a resolution opposing the reorganization to the SDBAB. Because each affected school district must adopt a resolution ordering detachment and attachment for consensual reorganization to take place, on

August 19, 1996, the SDBAB prepared an order denying the requested reorganization. Madison District then filed a petition with the SDBAB requesting a review of its request to attach the annexed land.

On November 22, 1996, the SDBAB conducted a hearing during which it received testimony from proponents and opponents of the reorganization, written statements and exhibits. At the conclusion of the hearing, the SDBAB denied the petition for detachment, and on January 8, 1997, it issued a written Decision and Order affirming the denial.

Madison District appealed to the circuit court, and the circuit court reversed the SDBAB's decision. The circuit court concluded that Madison District had established a "dire need" to equalize its socioeconomic and racial imbalance and that the SDBAB had "failed to engage in a rational process of winnowing and sifting the evidence with respect to the 'socioeconomic level and racial composition.'" This appeal followed.

DISCUSSION

Standard of Review.

In considering an appeal from an order of the circuit court reviewing the actions of the SDBAB, we review the decision of the SDBAB, not that of the circuit court. ***School Dist. of Waukesha v. School Dist. Boundary Appeal Bd.***, 201 Wis.2d 109, 116, 548 N.W.2d 122, 126 (Ct. App. 1996). Our standard of review of the SDBAB's decision is limited to two considerations: (1) Whether the

SDBAB acted within its jurisdiction, and (2) whether its order was arbitrary and capricious. ***Id.*** at 113, 548 N.W.2d at 125.[1]

1. The Statutory Framework.

School district reorganization is a legislative policy-making function, which the legislature has delegated to local boards. ***Id.*** at 113, 548 N.W.2d at 125. The merits of a reorganization, as determined by the SDBAB, is a "legislative determination and does not raise justiciable issues of fact or law." ***Id.*** Thus, the SDBAB is not required to make any formalized findings of fact, rather its decision may be policy driven and based on matters within its knowledge and expertise in establishing educational policy. ***Joint Sch. Dist. No. 2 v. State Appeal Bd.***, 83 Wis.2d 711, 720, 266 N.W.2d 374, 378-79 (1978).

The broad discretion afforded the SDBAB is emphasized by the statutes pertaining to school district reorganization. According to the statutory directives, the SDBAB must consider the factors set out in § 117.15, STATS., "as they affect the educational welfare of all of the children residing in all of the affected school districts." In addition to the listed factors, § 117.15 states that the SDBAB "may consider other appropriate factors." The addition of subsec. (6), which requires the SDBAB to consider the socioeconomic level and racial composition of pupils who reside or will reside in the territory at issue, did not affect the legislature's broad delegation of legislative authority to the SDBAB or expand the scope of our judicial review. ***School Dist. of Waukesha***, 201 Wis.2d

[1] As we have previously decided, our review does not permit us to substitute our own weighing of testimony for that done by the SDBAB, which the dissent has done. ***School Dist. of Waukesha***, 201 Wis.2d 109, 115, 548 N.W.2d 122, 125 (Ct. App. 1996).

at 115, 548 N.W.2d at 125; ***Joint Sch. Dist. No. 1 v. State***, 56 Wis.2d 790, 794, 203 N.W.2d 1, 3 (1973).

2. The SDBAB's Decision.

In this appeal, there is no question that the SDBAB acted within its jurisdiction; therefore, the only issue for us to consider is whether the SDBAB acted in an arbitrary and capricious manner.

> Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is unreasonable or does not have a rational basis …. Arbitrary action is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the 'winnowing and sifting' process.

District No. 1, 56 Wis.2d at 797, 203 N.W.2d at 5 (quoting ***Olson v. Rothwell***, 28 Wis.2d 233, 239, 137 N.W.2d 86, 89 (1965)).

