THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of

JOSHUA S[redacted]

by the D.C. Everest School District Board of Education

DECISION AND ORDER 90-EX-05

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to s. 120.13(1)(c), Wis. Stats., from the order of the D.C. Everest School District Board of Education to expel Joshua S[redacted] from the schools of the D.C. Everest School District for the balance of the 1989-90 school year with the right to be readmitted for the 1990-91 school year upon completion of two conditions. This appeal was filed by Philip J. Freeburg, Joshua's attorney, and was received by the Department of Public Instruction on April 23, 1990.

In accordance with the provisions of s. PI 1.04(5), Wis. Adm. Code, this decision is confined to a review of the record of the school board hearing. The state superintendent's review authority is specified in s. 120.13(1)(c), Wis. Stats. The state superintendent's role is to ensure that the required statutory procedures were followed, that the board's decision was based upon one of the established statutory grounds, and that the board was

satisfied that the interest of the school demanded that the student be expelled.

FINDINGS OF FACT

On March 13, 1990, Roger W. Dodd, principal of D.C. Everest Senior High School, sent Mr. and Mrs. Douglas S[redacted] and Joshua letters advising them that the D.C. Everest Board of Education had scheduled a hearing on March 22, 1990, to consider Joshua's possible expulsion. The letters stated as follows:

> Tuesday, March 13, 1990, you were verbally informed of your suspension from school for repeated violations of school rules. You have failed to obey school board policy relative to the no smoking rule. You are officially suspended from school until a hearing can be held to consider your expulsion from school for repeated refusal to obey school rules.

The March 13, 1990, letters noticing the hearing were sent within the time period required by statute and stated the time and place of the hearing.

The D.C. Everest Board of Education held Joshua's expulsion hearing at the indicated time and written minutes were kept. Joshua and his parents were at the hearing and were represented by legal counsel Philip Freeburg.

Dr. Dodd submitted the administration's evidence supporting the recommendation to expel. The administration's evidence included a written statement by Tom Conrad, a teacher at the high school, reporting the smoking incident in issue, Joshua's academic records and records of previous

offenses. Dr. Dodd noted that the board's policy is that every third and subsequent tobacco offense should be referred to the board for possible expulsion. He indicated that the incident in question was Joshua's fourth offense.

Mr. Freeburg asked for clarification of his assumption that the hearing was only on the fourth offense. Superintendent Makie confirmed that was the case but indicated that Joshua's record indicated a continued failure to follow school rules and that the board had the right to review Joshua's actions that preceded the fourth offense.

Mr. Conrad was not present at the hearing. His written statement reported his having seen Joshua smoking outside of the school building but on school premises. Mr. Conrad taught Joshua and 28 other students in the classroom portion of driver education. Joshua testified that he did not think Mr. Conrad had reason to dislike him.

Joshua testified that he did not go outside and have a cigarette as stated by Mr. Conrad. Mr. Freeburg presented two student witnesses who each testified that they had been in the same general area as Joshua inside the school at the time of the asserted smoking incident. They also each testified that they had not seen Joshua go outside during that time.

Mr. Dodd indicated that Joshua's academic record showed that he had not made satisfactory progress. Mr. Freeburg questioned Joshua regarding improvement in his most recent quarter grades.

The administration read their recommendation into the record which follows:

> At the Board of Education hearing on Thursday, March 22, 1990, Mr. Johansen, Mr. Crump, and I will make the following recommendations regarding Josh S[redacted]'s status as a student at D. C. Everest High School.
>
> 1. Josh S[redacted] should be expelled from school for the remainder of the 1989-90 school year.
>
> 2. Josh can be readmitted in the fall semester of the 1990-91 school year, provided:
>
>   a. He enrolls in a correspondence course from the University of Wisconsin-Extension or in two summer school courses during the summer of 1990. The district will provide up to two hours of tutoring/week to help Josh complete a correspondence course until the end of the school year. The tutoring will take place at home or at school during after-school hours. The district will pay for the correspondence course when Josh successfully completes it.
>
>   Up to 1 1/2 credits of correspondence courses from the UW-Extension will be accepted toward graduation. Approval of the courses should be obtained from the high school principal before enrollment.
>
>   b. He enrolls in a "stop smoking" course.
>
> 3. Josh is not allowed to attend any school activities or be on school property without written permission from the principal.

In summation Mr. Freeburg stated he felt the questions presented to the board were whether the board policy had been violated and if the incident took place.

The board deliberated on the evidence and voted to approve the administration's recommendation by a vote of 3 to 1. The board did not make findings on whether the incident took place, whether there was a repeated refusal or neglect to obey the rules or whether it was satisfied that the interest of the school demands the pupil's expulsion.

