IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 77-1894

MARLENE KOLZ, et al.,

Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

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BRIEF FOR FEDERAL DEFENDANT-APPELLEE

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ISSUE PRESENTED FOR REVIEW

Whether the district court abused its discretion in denying a preliminary injunction which, if issued, would have prevented the implementation of a plan of teacher desegregation adopted by the Chicago Board of Education.

STATEMENT OF THE CASE

For the purpose of this appeal, the Secretary of Health, Education and Welfare, the federal defendant-appellee, agrees with the statement of the case of defendants-appellees Board of Education, et al. There is no testimony in the record, no affidavits filed, nor any stipulations of fact in this case. Thus there is little factual record on appeal. To the extent that it is relevant, for the purposes of this appeal, the federal defendant-appellee agrees with the Board's statement of facts. It should be noted that the references therein to the transcripts are to representations of counsel.

Appellants' Appendix contains ten pages of documents which have not been admitted in evidence in this case (although pages 2-10 are an exhibit to plaintiffs' complaint). The following facts are based primarily on items in that appendix.

On May 25, 1977, the Chicago Board of Education adopted a plan to desegregate the faculties of the Chicago public schools (Appendix page 10). Plaintiffs-appellants are teachers in the public schools of Chicago who seek to have the implementation of the plan enjoined.

The plan was styled "Plan For the Implementation of the Provisions of Title VI of the Civil Rights Act of 1964 Relative to: Integration of Faculties" (Appendix page 2). This plan was adopted by the Chicago Board of Education to settle the difference then existing between the Board and the United States Department

of Health, Education and Welfare concerning the Board's responsibility to desegregate its faculties (Appendix page 10). The plan represented the culmination of many months' effort and was considered in the best interest of the school system (Appendix pages 3 and 10). It was adopted after formal findings by a Department of Health, Education and Welfare Administrative Law Judge that the Board had violated Title VI of the Civil Rights Act of 1964 by assigning teachers to certain schools on the basis of race (Appendix page 10).

The plan provided for the transfer of a maximum of eight percent of the approximately 27,000 teachers employed by the Board (Appendix page 3). The goal of the plan was to reassign some teachers in the system so that no school would have a faculty over 65 percent white or over 60 percent minority (Appendix page 9).

Plaintiffs, who were assigned to schools for the 1977-78 school year, which were different than those to which they had been assigned to for the 1976-77 school year, filed suit seeking injunctive relief against the Board, certain of its officials, and the Secretary of Health, Education and Welfare to halt the implementation of the plan. Their request for a preliminary injunction was denied on August 30, 1977. This appeal followed. On September 2, 1977, a panel of this circuit denied a "motion to hear emergency appeal and to reverse order denying injunctive relief."

On September 28, 1977, defendant-appellee Califano filed an answer to the complaint raising several defenses while the other defendants-appellees filed a motion to dismiss on September 30, 1977. This motion is currently under submission in the District Court.

We note that plaintiffs-appellants abandoned their request for an injunction against the federal defendant-appellee (Preliminary Injunction Transcript, pages 5-7, 27-28) and thus are not seeking an injunction against the federal defendant from this Court.

SUMMARY OF ARGUMENT

The standard of appellate review of a denial of a preliminary injunction is abuse of discretion. The district court did not abuse its discretion in this case. Plaintiffs were required to demonstrate the existence of the four prerequisites to the issuance of a preliminary injunction: (1) likelihood of success on the merits, (2) irreparable injury and the lack of an adequate remedy at law if the injunction does not issue, (3) relative hardship, and (4) service of the public interest. Plaintiffs have established none of the four. Thus they have no claim that the court below abused its discretion in finding that they were not entitled to a preliminary injunction, the issuance of which would have impeded the long-delayed desegregation of the Chicago public school teaching staffs.