In other words, we must determine whether the SDBAB examined and weighed the available information to arrive at a reasonable decision. The information that the SDBAB winnows and sifts to make its determination does not necessarily need to result in formalized findings of fact. *See* ***District No. 2***, 83 Wis.2d at 720, 266 N.W.2d at 378-79. As noted above, the SDBAB may base its conclusion on matters within its knowledge and expertise as an educational policy maker, and the wisdom of the SDBAB's decision in terms of policy is not a matter for judicial review. ***Id.***

Madison District argued, and the circuit court agreed, that the SDBAB's decision was irrational because it failed to engage in the process of winnowing and sifting the evidence related to the reorganization, particularly in regard to the socioeconomic evidence. Madison District asserts that the SDBAB

should place the greatest weight on the socioeconomic and racial composition of pupils who reside or will reside in the reorganized district. *See* § 117.15(6), STATS. It contends that the statute's legislative history supports this position because the statute was revised to include the socioeconomic factor to address the growing disparities in socioeconomic levels and racial compositions among school districts.

Madison District's interpretation of § 117.15, STATS., ignores the plain language of the statute. Nowhere in the statute does it state that one factor is controlling over the other factors. The statute requires SDBAB only to "consider" the listed criteria, and it may also consider other factors related to educational policy. Therefore, after the SDBAB considers the socioeconomic evidence, it is well within the SDBAB's discretion to give this evidence whatever weight it deems appropriate.

The SDBAB heard evidence which exhaustively covered the socioeconomic factors and racial criteria of § 117.15(6), STATS. Although the SDBAB was not persuaded that this evidence should control its decision, the comments[2] of the board members indicate that the SDBAB thoroughly reviewed and weighed it. This is precisely the sort of winnowing and sifting of information by which legislative determinations of public policy are presumptively to be reached. Therefore, the SDBAB's decision was not irrational in terms of the weight given to socioeconomic and racial composition factors.

[2] The SDBAB concluded that the presentation on future racial composition was too speculative. This was a conclusion a reasonable decision maker could have reached.

During the day-long SDBAB hearing, the board members heard evidence bearing on all of the factors listed in § 117.15, STATS. All points of view were thoroughly discussed. For example, the SDBAB considered the lack of contiguity between the Property and the Madison District. Section 117.15(5) requires the SDBAB to consider contiguity. The SDBAB also considered the increasing pattern of municipal annexations followed by school district expansions on the part of the Madison District. The SDBAB was concerned by this pattern because automatically expanding school districts following municipal annexations was rejected by the legislature in 1982. Legislative concern about automatic expansion is related to the educational welfare of the children residing in the affected districts and was an appropriate factor for the SDBAB to consider. A related concern was the pattern of Madison District's expansion to finance what it perceived to be the ever-increasing needs of the existing district. The SDBAB saw no logical ending point to this pattern. Again, it was within the SDBAB's authority to decide that having more stable school district boundaries furthers the educational welfare of the children who will be affected.

Finally, the SDBAB considered the preferences of the residents of the territory in question and of other residents in the area. The residents disapproved of the detachment because they preferred the Middleton-Cross Plains School District to the Madison District. The residents' preferences in terms of their children's educational welfare is related to the "educational welfare of all of the children residing in all of the affected school districts." *See* § 117.15, STATS. Therefore, it was rational for the SDBAB to consider this factor.

Madison District also argues that we should rely on ***Kammes v. Mining Inv. & Local Impact Fund Bd.***, 115 Wis.2d 144, 157, 340 N.W.2d 206,

213 (Ct. App. 1983), in our review. In ***Kammes***, we elaborated on what it means for an agency to act in an arbitrary and capricious manner:

> The reasoning process required for a rational course of conduct requires more than an articulation of the factors considered by the agency. When making an award, the agency must explain how those considered factors justify the award made. The gap between the facts and the conclusion must be filled.

Id. Although dealing with an ostensibly similar standard of review, ***Kammes*** does not involve the SDBAB and does not modify the standard of review for SDBAB decisions. Because the SDBAB is not required to make any findings of fact, it cannot be required to fill the gap between the facts and its conclusion as Madison District asserts. Therefore, the SDBAB is not required to articulate every factor relied on for its decision. All that is required is a record which demonstrates what the SDBAB considered. Such a record is present here. Therefore, we have examined the record and determined that a rational basis existed for the SDBAB's conclusion. *See* ***District No. 2***, 83 Wis.2d at 720-21, 266 N.W.2d at 379.

