THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion from
Wauwatosa School District of DOUGLAS A.
B[redacted]

FINAL ORDER

Appellant.

THE NATURE OF THE CASE

This is an appeal to the State Superintendent of Public Instruction of the State of Wisconsin pursuant to sec. 120.13(1)(c), Wis. Stats., from an expulsion decision of the Board of Education (hereinafter Board) of the Wauwatosa School District (hereinafter Respondent), on February 25, 1982 expelling Douglas B[redacted] (hereinafter appellant), from Wauwatosa West High School for the remainder of the 1981-82 school year. This matter is now before the State Superintendent on appellant's motion for reinstatement pending determination of the appeal. Now having reviewed all matters of record, the State Superintendent 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 Wauwatosa West High School in Respondent's District. On November 20, 1981, appellant was admittedly found in [possession of marijuana] in Respondent's high school for which appellant was given an in-house suspension which allowed him to complete the first semester of the 1981-82 school year.[1]

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1. Reference is made as follows to the incident in the District's Exhibit #2, Notice of Suspension, sent to appellant's mother on February 12, 1982.

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In a second event occurring on February 12, 1982, appellant was asked by school authorities to open his physical education locker and reveal the contents in the pockets of his clothes on suspicion of possession of drugs. Appellant refused the request and was detained until Wauwatosa police officers were called to the school and searched his person and locker in the presence of the school authorities. Appellant was found to be in possession of a marijuana pipe, a substance appearing to be hashish wrapped in tin foil and a container of black capsules. Appellant was taken from the school by the police officers on charges that included possession of controlled substances. The substance in question, suspected to be hashish, proved positive for marijuana according to a written report attributed to the police whereas the black pills proved to be caffeine with two other legally constituted drugs. At the February 25, 1982 expulsion hearing, appellant was charged with violating school rules concerning the possession of a controlled substance at school. William Simon, associate principal, was the sole witness for the District and testified to the alleged possession of marijuana by appellant on February 12, 1982 that the material taken from appellant which was wrapped up in tin foil appeared to be hashish.

Specifically, at the expulsion hearing, the evidence offered by the District that the appellant was in possession of marijuana at school was a letter purportedly signed by Juvenile Officer Royale G. Knight of the Wauwatosa police department and stating "the suspected material submitted

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1. "Doug has been previously made directly aware of the School Board Rules regarding the use of drugs. On November 20, 1981 Doug was previously charged with possession of drugs."

See also the State Superintendent's order of January 15, 1982 in the Petition of Douglas A. B[redacted] dismissing appeal of suspension for November 20th incident for lack of jurisdiction.

to this department on 2-12-82 was narcodal field tested by Juvenile Officer Knight and it proved positive for marijuana." Appellant objected to the introduction of this document at the hearing on the basis that it was hearsay and for lack of foundation.

Mr. Simon acknowledged that the searches of appellant's physical education locker were on general suspicion of possession of drugs and that he had ordered the search of appellant's locker on February 12, 1982. At the close of the hearing, the Board ordered the expulsion which is the subject of this appeal.

CONCLUSIONS OF LAW

The main contention of appellant in both his appeal and motion for temporary reinstatement _pendente lite_ is that there is insufficient evidence to support findings of guilt of the conduct charged. The possession of marijuana is a criminal act (sec. 161.41(3), Stats.), and the State Superintendent has held that proof of criminal activity in expulsion hearings must meet the standard of clear, satisfactory and convincing evidence. In the case cited by appellant, a letter attributed to an officer and offered as proof of possession with intent to deliver an uncontrolled substance when considered with other hearsay evidence, was held to be insufficient when standing alone to support administrative findings. Although I agree that Officer Knight's statement as offered is hearsay, I am not convinced that it is settled, as stated in appellant's motion for reinstatement, that hearsay evidence cannot be considered by the Board in reaching its decision on the expulsion.

In a later expulsion case decided by a circuit court and where the student was charged with criminal activity, it was held that hearsay evidence is admissible in student expulsion cases (_Racine Unified School_

District v. Thompson, Racine County Circuit Court, File No. 80-CV-0894). The court said that in reviewing the evidence the State Superintendent must determine whether there is sufficient evidence of reasonable probative value to support the expulsion. That case differs in that appellant did not object to the introduction of the hearsay statements, whereas in the instant case the appellant objected to the introduction of the Juvenile Officer's statement and objects that it is insufficient standing alone as sufficient basis for proving that appellant possessed marijuana in Respondent's schools on February 12, 1982.

In a case involving hearsay evidence on a question of dependency before an administrative agency, the court held that hearsay testimony should not be received over objection where direct testimony as to the same facts is available, Outagamie County v. Brooklyn, 18 Wis. 2d 303, 312 (1962). See also State v. McFarren, 62 Wis. 492 (1973), p. 506, similarly holding.

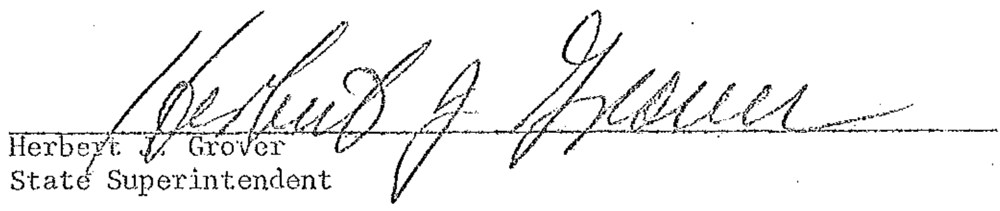
In the instant case the expulsion hearing record discloses that the Board chairman permitted the introduction of Officer Knight's hearsay statement over objection on the basis that appellant's name was on the statement. The chairman made no attempt to show that the witnesses were unavailable and appellant's name on the officer's statement made it no less hearsay or more trustworthy.

Where the meager record of proceedings before the Board at its expulsion hearing on February 25, 1982 contains only the hearsay statement of Officer Knight, offered over objection to prove the contention that a certain substance possessed by appellant at school on February 12, 1982 was marijuana, it is insufficient without an explanation that direct testimony was unavailable to support a finding that appellant possessed

marijuana. See Outagamie County and McFarren, supra. Under the circumstances, appellant is entitled to an order setting aside his expulsion and remanding the matter to the Board for proceedings not inconsistent with this opinion.

BY THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION: So ordered.

Dated and mailed this 30 day of April, 1982.



Herbert J. Grover
State Superintendent