ARGUMENT

I. The Standard of Review

The burden that appellants carry is difficult. They appeal from the denial of a preliminary injunction. Thus they must convince this court to substitute its judgment for that of the court below by demonstrating that the district court abused its discretion in denying plaintiffs' request for a preliminary injunction. Helene Curtis Industries v. Church & Dwight Co., 560 F. 2d 1325, 1330 (7th Cir. 1977); Washington v. Walker, 529 F. 2d 1062, 1065 (7th Cir. 1976); Banks v. Trainor, 525 F. 2d 837, 841 (7th Cir. 1975), certiorari denied 424 U.S. 978. Abuse of discretion is the universally accepted standard for the appellate test of a lower court's decision on the issuance of a preliminary injunction. Fox Valley Harvestore v. A. O. Smith Harvestore Prod., 545 F. 2d 1096, 1097 (7th Cir. 1976) citing Morgan v. Fletcher, 518 F. 2d 236, 239 (5th Cir. 1975). Because abuse of discretion is the standard, appellate review of the decision on a preliminary injunction application is extremely limited. American Medical Association v. Weinberger, 522 F. 2d 921, 924 (7th Cir. 1975). This court has articulated the standards for determining whether a trial judge has abused his discretion in ruling on an application for a preliminary injunction. "'Generally, an appellate court may set aside a trial court's exercise of discretion only if the exercise of such discretion could be said to be arbitrary. [D]iscretion

is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.'" (Citations omitted) Particle Data Laboratories, Inc. v. Coulter Electronics, Inc., 420 F. 2d 1174, 1178 (7th Cir. 1969) quoted in American Medical Association v. Weinberger, 522 F. 2d 921, 924 (7th Cir. 1975).

II. The Requirements for a Preliminary Injunction

"By now it is axiomatic that a preliminary injunction will not issue unless the movant establishes: (1) reasonable probability of success at trial; (2) irreparable injury; (3) lack of serious adverse effects on others; and (4) sufficient public interest." Illinois Migrant Council v. Pilliod, 540 F. 2d 1062, 1069 (7th Cir. 1976) modified on other grounds en banc 548 F. 2d 715. Although the precise phrasing of the standard varies, the substance of its requirements does not. Compare Fox Valley Harvestore v. A. O. Smith Harvestore Prod., 545 F. 2d 1096, 1097 (7th Cir. 1976); Banks v. Trainor, 525 F. 2d 837, 841 (7th Cir. 1975), and American Medical Association v Weinberger, 522 F. 2d 921, 925 (7th Cir. 1975).

This circuit requires that "plaintiffs carry their burden of persuasion as to all of the prerequisites." Fox Valley Harvestore v. A. O. Smith Harvestore Prod., supra, 545 F. 2d at 1097 citing Canal Authority v. Callaway, 489 F. 2d 567, 576 (5th Cir. 1974).

"The grant of a preliminary injunction is the exercise of an extremely far reaching power not to be indulged in except in a case clearly warranting it." Fox Valley Harvestore v. A. O. Smith Harvestore Prod., supra, 545 F. 2d at 1097. In the instant case the facts clearly warrant the district court's refusal to grant the preliminary injunction as no element in the calculus of requirements was established.

IIA. The Merits

One of the difficulties in reviewing decisions on preliminary injunctions and determining the relative probability of success on the merits is the often amorphous character of the record before the court. See Burns v. Paddock, 503 F. 2d 18, 28 (7th Cir. 1974).

Plaintiffs-appellants are teachers in the Chicago public school system. Last summer they and several thousand colleagues were reassigned to different schools than the ones they had taught at the previous year. This action was taken to effectuate a plan to desegregate the school faculties in the Chicago Public Schools. This plan was voluntarily adopted by the Chicago Board of Education to resolve longstanding differences with the United States Department of Health, Education and Welfare regarding compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.). The plaintiffs claim that the transfers violated their constitutional rights and should have been preliminarily enjoined by the district court.

Despite difficulties with the record, there is little disagreement between plaintiffs and the federal defendant on the basic fact that "Plaintiffs . . . were transferred to new teaching positions to achieve the integration of Chicago school faculties." (Brief for Plaintiffs-Appellants at 27). Similarly, all parties agree that the Chicago Board of Education may, under Illinois state law, transfer teachers for any reason or for no reason at all. (Brief for Plaintiffs-Appellants at 27). Also, it is common ground that the Board's transfer authority cannot be exercised in violation of a right secured by the United States Constitution. The difference between the parties lies in whether the transfers violated any of plaintiffs-appellants' constitutional rights.

Plaintiffs' argument that their constitutional rights were violated is threefold: (1) they were denied equal protection because they were transferred and others, similarly situated, were not; (2) they were denied procedural due process because they were not accorded a hearing prior to their transfers; and (3) they were discriminated against on the basis of race in violation of the Fourteenth Amendment because the transfers were done on the basis of race.

