THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion from the schools of the [redacted] District [redacted], of [redacted],

OPINION AND ORDER

Appellant.

THE NATURE OF THE CASE

This is an appeal pursuant to Section 120.13(1)(c), Stats., from the March 8, 1979 decision of the School Board, hereinafter Board, of the [redacted] School District [redacted], hereinafter respondent, expelling appellant from [redacted] High School.[1] Now having fully reviewed all matters of record relative to this case, the State Superintendent of Public Instruction makes the following

FINDINGS OF FACT

On November 13 and November 16, 1978, during school hours, rifle shots penetrated the windows of certain occupied classrooms in the [redacted] High School Annex building. Students and teachers were forced to flee these rooms in the midst of shattering glass and ricocheting bullets. Needless to say, regular classroom activities were substantially disrupted on these occasions, not to mention the serious jeopardy to which the very lives of the students and teachers were subjected.

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[1]For reasons which will become apparent in the body of this opinion, this office finds the obligation to issue the order in the instant case distasteful at best.

It is undisputed that the shots in question were fired off school premises from the basement window of a private residence located approximately 120 feet from the [redacted] Annex. It is likewise undisputed that appellant was truant from his assigned class on both of these occasions and, in the company of a fellow student, was present at the time and place from which the shots were fired. Appellant has admitted that on one of these occasions he fired several shots over the school but denied that any of these shots went into the building. After due notice and hearing, appellant was expelled from [redacted] High School on the basis of the aforementioned conduct.

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 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 be issued ". . . specifying the particulars of the alleged refusal, neglect or conduct . . ." for which expulsion is sought. From

the notice of hearing and record as a whole, it is clear that respondent chose to rely upon the second alternative statutory ground in prosecuting this expulsion. Assuming that this ground had been fully satisfied, this office would have no difficulty in concluding that the Board had properly determined that the interests of [redacted] High School, its students and staff demanded appellant's expulsion. Indeed, never has this office been called upon to review a case where expulsion would seem to be so appropriate, whether regarded as a disciplinary tool or a purely prophylactic measure. However, under the facts of this case, a serious jurisdictional question to the pursuit of the ground relied upon appears at the outset.

The ground relied upon, " . . . conduct while at school or while under the supervision of a school authority which endangers the property, health or safety of others . . ." is composed of three elements, of which the first two are alternative and the third mandatory. In order to satisfy the ground, it must first be established that the conduct in question either (1) occurred at school, that is, on school premises, or (2) took place while the student was under the supervision of a school authority. Upon the establishment of either of these elements, the third element requires proof that the conduct complained of was such that it endangered the property, health or safety of others. The third element has been amply proved by, respondent, even assuming to be true appellant's contention that he had fired over rather than into the school building. Contrary to appellant's argument at the hearing, the class of individuals who must be endangered in order to render this element of the ground operative is not limited to students. The statute designates this class as "others." Statutes in para materia uniformly employ the term "pupils" where the application of the law is limited to students. The act is not phrased so as to be subject to the doctrine of ejusdem generis; accordingly, the term "others" must be understood in the full generic sense, that is, other persons,

both real and corporate, rather than limited to students, the school or its staff. The record reflects that the area beyond [redacted] Annex opposite the point from whence the shots were fired is developed. Telephone Company offices were within the range of falling projectiles and presumably, too, both pedestrian and vehicular traffic could be found on the streets in the vicinity. It is not necessary to establish that harm in fact befell persons or property in this area as the statute proscribes conduct which endangers as well as that which inflicts actual damage. As the current Skylab episode suggests, the maxim "what goes up must come down" remains valid; so too, it must be presumed that appellant's shots fell to earth in the area beyond [redacted] Annex and that persons and property in that area were jeopardized thereby. Simply put, it cannot seriously be contended that the reckless discharge of a firearm in an urban area is not conduct which endangers the property, health or safety of others.

