THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion from the Spooner School District of BRADLEY B[redacted]

Appellant.

DECISION AND ORDER

THE NATURE OF THE CASE

This is an appeal to the State Superintendent of Public Instruction pursuant to sec. 120.13(1)(c), Wis. Stats., from the March 9, 1982 decision of the Spooner school board expelling the appellant, Bradley B[redacted], from school for the remainder of the 1981-82 school year. The appeal was not filed until April 26, 1982. An interim decision denying appellant's motion for reinstatement pending final determination of the appeal was issued on May 13, 1982. In accordance with the provisions of Wis. Admin. Code PI 1.04(3), this decision is based on a review of the record of the school board hearing. Both parties were offered an opportunity to submit written arguments regarding the merits of the appeal and have done so.

FINDINGS OF FACT

It is uncontroverted that on the morning of February 9, 1982, Bradley B[redacted], then age 18 (D.O.B. 9/14/63), telephoned a bomb threat to the home of the superintendent of the Spooner school district. As a result of that threat, Bradley was also charged with a felony. Subsequent to his expulsion from school, he entered a guilty plea to the lesser misdemeanor offense of

turning in a false alarm in violation of sec. 941.13, Stats., and was sentenced to a term of probation.

Bradley initially received a three-day suspension for his conduct on February 9. The record establishes that Bradley did not return to school at the end of the suspension period.

On February 26, 1982, Bradley received written notice of the expulsion hearing to be conducted by the Spooner Board of Education on March 9, 1982. The misconduct alleged in the notice of hearing was that Bradley:

> . . . knowingly conveyed or caused to be conveyed a threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives. . . .

At the March 9, 1982 expulsion hearing, Bradley's attorney advised the board that Bradley wished to join the Marines rather than return to school and had passed an "unofficial" Marine entrance exam. Bradley's attorney also stated that he was attempting to negotiate a plea bargain with the District Attorney which would reduce the felony charge to a misdemeanor so that Bradley would be eligible to enter the service.

At the expulsion hearing, the district presented testimony that Bradley was enrolled in a special education program for educable mentally retarded students, that his handicap was academic rather than behavioral, and that the school psychologist and guidance counselor agreed that Bradley knew right from wrong, a fact that is confirmed by Bradley's written confession at the police department after his apprehension. Bradley's attorney neither cross-examined these witnesses nor offered any evidence that would tend to refute the district's evidence in this regard.

CONCLUSIONS OF LAW

In his letter of appeal, appellant has proposed seven grounds on which he believes the Spooner school board's expulsion decision should be reversed. They are as follows:

1. The notice of hearing was defective in that the specific statute cited, sec. 120.13(1)(c), Wis. Stats., was not current and did not specifically state that making a bomb scare was grounds for expulsion, which constitutes a violation of sec. 120.13(1)(c), Stats., which states, "This paragraph shall be printed in full on the face or back of the notice."

2. There was no separate counsel for the school board and administration.

3. The notes of the school board meeting did not state specific findings of fact and conclusions of law.

4. The petitioner did not receive a written copy of the school board's notes which apparently constitute the order.

5. The petitioner is not being provided with alternate educational services during the period of his expulsion.

6. Before a handicapped student can be expelled, a determination must be made that the alleged misconduct in question is not symptomatic of the student's handicap, and no such determination was made in the instant case.

7. Bradley's misconduct is the result of his poor social judgment and inability to withstand peer pressure which is the result of or symptomatic of his handicap.

We find all seven proposed grounds for reversal to be totally without merit.

The first ground for reversal apparently relates to the adequacy of the notice of hearing received by the appellant. It is well established that a

student facing expulsion is entitled to timely and adequate notice of the charges against him so as to allow him a meaningful opportunity to be heard. Keller v. Fochs, 385 F. Supp. 262, 265 (E.D. Wis. 1974). The Seventh Circuit Court of Appeals has observed that where a student has admitted the misconduct with which he is charged the function of procedural protections in insuring a fair and reliable determination of the retrospective factual question of whether the student in fact committed the act with which he is charged is not essential. Betts v. Board of Education of City of Chicago, 466 F.2d 629, 633 (7th Cir. 1972). Bradley received the "notice of hearing" on February 26, 1982. The hearing was scheduled for March 9, 1982. The notice stated that the hearing could result in Bradley's expulsion and specifically alleged the misconduct with which he was charged. Bradley had initially been apprehended on February 9, 1982 through a telephone "trap" installed on a school official's home after a series of bomb threats had been made against the school district. Bradley confessed to having made the bomb threat at the time he was apprehended. His confession was made in the presence of both school officials and the local police. He was promptly suspended from school for three days and was charged with a felony. At the time the expulsion hearing was held, he had been bound over for arraignment after a preliminary hearing on the criminal charge. The notice to Bradley was both timely and specific as to the misconduct charged and clearly came as no surprise in light of the previous actions taken by local school and police officials.

Appellant's second and third grounds are that there was no separate counsel for the school board and administration and that the notes of the board meeting did not state specific findings of fact and conclusions of law. He has not, however, provided any legal authority in support of either proposition.

Section 120.13(1)(c), Stats., requires only that minutes be kept at the meeting. There is, likewise, no statutory requirement that either or both the board and administration have counsel. Consequently, both claims are without merit.