Plaintiffs' argument that they were denied equal protection, because they were transferred and others were not, misapprehends the requirements of the Equal Protection Clause. They concede that it is of no moment to them that they may

have been treated identically with all others, while the Board began to implement its plans (Plaintiffs-Appellants' Brief at 10), but they assert that the Constitution requires that the "Board's integration plan . . . not impose a greater burden upon those teachers being transferred as opposed to the other . . . teachers . . . not required to bear any of the burden at all." (Plaintiffs-Appellants Brief at 7). That is, no one can be compelled to transfer. Yet they concede that the Board may transfer teachers for any reason or for no reason at all (Plaintiffs-Appellants Brief at 27).

Plaintiffs argue that their substantive and procedural due process rights were violated because they were entitled to a hearing prior to their transfers and the hearings they received were inadequate. We do not see how they can sustain this premise while conceding that the Board may transfer teachers for any reason or for no reason. In any event, this contention and its factual underpinnings would need relevant evidence in the record before such an argument could be a basis for decision.

Plaintiffs also contend that the transfers should be voided because race was a factor in the selection of the transferees. (Plaintiffs-Appellants' Brief at 24). Plaintiffs concede that race may be taken into account to remedy past discrimination. They could not do otherwise. Considerations of racial factors in undoing unconstitutional segregation are

permissible. United States v. School District 151 of Cook County, Illinois, 404 F. 2d 1125, 1135 (7th Cir. 1968). That is what occurred here. There was a finding by an administrative law judge that the Board had assigned teachers and professional staff to certain schools on the basis of race. (Plaintiffs-Appellants Statement of the Case #5). The Board and HEW agreed on a plan calculated to rectify a situation which constituted unlawful discrimination. To do so required considerations of racial factors.

Arguments in opposition to faculty desegregation because reassignments would take cognizance of each teacher's race have been rejected by the Supreme Court. In Swann v. Board of Education, 402 U.S. 1, 19 (1971) the Court recited:

> . . . the Mobile school board has argued that the Constitution requires that teachers be assigned on a "color blind" basis. It also argues that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention.
>
> In United States v. Montgomery County Board of Education, 395 U.S. 225 (1969), the District Court set as a goal a plan of faculty assignment in each school with a ratio of white to Negro faculty members substantially the same throughout the system.

Accord, Davis v. School Commissioners of Mobile County, 402 U.S. 33, 35 (1971). The foregoing discloses the Supreme Court's approval of both race-consciousness in assignment and the

employment of numerical ratios of minority to majority teachers in remedying proscribed faculty segregation. This remedial procedure has been adopted by those circuits which have addressed the problem. See for example, Singleton v. Jackson Municipal Separate School District, 419 F. 2d 1211, 1217-18 (5th Cir. 1969) (en banc), rev'd in part on timing sub nom. Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970); Nesbit v. Statesville City Board of Education, 418 F. 2d 1040, 1042 (4th Cir. 1969) (en banc); United States v. School District of Omaha, 521 F. 2d 530, 546 (8th Cir. 1975); Keyes v. School District No. 1, Denver, Colorado, 521 F. 2d 465, 484 (10th Cir. 1975).

As plaintiffs were unable to demonstrate probability of success on the merits, the district court did not abuse its discretion in denying the request for a preliminary injunction.

IIB. Irreparable Injury and the Adequacy of Any Remedy at Law

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Fox Valley Harvestore v. A. O. Smith Harvestore Prod., 545 F. 2d 1096, 1098 (7th Cir. 1976) citing Beacon Theatres v. Westover, 359 U.S. 500, 506-7 (1959).

Plaintiffs allege that the violation of their constitutional rights constitutes irreparable injury. Assuming arguendo, that it is true that a constitutional right of plaintiffs has been violated, they still have not met the burden of demonstrating inadequacy of legal remedies.

Plaintiffs could still proceed under Title VII of the Civil Rights Act. 42 U.S.C. §2000e et seq. Washington v. Walker, 529 F. 2d 1062, 1065 (7th Cir. 1976). As they have failed to indicate inadequacy of their remedy at law they were properly denied a preliminary injunction below.

