ORIGINAL

IN THE SUPREME COURT OF OHIO

Brian Spitznagel, et al.,	)	Case No. 09-0015
	)	
Appellants,	)	On Appeal from the Franklin
	)	County Court of Appeals,
v.	)	Tenth Appellate District
	)	
State Board of Education, et al.,	)	Court of Appeals
	)	Case No. 07APE-09-757
Appellees.	)	
	)	

APPELLEE BEDFORD CITY SCHOOL DISTRICT'S MEMORANDUM IN OPPOSITION TO APPELLANTS' MOTION FOR RECONSIDERATION

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INTRODUCTION

The Supreme Court Rules of Practice are clear that "[a] motion for reconsideration shall not constitute a reargument of the case[.]" S.Ct. Prac. R. XI(2)(B). Yet, Appellants once more attempt to reargue the same factual issues which they have argued unsuccessfully at every stage of this matter – the Court of Appeals, the Common Pleas Court, and the State Board of Education – the amount of revenue that the Bedford schools would lose if the proposed territory transfer were to occur. In affirming the decision of the Court of Appeals, this Court held that "the state board may consider a loss of revenue to be a sufficient demonstration of a financial or educational detriment to the transferring school district." *Spitznagel v. State Bd. of Educ.* (June 17, 2010), __ Ohio St. 3d __, Slip Op. No. 2010-Ohio-2715, at ¶13 ("Opinion"). The Court went on to state, "[t]he question of whether, or how much, it should weigh against the transfer is dependent upon the facts and evidence in each case." *Id.* Applying the holding to the facts of this case, the Court then concluded that "the board did not err when it considered the loss as causing a financial or educational detriment that factored against the transfer." *Id.* at ¶16.

In their motion, Appellants appropriately do not challenge the Court's holding. Instead, they seem to disregard the holding and yet again regurgitate their now inapposite arguments that the amount of revenue loss is actually less than the Court perceived and that there was no evidence that the lost revenue would actually cause harm to the Bedford schools. Just as when they made these arguments before this Court and at each preceding stage of this matter, Appellants are factually incorrect on both points. Further, in light of the Court's holding, Appellants' misplaced argument is yet another inappropriate invitation to this Court to both withhold the deference it owes the state board and to substitute the Court's judgment for the state board's.

Appellants even seek reconsideration on the issue relating to racial factors, again rearguing that the state board's consideration of racial factors was not harmless error and that they are somehow "entitled" to a decision on this issue seemingly because they "have expended great time and resources over the past decade in petitioning for a school transfer[.]" Appellants' Motion for Reconsideration, p. 3. Appellants are simply incorrect. Even if error occurred on this issue, it was harmless, and the Court was correct to not consider the issue from a constitutional or any other perspective.

Accordingly, Appellants' motion should be denied.

ARGUMENT

I. BECAUSE APPELLANTS SIMPLY REGURGITATE PRIOR ARGUMENTS, THE COURT SHOULD DENY APPELLANTS' MOTION FOR RECONSIDERATION.

The Court's rules are clear that "[a] motion for reconsideration shall not constitute a reargument of the case[.]" S.Ct. Prac. R. XI(2)(B). The Court has previously stated that it has only "invoked the reconsideration procedures set forth in S. Ct.Prac.R. XI to correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. West Jefferson Village Council, et al.* (1995), 75 Ohio St. 3d 381, 382; *see also State ex rel. Shemo v. City of Mayfield Heights* (2002), 96 Ohio St. 3d 379 (reconsideration denied in part where the respondent had previously cited cases which were the basis for their argument for reconsideration).

Here, Appellants do not argue that the Court either deviated from any established precedent or made a legal error in its holding. Instead, they again regurgitate that the Court should have interpreted or applied differently facts which this Court has already considered. Essentially, Appellants attempt to reargue precisely the same facts which they have previously

briefed and argued and which this Court has carefully considered. The Court in its rule directly prohibits Appellants' attempt. For that reason alone, Appellants' motion should be denied.

II. APPELLANTS CONCEDE THAT THIS COURT PROPERLY HELD THAT A POTENTIAL LOSS OF REVENUE IS A LEGALLY SUFFICIENT BASIS FOR THE STATE BOARD TO DETERMINE A TERRITORY TRANSFER WOULD CAUSE DETRIMENT TO THE FISCAL OR EDUCATION OPERATIONS OF THE SCHOOL DISTRICT AND SUPPORT THE DENIAL OF A TRANSFER.