Appellant's fourth ground for reversal is that he did not receive a written copy of the school board's notes which, according to him, constitute the board's order. This argument (for which no legal authority has been cited) overlooks several factors. The first is that the board rendered an oral decision in the presence of Bradley and his attorney at the expulsion hearing on March 9. The second is that a letter was sent to Bradley on March 10, 1982 confirming the board's verbal decision and order of the evening before. The letter contained a verbatim copy of the motion adopted by the board when it expelled Bradley. The third reason is that, pursuant to the provisions of sec. 120.11(4), the minutes of the board meeting are published in the local newspaper. Finally, the minutes are public records available upon request to any individual, including Bradley and his attorney.

The three remaining grounds for reversal relate to Bradley's status as a student with exceptional educational needs. On appeal, Bradley argues for the first time that the bomb threat he made was the result of or symptomatic of his handicap of mental retardation. There is not, however, one scintilla of evidence in the record that would support this claim. As a general rule, matters of defense not raised and argued during a hearing are effectively waived and cannot thereafter be urged as a ground for reversal. Omernick v. Department of Natural Resources, 100 Wis. 2d 234, 246 (1981); State v. Conway, 34 Wis. 2d 76, 83 (1967). The basis of this rule is that matters of defense should be raised at the school board hearing, so that due consideration may be given to them by the school board, forming a proper factual foundation for consideration

on appeal. Although exceptions are made to the general rule, these exceptions are limited to situations where the matter can be disposed of based upon a consideration of the record. When these exceptions are made, they involve situations in which questions of law are involved, and all facts necessary to dispose of the question of law are on the record.

In the present case, the only evidence in the record regarding Bradley's handicapping condition came from testimony of school personnel and was to the effect that Bradley's handicap was academic, not behavioral, and that he knows right from wrong. Bradley's attorney did not cross-examine these witnesses regarding their testimony. Neither did he submit any evidence on Bradley's behalf regarding the effect of Bradley's handicap on his conduct. In point of fact, the record indicates beyond any doubt that neither Bradley nor his counsel considered Bradley's handicap to be of any relevance to Bradley's defense at the expulsion hearing.

One rule that is adhered to regularly by both administrative and judicial appellate bodies is that the hearing or trial strategy chosen by counsel, whether in a civil or criminal case, is binding. When counsel chooses to call or not call a witness, chooses to cross-examine or not cross-examine a witness, chooses to introduce an exhibit or not introduce an exhibit, he or she chooses a hearing or trial strategy. An appellate body will not remand a matter for a new hearing and allow counsel a new "kick at the cat" when the reason for reversal is a choice of strategy. The attorney in such a case is stuck with his or her record, and so it is here. Bradley's counsel did not contest the school administration's request that the board expel Bradley from school. Instead, he appeared before the board at the expulsion hearing to

enlist the board's cooperation in getting the criminal charges against Bradley reduced from a felony to a misdemeanor to enable Bradley to enter the Marines. His strategy was conducted accordingly.

Along the same line, I would direct the appellant's attention to a recent Wisconsin Court of Appeals decision involving the State Superintendent's scope of review in an expulsion appeal where the following observation was made:

> While our decision here is founded solely upon an error of law of the state superintendent, we point out, obiter dicta, that the superintendent's review of a board's expulsion hearing would appear to be limited by the statute which created that appeal, namely, sec. 120.13(1)(c), Stats. The superintendent's review, then, would be one to insure that the school board followed the procedural mandates of subsection (c) concerning notice, right to counsel, etc. Racine Unified School District v. Thompson, 107 Wis. 2d 657 (1982).

Even assuming the State Superintendent had the authority to overturn expulsions in the interest of justice, this appeal involves a fact situation in which such a reversal would be singularly unwarranted. The appellant was an adult at the time he committed the act for which he was both expelled from school and convicted by a court of law. As such, he was not subject to the compulsory attendance requirements of sec. 118.15, Stats. He received a three-day suspension on February 9 but did not return to school at the termination of the suspension even though the expulsion notice was not sent until February 26. Thus, at the time of the March 9 hearing, Bradley had been out of school for an entire month, all but three days at his own volition. It would be difficult to draw any conclusion from Bradley's conduct in this regard other than that he had dropped out of school. Similarly, Bradley's defense at the expulsion hearing was that he did not wish to return to school and intended to join the Marines. Even more significantly, the instant appeal was not filed until April 26, approximately six weeks after the expulsion was

imposed and at a point when only a month remained in both the school term and his expulsion. It appears that the impetus for filing the appeal at that time was the subsequent sentence of probation imposed on Bradley in the criminal case, since the imposition of that sentence meant that he could not join the Marines until the term of probation ended.

It is the policy of this state that students cannot drop out and re-enroll in school at whim. This is so whether the student is handicapped or not (see sec. 118.15(1)(c), Stats.). Once Bradley embarked upon his strategy of dropping out of school and entering the Marines, he could not start over with a different strategy when other circumstances intervened to prevent him from achieving his goal.

Bradley's expulsion terminated with the close of the 1981-82 school year. The record does not reflect whether he re-enrolled for the 1982-83 school year, although the terms of the expulsion order and the law clearly entitled him to do so.

IT IS THEREFORE ORDERED that this appeal be and hereby is denied.

Dated and mailed this 15th day of February 1983.

Herbert J. Grover
State Superintendent