THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of

MICHALENE J[redacted]

by the Washington School District Board of Education

DECISION AND ORDER 89-EX-06

NATURE OF THE APPEAL

This is an appeal filed to the State Superintendent of Public Instruction on behalf of Michaelene (Missy) J[redacted] and her parents, Ivan G. and Micki J[redacted], contesting the May 31, 1989, decision of the Washington School District Board of Education expelling Missy from school for the remainder of the 1988-89 school year.

A previous expulsion decision against Missy was issued by the Washington School District Board of Education (hereafter Washington Island School Board or School Board) on March 8, 1989, on the same charges as those leading to the expulsion herein appealed. The March 8, 1989, expulsion decision was reversed on appeal by a Decision and Order of the State Superintendent of Public Instruction dated May 19, 1989, on the basis of procedural due process violations. Subsequently, the Washington Island School Board held another expulsion hearing on May 31, 1989, and issued its Decision and Order expelling Missy.

Mr. and Mrs. J[redacted] and Missy cite the following grounds as the basis of their current appeal:

1. The Notice of Expulsion Hearing dated May 25, 1989, does not state with particularity the grounds for expulsion as required in s. 120.13(1)(c), Wis. Stats., and the evidence presented does not support a finding of endangerment to property of others as required by the statute.

2. The May 31, 1989, expulsion hearing was not a fair hearing in that the Washington Island School Board did not exhaust its remedies by appealing the May 19, 1989, decision of the State Superintendent. Counsel for the student argues that the J[redacted] exclusive remedy for appeal of a State Superintendent decision adverse to them would be court review. The J[redacted] allege it is not fair for the school district to hold another expulsion hearing when the appeal time is still running on the State Superintendent's order.

3. The Washington Island School Board was not an impartial body because four of the five board members who decided the May 31, 1989, expulsion had sat in judgment at the March 8, 1989, hearing in which they voted to expel her on the same facts. Counsel

for the student argues that the Board, in rehearing the expulsion case a second time, has pre-decided the facts, applied the law to those facts and pre-decided the disposition.

FINDINGS OF FACT

On May 25, 1989, the Washington Island School Board served a Notice of Expulsion Hearing on Mr. and Mrs. J[redacted] and Missy. The notice advised the J[redacted] that the School Board would hold a closed hearing on May 31, 1989, to determine whether Missy should be expelled. The notice alleged that Missy had engaged in activity endangering the property of the school district, namely, the theft of confidential correspondence and files from the district administrator's office and the dissemination of those materials to the public.

On the evening of May 31, 1989, the School Board conducted the expulsion hearing. The Board was represented by its legal counsel. Missy and her parents were represented at the hearing by their own counsel. The Board's counsel instructed the Board members to base their decision that evening solely on information presented at the May 31, 1989, hearing.

Counsel also asked any Board member who felt he or she had any preconceptions or strong feelings about the case to disqualify himself or herself. No Board member did so excuse himself or herself on the basis of self-perceived ina-

bility to be impartial. In addition, counsel for the Board asked the members to consider any proposal or suggestion from Missy or her parents or attorney with respect to how the matter should be handled, and asked the Board to consider those suggestions in good faith.

At the hearing, a letter written by Missy to Mr. Purinton, a School Board member, dated February 23, 1989, and a letter written by Missy to Dr. Grover, State Superintendent, dated May 2, 1989, were received into evidence. In addition, Missy was provided the opportunity to present any testimony she wanted considered. Missy's testimony included her account of what happened in connection with her taking confidential computer correspondence and files from the school superintendent's office on February 17, 1989. She presented this account in response to the School Board's request for the facts about the incident in question.

After hearing Missy's statements, the School Board considered the expulsion. By unanimous vote of the four voting members (the fifth member, a former teacher elected to the board after the incident, abstained), the board ordered that Missy be expelled for the remainder of the 1988-89 school year. In addition, the order provided that the district would accept work performed by Missy inside and outside the district which was agreed upon by staff and the acting administrator as credits toward her diploma from Washington Island High School and, further, that Missy would not be al-

lowed to participate in graduation and baccalaureate ceremonies.

According to Missy's testimony, an administrative decision had been made after the March 8, 1989, expulsion by the high school principal to allow Missy to earn credits, similar to the arrangement incorporated into the May 31, 1989, order as described above.

CONCLUSIONS OF LAW

A school board is authorized under s. 120.13(1)(c), Wis. Stats., to expel a student upon a finding that the student has engaged in one of the statutory grounds upon which an expulsion must be based. The role of the state superintendent on appeal of an expulsion decision is to ensure that the required statutory procedures were followed and that the board decision is based upon one of the statutory grounds. See Racine Unified School District v. Thompson, 107 Wis. 2d 657, 667, 321 N.W.2d 334 (1982).