CONCLUSION

The SDBAB, as a legislative policy-making board, has a broad delegation of legislative authority which it uses to resolve school district boundary disputes. On review, a court may not substitute its judgment for the judgment of the SDBAB, rather we consider only whether the SDBAB stayed within its jurisdiction and whether it acted arbitrarily and capriciously. In considering the school district boundary dispute between Madison District and Middleton District, the SDBAB did not overstep its authority because it arrived at a rational resolution by winnowing and sifting all the information presented to it, including the factors

of § 117.15, STATS., and other factors related to educational policy. Therefore, we reverse the order of the circuit court and reinstate the order of SDBAB.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

No. 97-3249(D)

DYKMAN, P.J. *(dissenting)*. Courts reviewing administrative decisions are not always required to reply "Amen" to an agency assertion that it has found the truth. There is more to it than that. Judicial review is an inquiry which grants considerable deference to the decisions of other branches of government. But judicial review is not a rubber stamp, and the inquiry is more than just words.

If there is to be any meaningful review of the School District Boundary Appeal Board (board) decision, our inquiry must be into what the board did and why it did so. I differ with the majority because the record in this case does not answer why the board affirmed the order of the Middleton-Cross Plains Area School District.

To begin, we must know what we are and are not reviewing. In ***School Dist. of Waukesha v. School Dist. Boundary Appeal Bd.,*** 201 Wis.2d 109, 116, 548 N.W.2d 122, 126 (Ct. App. 1996), we noted that we are to review the decision of the board. We are therefore not reviewing other matters, such as the orders of the two school boards, the decision of the circuit court, or the various opinions expressed by witnesses or individual board members. Nor may we consider the wisdom of the board decision in terms of policy. ***Id.*** at 119, 548 N.W.2d at 126. We confine our review to whether the action of the board is arbitrary or capricious. ***Id.*** at 116, 548 N.W.2d at 127. A board's findings are arbitrary and capricious if it is "the result of an 'unconsidered, willful and

irrational choice' and not the result of the 'winnowing and sifting' process." ***Id.*** (quoted source omitted). We have also said:

> The reasoning process required for a rational course of conduct requires more than an articulation of the factors considered by the agency. When making an award, the agency must explain how those factors justify the award made. The gap between the facts and the conclusion must be filled.[3]

Kammes v. Mining Inv. & Local Impact Fund Bd., 115 Wis.2d 144, 157, 340 N.W.2d 206, 213 (Ct. App. 1983).

Our obligation in cases such as this is to examine the record made and the decision of the board. For instance, in ***Iron River Grade Sch. Dist. v. Bayfield County Sch. Comm.***, 31 Wis.2d 7, 13, 142 N.W.2d 227, 229 (1966), the court noted: "In determining whether the action of the committee was capricious, it would be well to review the facts of public record that were known to the school committee at the time of this order." The court then reviewed the facts of the case. In ***Joint Sch. Dist. No. 2 v. State Appeal Bd.***, 83 Wis.2d 711, 720, 266 N.W.2d 374, 379 (1978), the court said: "The board is not required to make formalized findings of fact and this court, in the past, has reviewed the board's record to determine if a rational basis exists for the board's decision." I believe that that is what we must do here, after examining the matters the board is required by statute to consider.

[3] The majority rejects this definition because ***Kammes*** does not involve a School District Boundary Appeals Board and because the board is not required to make any findings of fact. I do not agree. Whether or not a statute requires fact-finding, a board which fails to identify the facts upon which it relies runs the risk that a reviewing court will be unable to determine why the board reached its conclusion. And, I see no reason to have a different definition of "arbitrary and capricious" for each agency we review.

Section 117.15, STATS., lists seven factors a board "shall consider" and permits the board to consider "other appropriate factors." The board's decision, which I have attached as Appendix I, considers six of the seven factors.[4] As to factors one through four, the board concluded that both school districts were capable of providing transportation to the property in question, both could meet the educational needs of their students, both offer quality educational programs, and that no children resided in the disputed area. The board found that if the property were transferred, an island would be created. It also found that the socioeconomic level and racial composition of the pupils who will reside in the district is an issue that carried greater weight than the other criteria, but it still was not a compelling reason to detach the property. A number of board members felt that the issue of school district reorganization of annexed property should be worked out between the affected school districts.