Appellants appropriately concede the Court's holding: "the state board may consider a loss of revenue to be a sufficient demonstration of a financial or educational detriment to the transferring school district." Opinion at ¶13. They do not contend that this holding is in any way incorrect or contrary to any binding precedent.

Instead, Appellants' argument for reconsideration is based on a fundamental misunderstanding of the Court's holding. Appellants argue that the Court misconstrued the financial evidence presented at the administrative hearings and that the actual financial loss to Bedford relating solely to the lost personal property tax revenue would be lower than what the Court indicated. Motion for Reconsideration, pp. 3-7. More specifically, fixating solely on the loss of personal property tax revenue, Appellants once again argue that the evidence showed that the amount of revenue loss would be virtually inconsequential, particularly in light of their so-called "mitigation" steps, which they contend the Court disregarded. *Id.* Appellants' arguments are both factually incorrect and, as a result of the Court's unchallenged holding, inapposite.

Contrary to Appellants' argument, the Court did expressly acknowledge that the state board's referee considered the two "mitigation" techniques that would likely take effect and that the referee nonetheless found that the transfer still "would 'impose a significant detrimental financial impact' on Bedford." Opinion at ¶9. Because Appellants did not challenge them on appeal, the referee's factual findings became binding on both the court of appeals and this Court.

Accordingly, the only issue before the Court was whether the state board erred in determining that a territory transfer would cause significant detriment to the fiscal or educational operation of the transferring school district based only upon a showing of a potential loss of revenue. *Id.* at ¶2. This Court answered this question in the affirmative, and Appellants concede that this holding is correct. Instead, they argue a factual determination – that the referee in this case should not have considered the financial loss to be detrimental in this case – which was not before this Court on appeal. "Questions regarding the weight given to the revenue loss in the overall balancing factors and whether the petitioners met their burden" were not before the Court. *Id.* at ¶19.

Further, Appellants' repeated factual argument that the transfer would result in inconsequential revenue loss blatantly disregards the record evidence and the facts the Court points to in its Opinion. Because Bedford undoubtedly would lose a significant amount of revenue , the Court properly held that the state board had a legally sufficient reason to find fiscal or educational detriment to Bedford. *Id.* at ¶2. The record here plainly demonstrates that a transfer would undoubtedly cause Bedford to suffer immensely more fiscal, educational and operational harm than in any other school district territory transfer ever considered. Despite Appellants' incessant fixation on the significant loss of tangible personal property tax revenue, as correctly acknowledged by the Court, the transfer Appellants desire would cause Bedford to lose at least $4 million annually and in perpetuity in real property tax revenue alone. Opinion at ¶6. This fact is both undisputed and has been consistently ignored by Appellants throughout this process. The annual, perpetual $4 million real property tax loss is in addition to the loss of tangible personal property tax revenue which Appellants themselves admitted totaled—at the very least—nearly $7 million during the first five years following a transfer.

Contrary to what Appellants again assert would be the amount of lost revenue, the minimum amount of revenue Bedford would lose based on both a loss of tangible personal property tax **and** real property tax revenue would have been $23 million in the first five years after the transfer. Appellants' misleading contention that the "net loss is not 'potentially in the millions,' but, after mitigation, can be substantially reduced and may be eliminated" ignores the record and is clearly incorrect. Motion for Reconsideration, pp. 6-7. Although the Court correctly did not, Appellants again ignore the undisputed annual $4 million real property tax loss to Bedford. Accordingly, the size of the financial loss to Bedford caused by the proposed transfer undoubtedly would be substantial. The Court was correct to acknowledge that fact, and the Court should not entertain Appellants' misplaced, regurgitated factual argument to the contrary.

III. APPELLANTS CANNOT AGAIN REARGUE THEIR POINTS REGARDING THE POSSIBLE DETRIMENT THE FINANCIAL LOSS WILL CAUSE BEDFORD.

The Court should entirely disregard Appellants' argument that the Court should reconsider its decision in order to consider evidence relating to the effects the loss of revenue would have on Bedford. *See* Motion for Reconsideration, pp. 7-8. In again advancing this argument, Appellants' ignore the Court's conclusion that "[t]he question of whether, or how much [the loss of revenue] should weigh against the transfer is dependent upon the facts and evidence in each case." Opinion at ¶13. Further, Appellants yet again disregard the standard of review applicable to this Court and the Court's proper acknowledgement of the deference it owes to the state board:

> With evidence of significant possible losses in revenue and their possible effects, the board did not err when it considered the loss as causing a financial or educational detriment that factored against the transfer.

