THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the matter of the appeal of the order of the Board of Education of the New Berlin School District expelling BRUCE C[redacted],

Appellant

OPINION AND ORDER

THE NATURE OF THE CASE

This is an appeal from an order of the Board of Education of the New Berlin Public Schools, hereinafter Board, pursuant to Section 120.13 (1)(c), Stats., expelling appellant from school for the remainder of the 1977-1978 school year. Pursuant to the stipulation and agreement of the parties, this office will confine itself to a review of the record of the Board's March 1, 1978 hearing regarding this matter. Said record consists of 2 cassette recordings of testimony and several attached exhibits. Now having considered all of the evidence in the record, the State Superintendent of Public Instruction makes the following

FINDINGS OF FACT

At the time of the incidents giving rise to this action, appellant was a 15 year old 10th grade student at Eisenhower High School in the New Berlin School District (hereinafter District). At approximately 12:30 p.m. on February 21, 1978, a school day, Theodore Oertel, the vice principal of the high school was advised by undisclosed students that appellant had allegedly attempted while on school premises to sell amphetamine compounds or "speed" in a tablet form

known as "white cross." Based on this report, Mr. Oertel, in the company of another school official, removed appellant from the class he was then attending and confronted him with this allegation. Appellant cooperated with the two individuals and consented to a search of his person. When no contraband was discovered, the trio proceeded to appellant's locker and a further search was conducted. At such time, a candy vial containing 10 white tablets was discovered in the pocket of appellant's parka. Upon questioning, appellant acknowledged that the tablets were his and although he had not used any of the pills himself, he had attempted without success to sell them to his fellow students. He further conceded that he believed the tablets to be "speed." He admitted that the substance had been given to him by a former student whom he proceeded to identify by name. Thereafter, the local juvenile authorities were notified of the incident and appellant was taken into their custody, along with the 10 tablets.

On February 24, 1978, the Superintendent of School directed a letter to appellant's mother advising her that a hearing as to appellant's expulsion would be held before the Board on March 1, 1978. The sole ground for the proposed expulsion was stated as follows: "Bruce is charged with possession and the intent to transfer or sell controlled substance..."

At the hearing, the District's administration presented the testimony of several school officials in support of its recommendation of expulsion. With the exception of a blanket statement of corroboration by another administration witness, the only testimony relevant to the charge against appellant was that of Mr. Oertel. In addition to relating the incidents of February 21, 1978, Mr. Oertel testified that on February 24, 1978 he was given a letter which purported to be written by Sgt. William Miller of the New Berlin Police Department. The letter read in relevant part as follows:

"C[redacted] had in his possession ten white tablets at the time of his apprehension. A small portion of one of those tablets was tested on the W.C.L. field test kit and a positive test for the presence of amphetamines was achieved."

Neither Sgt. Miller nor any other individual with personal knowledge of the conduct of the alleged test was present at the hearing.

Appellant elected not to testify in his own defense. The sole witness called on his behalf was his mother. Her testimony related primarily to appellant's family situation. The Board began its deliberation at the close of the hearing and thereafter issued the order which is the subject of this appeal.

CONCLUSIONS OF LAW

School districts are limited purpose municipal corporations and have only such powers as are conferred specifically by statute or are necessarily implied thereby. Iverson v. Union Free High School Dist., 186 Wis. 342 (1925). The legislature has conferred upon school boards the power to expel students by Section 120.13 (1)(c), Stats. The statute mandates a two part test for determining whether expulsion is warranted in a particular case. Initially, it must be established that the conduct with which a student is charged falls within either of the alternative statutory grounds for expulsion: "....repeated refusal or neglect to obey school rules...." or "....conduct while at school or while under the supervision of a school authority which endangers the property, health or safety of others...." Once a student's conduct has been found to fall within the prescribed grounds, the second part of the test requires a finding to be made that, in view of such conduct, the interests of the school demand his or her expulsion. The statute further requires that a written notice of hearing specify the particulars of the offending conduct for which

expulsion is sought. In the instant case, the sole charge noticed related to appellant's alleged possession with intent to sell a controlled substance. As no other incidents were noticed, hence ruling out the ground relating to "repeated" infractions; it is clear that the District chose to rely on the second statutory ground: conduct which endangers the property, health or safety of others. Among other issues, this appeal has challenged the sufficiency of the record to support the Board's conclusion that this ground was met.

Simple amphetamine compounds are classed as a Schedule II controlled substance (Section 161.16 (5)(a) Stats.). Schedule II drugs are those which, although accepted for medical treatment with restrictions, have a high potential for abuse and such abuse can lead to severe dependence, both physical and psychic (Section 161.15 Stats.). Assuming, without deciding the issue, that it can be concluded as a matter of law, that by virtue of a substance's inclusion in Schedule II, the attempted sale of the substance endangers the health or safety of others, it is first necessary to lay a factual foundation upon which the conclusion may operate. In the instant case, the District has established that (1) while at school, appellant possessed what he believed to be "speed" or amphetamine, and (2) he had attempted to sell the substance in his possession to his classmates. However, before the conclusion may become operative, a third finding is required: the substance in question must be proven to be a controlled substance.

