THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion from the Schools of the School District of Webster of Jeffrey E[redacted],

OPINION AND ORDER

Appellant.

THE NATURE OF THE CASE

This is an appeal pursuant to Section 120.13(1)(c), Wis. Stats., from an order of the Board of Education, hereinafter Board, of the School District of Webster, hereinafter District, 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 April 27, 1978 hearing regarding this matter. Said record consists of a stipulation of fact as to the procedures utilized during said proceedings, typewritten minutes of the proceedings, and several related exhibits. Now having considered all matters of record, the State Superintendent of Public Instruction makes the following

FINDINGS OF FACT

On April 20, 1978, the District transmitted written notice to appellant's parents that appellant had been suspended from school "for allegedly selling a controlled substance to other students." The notice advised that appellant

was being referred to the Board for expulsion proceedings and, further, specified the time and place of said proceedings. As required by statute, said notice contained a verbatim copy of Section 120.13(1)(c), Wis. Stats., disclosing the authority for expulsion proceedings. In addition, a copy of the District's policy requiring expulsion proceedings to be held in all cases involving "dangerous drugs" was enclosed.

On April 27, 1978, the Board convened and adjourned to closed session to consider several related student disciplinary matters including that of appellant. Appellant's case was the last heard at the meeting. Appellant appeared in person and by counsel and was accompanied by his mother. The District's administration appeared by counsel with whom were present the district administrator, high school principal, and a local juvenile officer. Students V_____ P_____ and D_____ O_____, who allegedly had personal knowledge of the incidents giving rise to this case were present for proceedings relating to their own conduct but were sequestered on motion of appellant's counsel during the proceedings relating to appellant. The District did not call said students as witnesses and neither student nor any other individual offered direct testimony on behalf of the District in the instant case. Rather, counsel for the District presented its case to the Board in summary fashion stating the administration's position as follows:

a. On April 18, 1978, High School Principal D_____ S_____ was advised that some students had possession of marijuana on school grounds.

b. Pursuant to this information, V_____ P_____ was called into Administrator S_____'s office. She was advised of the allegation and consented, voluntarily, to a search of her purse. A substance thought to be marijuana and paraphernalia assiciated with smoking were found.

c. D_____ O_____ was also brought, separately, to the Administrator's office. She was advised of the allegation and also, voluntarily, agreed to a search of her purse. A cache containing remnants of what appeared to be marijuana and paraphernalia associated with smoking were found.

d. Because of the discovery of what appeared to be marijuana, the Village Constable and County Juvenile Officer were called to the Administrator's office. The students gave the officers, voluntary, sworn written statements.[1] V_____ and D_____, separately and independently, advised the officers that D_____ was approached by appellant in a school hallway regarding the sale of "Mexican marijuana." D_____ responded that she would buy some. Because she did not have any money, she contacted V_____ P_____. V_____ gave D_____ $5.00 to purchase the marijuana from appellant. The marijuana was transferred from appellant to D_____ while they were waiting for school buses to take them home from school. The marijuana was then divided between D_____ and V_____.

The District's administration rested its case after the foregoing summation with the recommendation that appellant be expelled from school for the remainder of the school year. Thereupon, counsel for the District advised appellant and the Board that the administrator, juvenile officer, and students V_____ P_____ and D_____ O_____ were available to answer any questions regarding the matter. Counsel for appellant declined to call as witnesses and question said individuals. Appellant offered no testimony on his behalf, invoking the privilege against self-incrimination. Counsel for appellant then made a brief statement to the Board noting several procedural objections and rested. Immediately thereupon, the Board began its deliberations. Neither the administration nor the appellant nor their respective counsel were present during nor participated in the Board's deliberations on the appropriateness of expulsion.

Following deliberations, the Board determined that the [sale of controlled substances while under school jurisdiction] endangered the health, safety and welfare of the students, and therefore, voted to expel, in a unanimous vote, appellant for the remainder of the school year. The Board thereupon voted to offer a homebound program of instruction to appellant.

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[1]The statements were distributed at the expulsion hearing and were received over appellant's objection as Exhibits C, D, E and F.

Sometime subsequent to these proceedings, a written report attributed to the Crime Laboratory Bureau of the Department of Justice was received indicating that a sample submitted, ostensibly from the substance which was the subject of such proceedings, tested positive for the presence of marijuana.

CONCLUSIONS OF LAW

At the outset, appellant has challenged the appropriateness of this office considering the report attributed to the Crime Laboratory Bureau as it had not then been received and, hence, was not considered by the Board in reaching its determination on April 27, 1978. The State Superintendent of Public Instruction declines to pass upon this issue as it is unnecessary to a decision in this case.

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 either of the proscribed 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 sale of 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. This appeal has challenged the sufficiency of the record to support the Board's conclusion that this ground was met in view of the District's reliance upon its counsel's offer of proof and the submission of unauthenticated, unidentified written statements in lieu of direct testimony thereto. Likewise, appellant contends that he thereby was not afforded due process in that he was denied the opportunity to confront and cross-examine his accusers. As both the evidentiary question and due process question speak to the same issue, they will be considered together.