On March 22, 1990, subsequent to the hearing, Gerald D. Makie, superintendent of schools, sent letters to Mr. and Mrs. S[redacted] and Joshua. The letters stated that the D.C. Everest Board of Education was taking disciplinary action regarding Joshua in the manner set forth. The letter reiterated the administration's recommendation for action as quoted above. The letter did not state any findings or conclusions regarding the basis for the expulsion or that the interest of the school demanded that Joshua be expelled.

DISCUSSION

School districts are limited purpose municipal corporations and have only such powers as are conferred specifically by statute or are necessarily implied therefrom. Iverson v. Union Free School District, 186 Wis. 342, 353 (1925). A school board's power to expel students derives from s. 120.13(1)(c), Wis. Stats., which establishes certain categories of offenses which may be the basis for an expul-

sion and sets out specific procedures which must be followed in the expulsion process.

In reviewing an appeal of an expulsion decision, the Wisconsin Court of Appeals has stated that the scope of the state superintendent's review is limited by the language of s. 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 in dicta stated 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." It is, therefore, incumbent upon the state superintendent in reviewing an expulsion decision to ensure that the required statutory procedures were followed, that the board's decision is based upon one of the established statutory grounds, and that the board is satisfied that the interest of the school demands the pupil's expulsion.

Counsel for Joshua contends that the hearing notice was inadequate for two reasons. He asserts first that it did not specify the particulars of the alleged conduct in accordance with s. 120.13(1)(c), Wis. Stats., and secondly, that it did not provide notice that Joshua's academic, attendance or disciplinary records were to be the subject of the expulsion hearing.

As I stated in a recent decision, "The notice requirement in a due process proceeding is intended to ensure that the parties are sufficiently apprised of the charges to be

able to adequately defend against them." Missy J. v. Washington School District, Decision and Order No. 165 (8/1/89). In this case, as in that case, I feel that the notice provided sufficient information to enable the student to defend himself against the charge. Joshua was prepared and testified to his whereabouts during the incident. In addition, Mr. Freeburg presented two witnesses who testified regarding Joshua's whereabouts during the time of the incident in question. It is clear from the record that a defense was presented to the specific charge being alleged and that, therefore, sufficient notice was received.

Joshua's second assertion of inadequate notice is also without merit. Joshua's academic, attendance and disciplinary records did not need to be noticed as issues for the hearing because they were not subjects of the expulsion hearing. The board used them as background information on Joshua as a student, not as grounds for expulsion. The expulsion was based upon the fact of Joshua's fourth violation which was adequately noticed.

It is also argued that the expulsion is faulty because the evidence against Joshua was hearsay evidence. It is asserted that it is a violation of due process to base a finding which leads to an expulsion on hearsay evidence. I disagree. In Racine v. Thompson, the Wisconsin Court of Appeals adopted the position that in an expulsion hearing, hearsay evidence of schoolteachers and staff members is admissible. "Moreover, in the absence of an allegation of

bias, we can conceive of no reason why school staff would fabricate or misrepresent statements of this sort." Supra at 664. The hearsay evidence in this case was a statement by a teacher at the school who had had Joshua in a class and against whom no claim of bias was made. I am bound by that case and conclude that there was no due process violation in the use of hearsay evidence.

Finally, it is argued that the board's findings are against the great weight and clear preponderance of the evidence. Allegations as to the credibility or sufficiency of the evidence are beyond the scope of review by the state superintendent. In reviewing the findings of an administrative board sitting as the trier of fact, the Wisconsin Supreme Court has held that the findings of such a body "are conclusive if any reasonable view of the evidence sustains them..." State ex rel. Deluca v. Common Council, 72 Wis. 2d 672, 695 (1976). Therefore, if there is any reasonable view of the evidence which will sustain the D.C. Everest school board's decision, the decision must be upheld. In light of the teacher's evidence that he saw Joshua smoking on school grounds, I find there is reasonable evidence to support the board's decision.

It is the duty of the state superintendent to review expulsion decisions for compliance with the procedural standards set out in s. 120.13(1)(c), Wis. Stats. In reviewing this case I could not find any reference to the statutory basis relied upon by the board in deciding to ex-

pel Joshua or to the board's having found that the interest of the school demands his expulsion. I have interpreted the statute to mean that a district may only expel a student after it has found that the student is guilty of one of the four alternate grounds listed in the statute and that the board is satisfied that the interest of the school 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.

It is clear that in deciding these appeals it is the state superintendent's duty to ensure that all procedural requirements have been followed. Since the record contains no indication that either of the necessary findings was made, I have no choice but to find that the board failed to make them and, therefore, to find procedural error and reverse the board's decision.

CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the school board did not comply with all of the procedural requirements of s. 120.13(1)(c), Wis. Stats., and, further, that based upon the statutory standard of review required of the state superintendent I conclude that the school board's noncompliance constitutes reversible error.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Joshua S[redacted] by the D.C. Everest School District Board of Education is reversed.

Dated and mailed this 22nd day of June, 1990.

Herbert J. Grover
State Superintendent of Public Instruction