Id. at ¶16.

Appellants reargue that, in discussing the possible effects of the transfer which would be caused by the amount of lost revenue, the Court mischaracterizes the record evidence. Motion for Reconsideration, p. 7. Again, however, Appellants' misplaced argument is simply a rehashing of their original merit brief and is inappropriate for a motion for reconsideration.

The Court properly discussed the referee's two reports in which he found it "'wholly foreseeable' that the revenue loss would result in 'the closing of facilities, reduced educational programming, and staff and faculty cutbacks, and other curtailments damaging the district students.' . . . Although the expected revenue loss was viewed as less after the legislative changes, the evidence does demonstrate the impact a financial loss could have on Bedford." *Id.* at ¶16. The Court properly concluded that the state board was within its authority to consider the loss as causing a financial or educational detriment that factored against the transfer. *Id.* Simply because they believe the state board should have agreed with Appellants' version of the facts does not render their rehashed arguments appropriate for a motion for reconsideration.

IV. THE COURT'S DECISION TO NOT ADDRESS THE ISSUE OF APPLYING RACIAL FACTORS AND ITS CONSTITUTIONAL IMPLICATIONS WAS PROPER.

Appellants' finally request reconsideration of the Court's decision to not address the question of whether the state board erred in applying racial factors against the transfer based on the Court's conclusion that, if error occurred, such error would have been harmless. However, Appellants again set forth no error in the law and contend no misapplication of the facts by the Court. Again, Appellants simply attempt another reargument of points already made, which is an improper basis for reconsideration. S.Ct. Prac. R. XI(2)(B).

Moreover, the judicial practice of not deciding constitutional issues unless absolutely necessary is firmly rooted in Ohio law. *See State v. Talty* (2004), 103 Ohio St. 3d 177, 179; *In re Miller* (1992), 63 Ohio St. 3d 99, 110; *Hall China Co. v. Public Util. Comm.* (1977), 50 Ohio St. 2d 206, 210; *State ex rel. Herbert v. Ferguson* (1944), 142 Ohio St. 496. Further, Ohio courts frequently find harmless error in administrative appeals. *See NBC-USA Housing, Inc. v. Levin* (Apr. 12, 2010), __ Ohio St. 3d __, Slip Op. No. 2010-Ohio-1553, ¶13, fn. 2. "Harmless error 'is any error that does not affect the outcome of the case and, thus, does not warrant a judgment overturned or set aside.'" *State v. Saxon* (3rd App. Dist.), 2008-Ohio-5402, ¶28 (citation omitted).

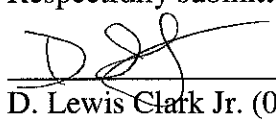
Here, because the Court properly found that the significant revenue loss was the primary factor against transfer and little weight was given to the racial impact, if error occurred, it would be harmless. In fact, the referee found the "main factor militating against the transfer is the financial detriment which will clearly and irrefutably be foisted upon [Bedford]." First Report at 28, App. Apx. 95. The referee's report was subsequently adopted by the state board in its order denying the transfer petition. Accordingly, this Court properly found that, if any error occurred, such error would be harmless because other legally sufficient grounds support the State Board's decision to deny the transfer.

Additionally, Appellants did not raise the issue until they filed their reply brief in the Court of Appeals. Because the issue was not properly raised below, it is waived. *Evans v. Evans* (10th App. Dist.), 2008-Ohio-5695, at ¶¶ 6-9 *quoting State ex rel. Zollner v. Indus. Comm.* (1993), 66 Ohio St. 3d 276, 278.

CONCLUSION

For the foregoing reasons, the Court should deny reconsideration.

Respectfully submitted,



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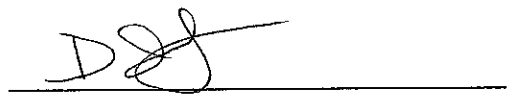
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee Bedford City School District's Memorandum In Opposition To Appellants' Motion for Reconsideration has been served upon Benjamin C. Mizer, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, Counsel for Appellee State Board of Education; Stephen W. Funk, ROETZEL & ANDRESS, LPA, 222 South Main Street, Suite 400, Akron, Ohio 44308 and David R. Harbarger, ROETZEL & ANDRESS, LPA, 1375 East Ninth Street, 9th Floor, Cleveland, Ohio 44114, Counsel for Appellants, by U.S. Mail, postage prepaid, this 8th day of July, 2010.



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