THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of MICHAEL S[redacted] by the Milwaukee Public Schools Board of School Directors	DECISION AND ORDER 84-EX-07

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stat. §120.13(1)(c) from the November 5, 1984 decision of the Milwaukee Board of School Directors to expel the appellant, Michael S[redacted], from school for a period of time not to exceed one year. This appeal was filed on November 29, 1984. In accordance with the provisions of Wisconsin Administrative Code §PI 1.04(3), this decision is confined to a review of the record of the school board hearing and the procedural standards required by §120.13(1)(c), Wis. Stats.

FINDINGS OF FACT

On October 30, 1984 Michael's parents, Mr. and Mrs. Richard S[redacted], were notified by letter from Mr. Phil Haddix, Field Counselor, that Michael's name had been submitted to the Board of School Directors with a recommendation that he be expelled from school for a period not to exceed one year, for his involvement in a purse-snatching incident which occurred near Marshall High School on

October 18, 1984. The letter also stated when and where the expulsion hearing would take place, advised the parents of their right to be represented at the hearing and included a copy of the applicable statutory provisions. No notice of hearing was sent to Michael individually. (Letter of March 11, 1985 from Susan D. Bickert, attorney for the school district, to Robert Mussallem, Chief Legal Counsel, Department of Public Instruction.)

A hearing was held before the Milwaukee Board of School Directors on November 5, 1984, and Michael and his father were present. At the hearing the board heard testimony from the school vice-principal, the school field counselor, two citizens who witnessed the purse-snatching incident, and Mr. S[redacted], Michael's father.

The testimony presented at the hearing indicated that on October 8, 1984 Michael was involved in a purse-snatching incident which took place off school grounds. Michael attempted to evade being caught by running back into the high school building where he was apprehended by school personnel and identified by a citizen who had pursued him. Michael had been suspended once before in May 1984 for loitering at a store during school hours.

After hearing the testimony, the board considered the matter in closed session and then reconvened in open session to consider a motion that Michael be expelled for not more than one year. The motion carried by a vote of 5 to 2. Neither the transcript of the hearing, nor the letter which was sent to the parents explaining

the expulsion decision, contains any findings as to the statutory basis the board relied upon for the expulsion, nor does it include a finding that the board "is satisfied that the interest of the school demands the pupil's expulsion" as required by §120.13(1)(c), Wis. Stats.

By letter dated November 9, 1984 Mr. and Mrs. S[redacted] were advised that the board had decided to expel Michael "for a period of time not to exceed one year." The parents were advised that they could petition the school administration at any time during the expulsion to request Michael's reinstatement.

Michael was not sent a copy of the letter explaining the expulsion decision. (Letter of March 11, 1985 from Susan D. Bickert, attorney for the school district, to Robert Mussallem, Chief Legal Counsel, Department of Public Instruction.)

CONCLUSIONS OF LAW

School districts are limited purpose municipal corporations and have only those powers which are conferred specifically by statute or are necessarily implied therefrom. Iverson v. Union Free High School District, 186 Wis. 342, 353 (1925). A school board's power to expel students derives from §120.13(1)(c), Wis. Stats., which provides in relevant part,

> The school board may expel a pupil from school whenever it finds the pupil guilty of repeated refusal or neglect to obey the rules, . . . or finds that the pupil engaged in conduct while at school . . . which endangered the property, health or safety of others, . . . and is satisfied that the interest of the school demands the pupil's expulsion.

In regard to procedures, the statute also requires that ". . . written notice of the hearing shall be sent to the pupil and, if the pupil is a minor, to the pupil's parent or guardian . . ." and that "[u]pon the ordering by the school board of the expulsion of a pupil, the school district clerk shall mail a copy of the order to the pupil and, if the pupil is a minor, to the pupil's parent or guardian." §120.13(1)(c), Wis. Stats. (Emphasis added.)

The Wisconsin Court of Appeals has indicated that the state superintendent's review of expulsion decisions appears to be limited by the language of §120.13(1)(c), Wis. Stats. In Racine Unified School District v. Thompson, 107 Wis. 2d 657, 667, 321 N.W.2d 334 (1982), the Court of Appeals opined in dicta that, "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." Thus, it is incumbent upon the state superintendent in reviewing an expulsion decision to ensure that the required statutory procedures were followed.

In this case the attorney for the school board has admitted in correspondence to the department that neither a written notice of hearing nor a copy of the expulsion decision was sent to Michael

individually as required by §120.13(1)(c), Wis. Stats. Further, neither the transcript of the hearing nor the letter notifying the parents of the expulsion decision includes any findings by the board as to the statutory basis for the expulsion decision or that the board "is satisfied that the interest of the school demands the pupil's expulsion," as required by §120.13(1)(c), Wis. Stats.

I will first address the board's failure to send Michael, individually, copies of the hearing notice and expulsion decision. The consequences of this failure rest upon whether one construes the requirements of the statute as mandatory or directory.

The Wisconsin Supreme Court has noted,

> "The differences between what is mandatory and directory lies mainly in the duty to comply and the consequence of noncompliance. Generally, a mandatory provision must be strictly complied with and there is no discretion in the agency or public official. Failure to comply with a mandatory statute renders the proceeding void, while noncompliance with a directory provision does not invalidate the proceeding."

