Reversed by Racine v. Thompson

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion from
Racine Unified School District of
VAN O[redacted],

OPINION
AND
ORDER

Appellant.

Nature of the Case

This is an appeal pursuant to sec. 120.13(1)(c), Stats., of a March 13, 1980 order of the Board of Education (hereinafter Board) of the Racine Unified School District (hereinafter Respondent) expelling Appellant from J. I. Case High School for the balance of the 1979-1980 school year. The matter is now before this office on the motion of Appellant's counsel and mother as next friend for [temporary reinstatement] pendente lite. Based upon the files, records and proceedings had herein, the State Superintendent now makes the following,

Findings of Fact

Facts appearing of record, insofar as relevant to the instant order, are as follows.

Appellant is an 11th grade student enrolled at J. I. Case High School in Respondent's district. On March 3, 1980, Mr. Christensen, Principal at Case, requested Appellant's consent to a search of his locker. The two proceeded to Appellant's locker and opened it. Thereupon, Appellant reached into the pocket of his jacket which was hanging in the locker and removed a ring which he surrendered to Mr. Christensen. The principal then escorted Appellant to the administrative offices where he was questioned by school authorities. While

Appellant was being questioned, Mr. Christensen returned to the locker, opened it, and discovered the remnants of what appeared to be two marijuana cigarettes. During subsequent questioning, Appellant acknowledged that this material was his and did not dispute the identity of the substance; however, he insisted that he had been unaware the material was in his pocket as he had not worn the jacket for some time until that day. He further denied that he had used the substance at school.

At the March 13, 1980 expulsion hearing, Appellant was charged with violating school rules prohibiting the possession of stolen property at school and the possession of a controlled substance at school. Following an extended narrative purporting to outline the basis for the proceedings presented by Mr. Johnson, Director of Pupil Personnel and, in effect, counsel for Respondent in the prosecution of Appellant's expulsion before the Board, Mr. Christensen and two other members of the Case staff (Mr. Stark and Mr. Van Caster) testified as to their personal knowledge of the above outlined incidents.* These three individuals further acknowledged that the searches of Appellant's locker were prompted by certain allegations attritubed to a particular student to the effect that that student's ring and certain other personal belongings had been stolen from his locker and allegations attributed to a Case physical education coach which purported to place Appellant in the vicinity of the alleged theft. Neither this student nor the coach were present at the hearing and, as such, offered no testimony before the board for its consideration.

At the close of the hearing the Board ordered the expulsion which is the subject of this appeal.

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*Mr. Johnson expressly conceded on the record that his narrative was based entirely upon hearsay and that he had no personal knowledge of any material incidents giving rise to the charges.

Conclusions of Law

This appeal has challenged the Board's decision on several grounds, including the sufficiency of the evidence to support findings of guilt of the conduct charged.

Both possession of marijuana and possession of stolen property are criminal acts (secs. 161.41(3) and 943.34, Stats., respectively). This, in effect, is the essence of the conduct with which Respondent 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 stolen property.

In simplest terms, in order for Respondent to establish that Appellant possessed stolen property, it was first necessary to establish by competent evidence that the property in question (the ring) had been stolen. This it failed to do. The statements attributed to both the student from whom the ring was allegedly stolen and the physical education coach who allegedly placed Appellant at the scene of the alleged theft 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 a material 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) sec. 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. Even in the federal forum where greater leeway is generally accorded as to the character of evidence required to support material administrative findings (and particularly those of school boards), the courts have found hearsay inadequate to support such findings in expulsion cases due to the severity of the penalty itself.

> "The strongest reason, of course, for not permitting these hearsay statements is that the accused student is deprived of his constitutional right to confront and cross-examine his accuser. Although strict adherence to common law rules of evidence is not required in school disciplinary proceedings, where the student is faced with the severe sanction of expulsion, due process does not permit admission of ex parte evidence given by witnesses not under oath, and not subject to examination by the accused student." Gonzales v. McEuen, 435 F. Supp. 460 at 469. (D.C., Cal. 1977)

There is nothing of record to suggest that the student from whom the ring was allegedly stolen or the coach could not have been produced at the hearing through the exercise of reasonable diligence on the part of Respondent. There being no competent evidence of record to support a finding that the ring had in fact been stolen, this office is obligated to dismiss the charge that Appellant possessed stolen property while at school.

The sole remaining charge against Appellant is possession of marijuana. Notice is taken of the fact that the issue of the propriety of the Board's expulsion of students solely on the basis of such a charge is pending before the Racine County Circuit Court and that Respondent is under court order to reinstate students that have been so expelled.

IT IS THEREFORE THE ORDER OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION That Appellant be forthwith reinstated to attendance at J. I. Case High School 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 period of expulsion thus far served. Further proceedings in this matter are hereby and herewith stayed pending a final decision of the circuit court in the case of M.P., et al. v. Racine Unified School District, et al.

Dated this 22nd day of May, 1980.

Barbara Thompson

BARBARA THOMPSON
STATE SUPERINTENDENT