Section 161.41 (1m) Stats., makes possession with intent to deliver a Schedule II controlled substance a felony. This, in effect, is the essence of the conduct with which the District has charged appellant. The Wisconsin Supreme Court has required the same standard of proof in civil cases involving criminal conduct as in cases involving fraud, undue influence or gross negligence: the preponderance of the evidence must be clear, convincing and satisfactory so

as to sustain a greater degree of certitude than does a mere or fair preponderance of the evidence necessary in ordinary civil actions. Kuehn v. Kuehn, 11 Wis. 2d 15 (1959). In Kuehn, the court cited with approval its discussion from an earlier case of the standard of proof required in civil actions resting on criminal conduct or fraud:

> The rule of clear and satisfactory evidence in fraud cases, as distinguished from mere preponderance of the evidence, is substantial and may, very properly, be the turning point, especially, when the matter rests in mere inference. As has been frequently said, while in ordinary civil matters the person on whom the burden of proof rests may rely upon evidence establishing the facts to a reasonable certainty, though the evidence be not, in all respects, clear and satisfactory, not so where fraud is the gist of the matter, then he must go further,--not to the extent of establishing the charge with the highest degree of certainty, but to that one which rests, not only in reasonable certainty, but on evidence which is clear and satisfactory. Will of Ball, 153 Wis 27, 35 (1913)

However, if it were permissible to employ the fair preponderance standard or even the minimal standard of some credible evidence utilized by the courts in reviewing administrative decisions in both unemployment and workers compensation cases, this office would be forced to conclude that the record before us on review is insufficient to support a finding that appellant possessed a controlled substance.

The statements and letter attributed to Sgt. Miller regarding the results of an alleged test performed on a sample of the confiscated substance are hearsay. While it has frequently been stated that administrative tribunals, such as the Board in the instant case, are not bound by common law rules as to the admissibility of evidence, their only obligation being to exclude irrelevant, immaterial and repetitious testimony from the record; a literal interpretation of this dictum is misleading. Although it is not error, per se, to admit incompetent evidence into the record; such evidence is insufficient to support an administrative finding. Administrative findings must be set aside on review

unless they are supported by a residuum of competent evidence in the record. Carroll v. Knickerbocker Ice Co. 173 N.E. 507 (1916). The effect of the residuum rule has been well stated by Professor Davis:

> "Under the residuum rule a finding which is unsupported by evidence which would be admissible in a jury trial must be set aside, no matter how reliable the evidence may appear to the agency and to the reviewing court, no matter what the circumstantial setting may be, no matter what may be the evidence or lack of evidence on the other side, and no matter what may be the consequences of refusing to rely upon the evidence." Davis, Treatise on Administrative Law, (3rd Edition) § 14.07 (1972)

In Wisconsin, the courts have consistently found hearsay evidence, standing alone, to be insufficient to support administrative findings. See State ex rel. Ball v. McPhee, 6 Wis. 2d, 190 (1959) and Koss Corp. v. DILHR and Gray, Dane County Circuit Court, case no. 153-261 (1977). Indeed, the Wisconsin Supreme Court has enunciated a stricter rule, holding that hearsay should not even be received at administrative hearings over objection where direct testimony as to the same matter is obtainable. Outagamie County v. Town of Brooklyn, 18 Wis. 2d, 303 (1962). Likewise its admission has been held to constitute prejudicial error. State ex rel Ball, supra. There is nothing in the record to suggest that Sgt. Miller could not have been produced for direct testimony with reasonable diligence. Under the circumstances, this office has no alternative but to set aside the Board's finding that appellant possessed a controlled substance absent a residuum of competent evidence in the record in support thereof.

The only other evidence in the record as to the identity of the substance in question was appellant's statement to Mr. Oertel upon his apprehension to the effect that he believed the tablets to be "speed." Appellant further noted that he had not used any of the tablets himself. The record is devoid of any evidence which would tend to suggest that appellant had ever previously

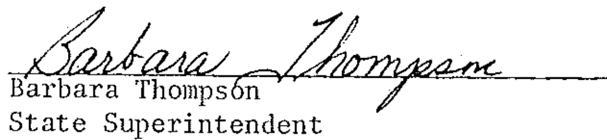
used amphetamines or any other street drugs during his 15 years of life. Rather, the sole basis of his opinion as to the nature of the substance appears from the record to be a statement attributed to his supplier, again an individual who was not present at the hearing. Clearly, appellant had no personal knowledge as to the identity of the substance he possessed. Under the circumstances, appellant's opinion in this regard was wholly lacking in foundation and without basis in fact. Thus, that opinion is no more competent to support a finding as to the nature of the substance to any reasonable degree of certitude than the hearsay attributed to Sgt. Miller.

As the record is insufficient to support a finding that appellant possessed a controlled substance, this office has no alternative but to hold that the Board's conclusion that appellant's conduct endangered the property, health or safety of others is unsupported by credible evidence. While this office is forced to reverse appellant's expulsion for the above reasons, this decision is in no way a condonation of the drug abuse which is plaguing increasing numbers of the young people in our schools. The State Superintendent is deeply concerned over this problem and remains committed to sound programs for combating its spread. However, no matter how noble be our aim to eliminate drugs from our schools, we must not use this end in justification of procedural short cuts which, as in this case, result in the deprivation without adequate due process of law of a student's property right to a public education. See Goss v. Lopez, 419 U.S. 565 (1975).

BY ORDER OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION: The March 9, 1978 order of the Board expelling appellant from school for the remainder of the school year is reversed. Appellant shall be reinstated to attendance at

regular classes with all the rights and privileges attendant thereto, without loss of course credit, and with reasonable opportunity to make up any required coursework or examinations missed by virtue of the order hereby reversed. The Board shall forthwith expunge any and all references to this expulsion from appellant's pupil records.

Dated this 13th day of July, 1978.



Barbara Thompson
State Superintendent