Muskego-Norway Consolidated School JSD No. 9 v. W.E.R.B., 32 Wis. 2d 478, 483 (1967). (Emphasis added.) Therefore, if the notice requirement of §120.13(1)(c), Wis. Stats., is mandatory, the district's failure to send Michael notice of the hearing or expulsion decision will render the expulsion order void. However, if the requirement is merely directory, then the failure to comply with §120.13(1)(c), Wis. Stats., will not necessarily invalidate the expulsion order.

It is the general rule that when the word "shall" is used in a statute, the statute is presumed to be mandatory, unless a different construction is necessary to carry out the clear intent of the legislature. In Matter of E. B., 111 Wis. 2d 175, 185, 330 N.W.2d 584 (1983); Karow v. Milwaukee County Civil Service Commission, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978). Further, "when the words 'shall' or 'may' are used in the same section of a statute, one can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings." Id. at 571.

In this case, the words "shall" and "may" each appear several times in §120.13(1)(c), Wis. Stats. Therefore, one may presume that the legislature understood the different meanings of these words and intended "shall" to denote a mandatory requirement.

However, the courts have at times construed the word "shall" to be directory, "if necessary to carry out the legislature's clear intent." Cross v. Soderbeck, 94 Wis. 2d 331, 340, 288 N.W.2d 779 (1980); Karow, supra at 571. To determine legislative intent the courts consider such factors as: the terms of the statute in relation to its scope, history, context, and subject matter; the spirit or nature of the act; the general objective sought to be accomplished by the statute; the consequences which would result from alternative interpretations of the act; and whether a penalty is imposed for violating the act. Muskego-Norway, supra at 485c; Cross v. Soderbeck, supra at 340.

In this case, the legislative history indicates that when §120.13(1)(c) was amended in 1973 the legislature stated its purpose as follows,

> "The purpose of this act is to provide access to educational opportunity for pupils, to provide for the orderly operation of public elementary and high schools in this state, and to ensure fairness in the administration of school rules ...."

L.1973, Ch. 94, §1. (Emphasis added.)

The 1973 amendments to §120.13(1)(c) are noteworthy because they changed the procedures governing expulsions to provide, among other things, that the pupil must receive not less than five days' written notice of the hearing, that the pupil must receive a copy of the expulsion order, and that the pupil may appeal the expulsion decision to the state superintendent. These changes are indicative of legislative intent when compared to the previous version of the statute which made no provision for prior notice of the expulsion hearing and permitted only the pupil's parents or guardian to receive a copy of the expulsion order or to appeal the expulsion decision to the state superintendent. See §120.13(1)(c), Wis. Stats., (1971). These statutory changes manifest a clear legislative intent to extend to the individual pupil the right to prior notice of hearing, the right to notice of the expulsion decision and the right to appeal.

It is further noted that these statutory changes preceded the U.S. Supreme Court's landmark decision in Goss v. Lopez, 419 U.S.

565 (1975), which addressed the issue of constitutional due process in school suspensions of less than ten days. The procedural requirements set out in §120.13(1)(c), Wis. Stats., are independent of the case law discussions of due process, and may well exceed the protections required by a constitutional due process analysis.

It is my conclusion that the language of the statute, its legislative history and the objectives it seeks to accomplish all indicate that the notice requirements set out in §120.13(1)(c), Wis. Stats., are mandatory in nature. Therefore, it follows that the school district's failure to send a written notice of the expulsion hearing or a copy of the expulsion decision to Michael individually renders the expulsion decision void.

In reviewing this case I was unable to locate in the record any findings as to the statutory basis the board relied upon in making its decision or that the interest of the school demands Michael's expulsion. Section 120.13(1)(c), Wis. Stats., permits a school board to expel a pupil only in those situations in which the board finds the pupil guilty of certain specified conduct and is satisfied that the school's interest demands the pupil's expulsion. Although the statute does not explicitly require these findings to be in writing, failure to put them in some sort of written form (even in the hearing transcript) deprives the state superintendent of any means of reviewing the board's decision to ensure that it meets the statutory standards. Since the state superintendent's

review is not de novo, and is based on the record, it is necessary that the board's findings be reflected in the record in some manner. The state superintendent has no authority to speculate as to the board's findings when nothing is reflected in the record.

Because of the board's failure to follow the statutory procedures concerning sending written notice to the pupil and making findings as to the basis and necessity of expelling the pupil, I find that I must reverse the board's decision to expel Michael.

I have reached this decision with a great deal of reluctance. My decision should in no way be construed as condoning the actions of the pupil. However, it is clear that in deciding these appeals it is the state superintendent's duty to ensure that all procedural requirements have been followed. Because the board did not comply with the procedural requirements of §120.13(1)(c), Wis. Stats., as discussed above, the order of the board must be reversed.

ORDER

IT IS THEREFORE ORDERED that the order of the Milwaukee Public Schools Board of School Directors expelling Michael S[redacted] for a period of time not to exceed one year be and hereby is reversed.

Dated and mailed this 10th day of May, 1985.

Herbert J. Grover
State Superintendent of Public Instruction