In this appeal it is argued that the Board failed to meet the elements of notice and grounds for expulsion under s. 120.13(1)(c), Wis. Stats. Counsel for the student maintains that the Notice of Expulsion dated May 25, 1989, does not include the required particularity, and that the evidence presented at the hearing does not support the finding of an endangerment to property of others under the statute.

The notice requirement in a due process proceeding is intended to ensure that the parties are sufficiently ap-

prised of the charges to be able to adequately defend against them. The notice of hearing document charged Missy with theft of confidential correspondence and files from the district administrator's office. This was the specific issue upon which Missy testified, and upon which the letters she wrote (which were subsequently received into evidence) were focused. There does not appear to be any confusion about what theft, what confidential correspondence or what district administrator's office. Accordingly, I must reject this argument as being without merit.

The second part of counsel's challenge to statutory requirements relates to whether the evidence supports the statutory ground of endangering property of others. Counsel argues first that Missy's actions did not "endanger" any of the personal property of the school. Contrary to this position, I find that Missy's actions did "endanger" property. The word "endanger," as defined in Webster's Ninth New Collegiate Dictionary, means "to bring into danger or peril." The concept of "danger" involves harm, damage or the chance of loss or injury. These terms embrace the notion of wrongful acts, or actions which are detrimental or involve loss or damage. Under this construction of terms, I must conclude that Missy's unauthorized taking of computer property was harmful and detrimental to the school and involved the chance of loss or injury to the property. This conclusion is further reinforced by the fact that the unauthorized taking, accessing or copying of data, computer pro-

grams or supporting documentation constitutes a crime under s. 943.70(2)(a) and (b), Wis. Stats., as pointed out by counsel for the School Board.

Counsel for the student also asserts that "property" means only tangible property. I do not believe that interpretation is correct. As previously indicated, crimes against "property" in the Wisconsin Statutes includes computer crimes involving such intangibles as data, computer programs and supporting documentation. Even if we were to agree that the statute limits expellable actions to tangible property, Missy's actions involved tangible disks and other physical items such as files and printouts. I must reject this contention as well.

Missy's counsel argues further that the statutory reference to "property of others" must be construed to exclude property belonging to the school. Again, I cannot agree with this construction. I believe the meaning of "others" in the clause at issue clearly means anyone "other" than the student himself or herself. To conclude otherwise would result in the ridiculous interpretation that endangering the health or safety of school personnel is not a ground for which expulsion action could be taken.

Counsel for the student alleges, as a second basis for this appeal, that Missy was denied a fair hearing. Counsel contends that it was prejudicial to Missy and her parents to hold another expulsion hearing within the 30-day period for appeal of the May 19, 1989 , decision of the State Super-

intendent. He argues that the School Board did not exhaust its remedies by appealing the State Superintendent's order reversing the March 8, 1989 expulsion, and that the statutory remedy for appeal under s. 120.13(1)(c), Wis. Stats., is an exclusive remedy. Further, counsel maintains it is unfair for the School Board to hold another expulsion hearing when Missy and her parents would have been limited to that exclusive appeal remedy had the State Superintendent's order been adverse to them.

I find no support for the appellants' objections under the law. There is nothing in s. 120.13(1)(c), Wis. Stats., which precludes a school board from instituting another expulsion proceeding within the time period for which an appeal from a decision of the state superintendent could be taken. Although the student's only remedy for an adverse state superintendent's decision would be to appeal to circuit court, this does not limit a school board's overall responsibility to govern the school district within an appeal period, which authority includes the bringing of expulsion actions at any time deemed necessary. I concur with the argument of the Board's counsel that the "appellants' objection that the District 'is not proceeding in a fair manner' might have more validity had the District attempted to both appeal the State Superintendent's Order and proceed with a hearing consistent with the terms of the Order."

The third and main ground for this appeal is that the School Board was not impartial, and therefore Missy was de-

nied her right to an impartial hearing. The basis for counsel's objection is that because four of the present five members on the School Board who sat in judgment of Missy's expulsion case on May 31, 1989, also collected and decided the evidence on the first expulsion, that the Board had prejudged Missy's case. He argues there is actual bias on the part of the Board in reaching a decision again in the matter which they had previously judged against Missy, and that holding a second hearing automatically creates a high presumption of bias in this case.

I agree that an unbiased tribunal is a constitutional necessity in an expulsion hearing, and maintain that a violation of this right is the denial of due process. Goss v. Lopez, 419 U.S. 565 (1975), Withrow v. Larkin, 421 U.S. 35 (1975), State ex rel. DeLuca v. Common Council, 72 Wis. 2d 672 (1976). The question remains whether the Washington School District Board of Education was biased and prejudiced, in violation of Missy's constitutional rights, on the basis of its prior investigative and adjudicative involvement in the first expulsion hearing.