IIC. The Public Interest and Balance of Hardship

We do not argue that the plan of faculty desegregation adopted here was necessarily the best conceivable. Our position is that the adoption of the faculty desegregation plan was, at least, clearly within the broad discretionary powers of the School Board. Swann v. Board of Education, 402 U.S. 1, 16 (1971); McDaniel v. Barresi, 402 U.S. 39 (1971). Collaterally, adoption and implementation of a faculty desegregation plan was necessary to bring the Chicago Board of Education into compliance with Title VI of the Civil Rights Act of 1964.

Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) is a device whereby the United States conditions receipt of federal financial assistance on nondiscrimination on account of race, color or national origin by the recipient.

"Congress, concerned with the lack of progress in school desegregation, included provisions in the Civil Rights Act of 1964 to deal with the problem through various agencies of the Federal government . . . 42 U.S.C. 2000c et seq.; 2000d et seq.; and 2000h-2." Green v. County School Board, 391 U.S. 430, 433 fn. 2 (1968). The legislation recognizes that the federal

government may not support, directly or indirectly, proscribed racial discrimination. The Congressional declaration in Title VI is that racial discrimination in federally assisted programs is impermissible. Title VI has been called a restatement of the national policy against government support for segregated education. Green v. Connally, 330 F. Supp. 1150, 1163 (D. D.C. 1971) (3-judge court), affirmed, sub nom. Coit v. Green, 404 U.S. 997 (1971).

The provisions of Title VI are few and its scheme is relatively simple. Section 601, 42 U.S.C. 2000d, prohibits programs and activities receiving federal funds from discriminating.

Section 602, 42 U.S.C. 2000d-1 authorizes and directs each federal department and agency which extends financial assistance to issue rules, regulations and orders of general applicability. The requirements of the Act may be enforced by termination of funds. However, no action, including the initiation of an administrative hearing if one is requested, may be taken until the agency concerned has "determined that compliance cannot be secured by voluntary means." Implicit in requiring an agency to attempt to secure voluntary compliance, is the simple logic that a school district that has been determined to be in non-compliance with the Act may voluntarily comply. */

*/ HEW is charged with the responsibility of seeing that school districts that receive federal financial assistance comply with the Act. In turn, HEW, in order to insure that each recipient

(footnote continued next page)

See Adams v. Richardson, 356 F. Supp. 92 (D. D.C. 1973) aff'd 480 F. 2d 1159 (D.C. Cir. 1973); Hardy v. Leonard, 377 F. Supp. 831, 837-8 (N.D. Cal. 1974).

Section 604, 42 U.S.C. 2000d-3, prohibits discrimination in employment practices when the primary objective of the federal financial assistance is to provide employment, or when the employment practice discriminates against the beneficiaries of the program receiving assistance. United States v. Frazer, 297 F. Supp. 319, 322 (M.D. Ala. 1968); United States v. Frazer, 317 F. Supp. 1079, 1083 (M.D. Ala. 1970); United States v. Jefferson County Board of Education, 372 F. 2d 836, 883 (5th Cir. 1966) affirmed en banc 380 F. 2d 385 (5th Cir. 1967); 45 C.F.R. 80.3(c) prohibits discrimination in employment practices, even if the primary purpose of funding is not employment, where the employment practices subject the beneficiaries of programs to discrimination.

The remaining sections of the Act provide that HEW apply the guidelines and criteria for compliance uniformly throughout the United States; and that compliance with a final federal court order for desegregation shall be deemed compliance with Title VI. 42 U.S.C. 2000d-5, 2000d-6.

(footnote continued from previous page)

assist it in enforcing the Congressional mandate, requires each recipient to sign an assurance in consideration of and for the purpose of obtaining funds. The assurance requires the recipient (here, the school district) to immediately take any measures necessary to effectuate the requirements of Title VI. The regulations promulgated pursuant to Title VI require recipients to take affirmative action to overcome the effects of prior discrimination. 45 C.F.R. §80.3(b)(6)(i). See, Lau v. Nichols, 414 U.S. 563 (1974)

Pending resolution of this action in the court below, the faculty desegregation plan, which is a product of defendants' coordinate responsibilities under Title VI, should not be enjoined. The appropriate rule is desegregation pending litigation. Singleton v. Jackson Municipal Separate School District, 419 F. 2d 1211, 1216 (5th Cir. 1969). See also, Alexander v. Board of Education, 396 U.S. 19 (1969) (per curiam).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of the foregoing Brief For Federal Defendant-Appellee upon the following counsel of record by mailing a copy to each, postage prepaid, to the addresses below:

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