Section 117.15(6), STATS., requires the board to consider:

> The socioeconomic level and racial composition of the pupils who reside or will reside in territory proposed to be detached from one school district and attached to an adjoining school district or in school districts proposed to be consolidated or in a school district proposed to be dissolved; the proportion of the pupils who reside in such territory who are children at risk, as defined under s. 118.153(1)(a); and the effect that the pupils described in this paragraph will have on the present and future socioeconomic level and racial composition of the affected school districts and on the proportion of the affected school districts' enrollments that will be children at risk.

Though § 117.15(6), STATS., requires the board to consider socioeconomic and racial factors, it does not explain the purpose of this

[4] The board did not consider factor number 7 "[t]he results of any referendum held under s. 117.10," because this factor is inapplicable here.

consideration. The purpose is made clear by the legislative history of the section. In 1988, a special legislative committee consisting of legislators and public members, considered changes to Chapter 117, STATS. Nan Brian, a public member of the committee and a member of the Madison School Board, moved that the committee adopt a memorandum she had submitted entitled "Legislation to Improve the Social, Economic and Racial Composition of Students in the Madison School District." That memorandum began:

> To improve the social, economic and racial composition of the Madison School District and to avoid creating similar problems that face the Milwaukee School District's student composition, the Madison School District recommends the following legislative changes:
>
> (1) In detachment and attachment cases require the School Boards and the School District Boundary Appeals Board to consider, in addition to all other statutory criteria, the following criteria:
>
> The socioeconomic level and racial composition of the students who reside or will reside on the property and the impact such students will have on the present and future student enrollments of the affected school districts.

Ms. Brian's motion was amended to apply statewide, and on a vote of nine to seven, it passed. The motion ultimately became § 117.15(6), STATS. Thus, although it might be argued from the language of the statute that all a board must do is discuss the socioeconomic level and racial composition of the prospective students with no purpose in mind, or even for the purpose of developing segregated districts, the history of the section leaves no doubt that the purpose of requiring consideration of socioeconomic and racial factors is to assist metropolitan school districts to become less poor and less segregated. While it is only one of the six factors the board must consider, the consideration must be with the intended purpose of making school districts less poor and less segregated. Were this not so, a court would be required to affirm a board's conclusion that

segregation of pupils according to their parents' economic level was desirable if the board came to that conclusion after discussing it.

As ***Iron River Grade Sch. Dist.*** and ***Joint Sch. Dist. No. 2*** teaches, I have examined the facts of public record known to the board to determine if a rational basis exists for the board's decision. There are two reasons why I conclude that a rational basis does not exist. First, in examining the board's decision, I note that there are only three factors that could have influenced the decision. First, should the property be transferred, an island would be created. Second, the socioeconomic level and racial composition of the pupils who would reside in the territory carried greater weight than the other factors. Third, a number of board members felt that school district reorganization should be worked out between the affected districts.

From the record presented, I am unable to tell what reasonable conclusion should be drawn from the fact that an island is created in this case. Are islands good or bad? If either, why? Is the island too big or too small? Too strangely shaped? To far from the "mainland?" The answers to these questions are not of record. Islands might affect transportation issues, but the board found that transportation was not a problem. An island might divide neighborhoods, but any border does that. The board's decision is silent on issues such as these. The supreme court recently held in ***Stockbridge Sch. Dist. v. DPI***, 202 Wis.2d 214, 225, 550 N.W.2d 96, 101 (1996) that the legislature intended to allow the detachment of island parcels. I have searched the record in vain to discover why this parcel's insular nature would be an impediment to the detachment of the parcel. If the board's decision is based upon the unexplained fact that the resulting parcel is an island, the decision is without a rational basis, and therefore arbitrary and capricious.

I am unable to determine the relevance of the fact that a number of board members felt that the issue of school district reorganization of annexed property should be worked out between the affected school districts. This is a nice idea, but it bears no more relevance to this case than a generalized belief that it would be beneficial if everyone settled their disputes amicably, making courts unnecessary. The fact is that the legislature has enacted Chapter 117, STATS., which sets out the procedure that must be followed when school districts cannot agree on boundary matters. If the board's decision relied upon its belief that school districts should settle their differences without the intervention of School District Boundary Appeal Boards, that decision is without a rational basis, and thus arbitrary and capricious.