More compelling, however, is appellant's argument that the situs of his conduct placed him beyond the application of the statute. Unquestionably, the first alternative jurisdictional element of the ground relied upon cannot be met as the firing of the weapon on both occasions took place on private property away from the school. As to the second element, respondent contends that jurisdiction exists because appellant was under the "technical" supervision of the school in that at the time of both incidents he was required by school rules and state law to be in attendance at class. The fact remains, however, that appellant had skipped class and left school property in favor of participating in the conduct with which he has been charged. Were Section 120.13(1)(c), Stats., to confer jurisdiction to expel in cases where an offending student was subject to the supervision of a school authority, respondent's position would be more

persuasive. It is noted that Section 118.16(6)(b), Stats., permits school truant officers to apprehend without warrant and return truants to school. In this limited sense, appellant could be regarded as subject to the supervision of the school inasmuch as the school, through a truant officer, could have exercised the power conferred by Section 118.16(6)(b), Stats., as to appellant had it chosen to do so. However, it cannot be concluded as a matter of law that appellant was under the supervision of a school authority when off premises and the school had not undertaken any attempt to exercise such authority over him. Indeed, there is nothing in the record to suggest that respondent was even aware of his absence at the time of the two incidents.

Appellant correctly points out that a ruling that "technical" school supervision follows truants throughout the community during scheduled school hours would have ramifications far beyond the limited context of student discipline. Were such "technical" supervision to exist, respondent could be subject to liability for damages had appellant accidentally shot himself while using the skies above [redacted] Annex for target practice. The California Supreme Court has ventured farther into this territory than has any other jurisdiction in the nation. Not even that court in its much bemoaned decision in Hoyem v. Manhattan Beach City School District, 150 Cal. Rptr. 1 (1978) extended school supervision to off-campus truants. While that case held that a cause of action could be maintained against a school district for damages resulting from injuries sustained in a traffic accident by an off-campus truant, the court declined to create some legal fiction whereby school supervision over the truant could be found existed blocks away from school property when the school had undertaken to exercise no such supervision. Rather, the

court ruled that any liability that might attach to the district would arise only if it were established at trial that the school had breached its duty to supervise the plaintiff while he was at school by failing to prevent him from leaving school property without permission and then only if such a breach of duty was the proximate cause of the subsequent accident. In this respect, Hoyem, although not the law in Wisconsin is not so novel as its critics suggest. See, for example, Bryant v. U.S., 565 F. 2d 650 (1977). Inasmuch as appellant's conduct occurred at a time and place when he was not under the supervision, "technical" or otherwise, of a school authority, this office must conclude that the Board lacked jurisdiction to proceed with his expulsion for the conduct charged. For this reason, this office reluctantly has no alternative but to reverse the Board's decision.

It is recognized that the incidents in question placed respondent in the difficult position of choosing between the peril of Scylla in proceeding with this matter in light of uncertain jurisdiction, and the peril of Charybdis in taking no action against appellant and thereby subjecting the school's students and staff to the risk of repetition of his conduct. That the former course of action was chosen is understandable and, from the record, must be concluded to have been taken in complete good faith. Practically speaking, it is difficult to conceive of any responsible school board acting otherwise. Yet, the fact remains that Section 120.13(1)(c), Stats., is too narrowly drawn to reach the activities at issue in this case. This is not to suggest that the law confers blanket immunity from expulsion for all off premises student conduct. Clearly, such conduct which endangers persons and property will not escape the application of the statute if it occurs away from school but under some form of school supervision (for example, on a field trip or at an off-campus extracurricular activity

chaperoned by agents or employees of the school). It is also clear that the statute was drafted as it was to preclude expulsions in cases of unsupervised, off premises conduct bearing no relationship to the school. As this case demonstrates, the language of Section 120.13(1)(c) goes far beyond what was necessary to accomplish that result. Let this case, then, stand as an example of the crying need for serious consideration to be given to proposals such as 1979 Assembly Bill 482 which would, while still preventing the exercise of school discipline in matters unrelated to the school, would authorize expulsion in cases where the unsupervised, off premises but dangerous or substantially disruptive conduct is directed at the school.

BY ORDER OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION: The Board's March 8, 1979 decision to expel appellant from the schools of the District is reversed. It is further ordered that all references to this expulsion be expunged from any and all records as to appellant maintained by the District.

Dated this 11th day of July, 1979.

Barbara Thompson

Barbara Thompson
State Superintendent