The leading Wisconsin case on bias, DeLuca, tells us there needs to be support in the record to overcome the presumption of a state tribunal's honesty and integrity. Id. at 687, referring to Larkin, 421 U.S. at 55. We learn from DeLuca, also, that although the appellant is not required to show actual bias, he or she must show special

facts and circumstances to demonstrate that the risk of unfairness was intolerably high. 72 Wis. 2d at 684.

The DeLuca court refers to Larkin in defining two situations "that clearly show such a high probability of actual bias as to be constitutionally intolerable, the first being a situation in which the adjudicator has a pecuniary interest in the outcome and the second where the adjudicator has been the target of personal abuse or criticism from the party before him." Id. at 684. The facts of this case do not fit these categories.

It is conceded that at the first expulsion hearing against Missy, the School Board combined the functions of investigation and adjudication. The court in DeLuca, id. at 684, quoting from Larkin, 421 U.S. at 47, reasons that this combination alone does not meet the heavy burden of showing an unconstitutional risk of unfairness.

> [The objector] must overcome the presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. Larkin, p. 47.

I find no evidence of actual bias in this record. Nor do I find, as another test of failure to exercise impartiality, that the adjudicator Board members were so "psychologically wedded" to their charges that they could not, on the basis of the evidence, fairly decide the matter

under consideration. DeLuca, 72 Wis. 2d at 691. The record indicates that at the second expulsion hearing, the Board submitted no evidence based on its prior investigation. In fact, the members were advised by their attorney at the May 31, 1989, hearing that they could not base their decision at the hearing on any information or evidence other than what was presented that evening. Counsel further instructed the Board that any member who could not make a fair and impartial decision because of preconceptions or strong feelings about the matter should disqualify himself or herself from the case. He also asked that Board members keep their minds open to any dispositional proposals or suggestion from Missy or her parents and that the Board consider those options in good faith.

These instructions and cautions reinforce the interpretation that the Board members were not approaching the second hearing with preconceived ideas or judgments as to facts or dispositions in the matter. The hearing was held, unlike the first one, in open session. The board's own investigative findings from the first hearing were not used at the second hearing. Missy and her counsel were given every opportunity to say what they wanted in Missy's defense, or to have others testify.

The appellants argue that rehearing the same case automatically creates a high presumption of bias in this matter. I find no legal support for this position . Courts address-

ing the issue of a body rehearing a case reach the opposite conclusion.

One such case, NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947), involved the question of whether a hearing examiner could sit again at further hearings on a case where he had recommended findings of fact rejecting certain evidence as not being probative. The Court of Appeals held the examiner should not preside again because it would be unfair to require the parties to try "issues of fact in front of those who may have prejudged them . . . ." 151 F.2d 854, 870 (8th Cir. 1945). The Supreme Court, by unanimous vote, reversed, saying:

> Certainly it is not the rule of judicial administration that, statutory requirements apart . . . a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing.

330 U. S., at 236-237.

Further guidance is provided in Larkin, in which the Court asserted that,

> [W]e should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around. See Cement Institute, 333 U.S. at 702-703; Donnelly Garment Co., 330 U.S. at 236-237.

Larkin, 421 U.S. at 56-57.

Taking a final look at the bias test, the Court in Larkin concluded:

> The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position.

Id., at 57.

In the case before us, as counsel for the Board points out, there is evidence of a change in position by the Board in the second hearing sufficient to rule out an intolerably high risk of bias or prejudgment. Not only did the Board submit no evidence in the second hearing based on its prior investigation, but all of the evidence at the hearing was submitted by Missy herself. There is no issue of the Board attempting to avoid the appearance of having erred, as here there was an obvious admission of the taking of the computer disk containing the confidential information from the district administrator's office.

Further, the May 31, 1989, Order of the School Board expelling Missy differed from the first order by providing her the right to receive credit toward graduation for work completed outside the District. The Board President himself, as quoted from a local newspaper, considered the Board's decision in the second hearing as a "compromise from its earlier decision." I would have to agree.

Based upon my review of the record in this case and the findings set out above, I conclude that the school board complied with all of the procedural and due process requirements of s. 120.13(1)(c), Wis. Stats., and the board's decision was properly based on established statutory grounds.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Michaelene J[redacted] by the Washington School District Board of Education is hereby affirmed.

Dated and mailed this 1 day of August, 1989.

Carl Carmichael for Herbert J. Grover

Carl Carmichael, Executive Assistant for
Herbert J. Grover
State Superintendent of Public Instruction