The only factor left is the socioeconomic level and racial composition of the pupils who will reside in the district. The board concluded that this factor carried greater weight than the other factors. If the other factors are either irrelevant or without a rational basis, the remaining factor would have to carry the greatest weight. But though the only relevant factor, or in the board's view, the factor deserving of the greatest weight, it was still not considered to be a compelling reason to detach the property.

Why is this so? I cannot find the answer in this record. The factor that the board said carried the greatest weight ought to carry the day, especially when the other two possible factors are irrelevant to a detachment decision. I believe that this situation fits the definition of "arbitrary and capricious," and would end my analysis with that conclusion. This is not a re-weighing of testimony, but an analysis of the reasons why the board reached its conclusion. The two concepts are entirely different.

The majority, however, analyzes reasons the board might have given for its decision, but did not. If we consider these non-reasons, they fare no better. The majority notes that some members of the board were concerned by a pattern of automatically expanding school districts following municipal annexations, a concept rejected by the legislature in 1982. But in 1989, the concept was again legislatively embraced, albeit in narrower situations such as the one present in this case. If "automatic patterns" was a decisional factor, it has no rational basis. It may well be that when a school district such as Madison petitions to annex territory, its racial and socioeconomic makeup will outweigh the other factors enumerated in § 117.15, STATS. But that is a result of legislative fiat, a factor all school districts must live with. Complaining about "automatic patterns," a result brought about by legislation, is similar to complaining about taxes. We are required to live with both, though we may not like either. Racial and socioeconomic makeup is a heavily weighted factor in Madison, but it probably would not be significant in a dispute between school districts with insignificant numbers of minority students. *See* ***State ex rel. Dieckoff v. Severson,*** 145 Wis.2d 180, 426 N.W.2d 71 (Ct. App. 1988) (a dispute involving the Juda and Brodhead school districts). Since the legislature has required boards to consider a factor which favors a particular result under predictable circumstances, complaints about that result should be taken to the legislature.

The majority also considers some board members' concern about the pattern of the Madison district's expansion to finance ever-increasing needs of the district. This is in effect a conclusion that if the Madison District needs more, they should be given less. The board heard why the Madison District was experiencing higher costs, and these costs were explained as a beginning of the situation Milwaukee now experiences, though not as pronounced. As the Madison district

is becoming more populated with children from poverty, and the number of children decline, the cost of educating those children rises dramatically. The Madison district sees more and more children arriving at school unprepared for learning. The evidence of increasing minority and poor school populations together with shrinking overall school populations was unrebutted. No one took issue with the Madison district's evidence that it costs more to educate a child who has no concept of learning when arriving at school for the first time. Ultimately, the "if they need more, give them less" reasoning is an assertion that a board refuses to consider § 117.15(6), STATS. Whether viewed as a failure to consider a proper factor or as lacking a rational basis, the reliance on "ever increasing needs" is arbitrary and capricious.

Nor are some board members' views as to the preferences of residents a significant factor. First, they are the member's views, not the board's. Second, if the issue of school district attachment were decided by a vote of the residents of the property proposed for detachment, there would be no need for a decision by the board. And the views of the six residents who objected to the detachment can hardly be a weighty matter when considering that, if annexed, the area is expected to create 820 additional dwelling units. Finally, the board's decision noted that socioeconomic level and racial composition outweighed the other factors, which indicates that the preferences of six residents is not a matter carrying much weight. If some of the board members' concerns about the views of six residents is the reason the board voted to deny the annexation, that decision is arbitrary and capricious when viewed with the board's decision that socioeconomic level and racial composition outweighed all other factors.

The board's decision that socioeconomic level and racial composition is a factor which carries greater weight than the other factors is a

necessary conclusion from the unrebutted evidence offered by the Madison district. Although that evidence is too voluminous to quote in full, I have attached as Appendix II, excerpts from the then Deputy Superintendent's report to the then District Administrator that outline a bleak future if the Madison district cannot maintain a healthy mix of students of different races and socioeconomic backgrounds. Problems of this sort are what led the legislature to enact § 117.15(6), STATS. It is apparent why this issue carried greater weight than the other criteria. I disagree that other factors, the weight of which is about zero, can logically be found to outweigh racial and socioeconomic factors. Accordingly, I agree with the trial court that the board's decision is arbitrary and capricious, and should be set aside.

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

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