Marijuana and its psychoactive derivatives are classed as Schedule I controlled substances (Section 161.14(4)(k), Stats.). Schedule I drugs are those which have been determined to have a high potential for abuse and have no accepted medical use or lack sufficient safety for medical treatment. (Section 161.13 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 I, the 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.

Section 161.41(1) Stats., makes the delivery of a Schedule I controlled substance a felony. This, in effect, is the essence of the conduct with which the District has charged appellant. The burden of proof with respect to this charge rests upon the District. 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 regarding 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, even if it were permissible to employ the fair preponderance standard or the minimal standard of some credible evidence utilized in reviewing administrative decisions in both unemployment and workers compensation cases, this office would be forced to conclude that the record on review in the instant case is insufficient to support a finding that appellant delivered a controlled or any other substance.

It is well settled that arguments or statements of counsel are not to be considered or given weight as evidence. Merco Distrib. Corp. v. O & R Engines, Inc., 71 Wis. 2d 792 (1975); Mullen v. Reinig, 72 Wis. 388 (1888); see also Wis. Jury Instructions - Civil, Part I, 110. Accordingly, counsel's summary of the District's position is not itself evidence and, hence, will not support the Board's findings. The only evidence submitted on behalf of the District are exhibits C through F which purport to be the sworn statements of

students V_____ P_____ and D_____ O_____. The threshold question to the admissibility of such writings is their authenticity. Master Plumbers Mut. Liab. v. Cormany & Bird, 79 Wis. 2d 308 (1977); McCormick, Handbook on Evidence (2nd Edition) § 218, (1972). As the documents in question do not fall within the categories of self-authenticating evidence recognized by Section 909.02, Stats., their authenticity, that is genuineness as opposed to veracity, must be proven by extrinsic evidence that they are what the District purports them to be. There being no direct testimony in the record as to any of the matters asserted by the District in this case, it goes without saying that no foundation was laid in respect to the authenticity of these writings and, therefore, they could not properly have been considered over appellant's objection even if otherwise qualified under one or more of the exceptions to the hearsay rule, which they are not.

While it has frequently been stated that administrative tribunals, such as the Board in the instant case, are not bound by common law and statutory 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 remains 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)

While certain jurisdictions have rejected this rule, in Wisconsin, the courts have consistently found hearsay and other incompetent 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 students V_____ P_____ and D_____ O_____ could not have been produced for direct testimony with reasonable diligence. Indeed, it is clear that they were immediately available at the proceedings, but, inexplicably, were not called to offer direct testimony on the District's behalf. The fact that these individuals were available for questioning by appellant is of no consequence. The District had the burden of going forward with clear, convincing and satisfactory evidence in support of its recommendation of expulsion. Appellant had no obligation to call these individuals adversely so as to secure his right to confront his accusers and it cannot seriously be contended that he "defaulted" by not so calling them. To hold otherwise would effectively shift the burden of proof from the District and place it squarely on appellant's shoulders, requiring him to lay the foundation for the District's case through the testimony of adverse witnesses while at the same time impeaching them: setting such witnesses up like so many strawmen and then attempting to

knock them down. While the quantum of proof required of the District in such a case is not so great as in criminal proceedings, the initial presumption of appellant's innocence must remain, lest he be denied process which is due. There being not one scintilla of competent evidence in the record in support of the District's charges against appellant, this office is obligated to conclude that the District has failed to carry its burden.[2]

As the record is insufficient to support a finding that appellant delivered a controlled substance, this office has no alternative but to hold that the Board's ultimate finding that appellant's conduct endangered the property, health or safety of others is unsupported by credible evidence.[3] 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 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 shortcuts which, as in this case, result in the deprivation without adequate

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[2]It must be noted that the State Superintendent of Public Instruction has never been called upon to review a record so wholy devoid of substantive, competent evidence as that in the instant case. At the risk of flyspecking, it may be observed that there is nothing in the record to even support a finding that appellant was enrolled in any school of the District. While the Board could certainly have taken notice of this fact, the record does not disclose that such notice was ever taken. However, as the Board undertook to expel appellant and inasmuch as there does not appear to be a material dispute as to this issue, it is assumed for the purpose of this review that appellant had been enrolled in some school of the District at the time of the events giving rise to this action.

[3]Even if the instant record were competent to support such finding and conclusion, reversal would nevertheless be mandated as the record contains no information to suggest that no other form of discipline available to the District was adequate to deal with appellant's alleged conduct; hence, the second prong of the test for expulsion requiring a finding that the interests of the school demanded appellant's expulsion was not satisfied. It may further be noted that the Board never addressed this issue.

due process of law of a student's property right to a free public education. See Goss v. Lopez, 419 U.S. 565 (1975) and Art. X, Sec. 3, Wisconsin Constitution.

BY ORDER OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION: The April 27, 1978 order of the Board expelling appellant from school for the remainder of the school year is reversed. It is further ordered that all references to this matter shall be forthwith expunged from any and all records relating to appellant maintained by the District.

Dated this 27th day of October, 1978.

Barbara Thompson

Barbara Thompson
State Superintendent
State Department of Public Instruction