THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion

JERRETT N[redacted]

by the Baraboo School District Board of Education

DECISION AND ORDER 91-EX-09

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to sec. 120.13(1)(c), Wis. Stats., from the October 14, 1991 order of the Baraboo School District Board of Education to expel Jerrett N[redacted] from the Baraboo schools until the end of the 1991-92 school year. An appeal dated October 29, 1991, filed by Jerrett's mother, Patsy N[redacted], was received by the Department of Public Instruction on October 30, 1991.

In accordance with the provisions of sec. 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 sec. 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 September 16, 1991, Michael G. Ecker, Baraboo Junior High School assistant principal sent separate notices to Jerrett N■■■■ and to his parents, Daniel and Patsy N■■■■, advising them that the Baraboo School District (hereafter "school board") would be holding a hearing on September 23, 1991 on whether to expel Jerrett from Baraboo Junior High School. The letter stated that the high school administrators recommended he be expelled for engaging in conduct while at school or under the supervision of school authority which endangered the property, health and safety of others in that on:

> Thursday, September 12, 1991, in the morning, Jerrett N■■■■, while at the Baraboo Junior High School, received a pipe bomb from another student, lit the pipe bomb and threw it out the back door of the school where the device exploded.

The notice indicated that the interest of the school demanded Jerrett's expulsion and sought expulsion "for the balance of the 1991-92 school year."

The notice was sent within the time period required by statute and stated the time and place of the hearing. It further indicated the hearing would be open unless the N■■■■ requested it be closed, provided for representation by counsel and, as required, had a copy of sec. 120.13(1)(c), Wis. Stats., printed

on the back. The notice and its service fulfilled the statutory requirements.

The school board held Jerrett's expulsion hearing on September 23, 1991. Jerrett and his father, Daniel, appeared in person and neither was represented by counsel. The hearing was recorded by tape and minutes were taken. A copy of the tape has subsequently been supplied to the department at the department's request. The appeal letter from Mrs. N[redacted] requested an opportunity for the submission of further written argument. That opportunity was provided but the department has received no further written correspondence from either party.

George Maxwell, the president of the school board, presided at the hearing. Other members of the school board were present, as well as District Administrator Kujawa and Assistant District Administrator Ament. At the request of Jerrett, the hearing was closed. Junior High School Principal Gwynne Peterson and Assistant Principal Michael Ecker were both sworn in prior to presentation of the school board's case.

Mr. Ecker testified that on the day in question another staff member told him she had seen two boys digging in K.H.'s duffel bag and removed something suspicious from it, and thought a search would be appropriate. Mr. Ecker, using a key, searched the locker and duffel bag and located what he described to be a five to six-inch metal pipe, squeezed closed at both ends and folded over, with a hole drilled in the middle from which a green wick protruded. He stated he thought it was a pipe bomb, took it to his office and called the local police. While awaiting the

police, he removed K.H. from his classroom and questioned him as to whether he had brought anything inappropriate to school that day. Initially K.H. denied any improper conduct. When presented with the object that had been removed from the locker, K.H. admitted that he had brought two such items to school that day and had given another to Jerrett N[redacted].

Mr. Ecker then separately questioned Jerrett who initially denied doing anything improper that day. After Officer Frye arrived, Jerrett admitted, when shown the object, that he had received a similar item from K.H. and that he had "gotten rid of it" between homeroom and first hour by lighting it and throwing it out the door of the school near the physical education area. He stated he heard it explode before he went to class. The officer searched that area for fragments and found none, and identified the remaining object as a pipe bomb. After finishing this direct testimony, Mr. N[redacted] asked for an opportunity to testify and cross-examine, but was told he could not do this until the school board had finished presenting its case. Principal Peterson then read, nearly verbatim, her prepared memorandum of September 23, 1991 which is part of the record. Attached and incorporated in the memorandum is a listing of some:

> 77 separate disciplinary incidents that necessitated administrative intervention. Twenty of these were incidents where Jerrett was physically aggressive, threatened physical aggression, actually assaulted another person, or behaved dangerously.

The list is four and one-half pages long. The memorandum is largely an argument by the principal that expulsion under all the circumstances is required.

At the conclusion of the principal's testimony, in answer to a school board member's question as to whether Jerrett had been tested for exceptional educational need (EEN), the attorney for the board explained that indeed prior to the incidents of September 12, Jerrett, with parental consent, had been referred by Mr. Ecker for M-team evaluation for EEN on September 3, 1991. He had been so referred in earlier years but his parents had refused. The attorney for the school board correctly explained the inter-relationship between the requirements of sec. 120.13(1)(c), Wis. Stats., and an M-team evaluation and the manner in which the board, if it found the requirements of state law fulfilled, could conditionally expel Jerrett pending the M-team report, and the alternatives possible under the law depending on the M-team report outcome.

After this explanation, Mr. N[redacted] and Jerrett were given an opportunity to cross-examine. There was little if any cross-examination. Jerrett and his father did not object to the list of 77 disciplinary incidents nor to the failure of the school board to indicate in its Notice of Expulsion Hearing that it would rely, in presentation of its case, on any other information than the pipe bomb incident. After the attorney explanation of conditional expulsion and its relationship to M-team findings, Jerrett and his father essentially waived cross-examination of the two board witnesses. Jerrett's father

asked that Jerrett be able to explain what happened. Jerrett and his father were then sworn in.

Jerrett was given an opportunity to explain what had happened. He simply stated that it happened the way Mrs. Peterson had described it. His father then asked him to give more detail and asked leading questions suggesting that Jerrett had not done what he did to endanger anyone, but rather to get rid of the pipe bomb, that he did not bring the bomb to the school, that other kids had coached him to let it explode in the hallway, that Jerrett is sorry for the incident, and that he did not intend to endanger anyone.

Mr. N[redacted] then referred to the long list of earlier incidents and requested and obtained permission to talk about two recent incidents not on the list that involved a particular boy from school but did not occur at school. He briefly discussed these.

Through questions by board members and others, further clarification of the school board's case was made with respect to comparisons of the pipe bomb to a firecracker, the police having clarified that the difference was that this one produced fragments although a search did not locate any, and that the remaining bomb was confiscated and disposed of. Jerrett and his father were given an opportunity to say anything else. There was further discussion of the possible M-team results and the missing of school. The school board went into executive session, made its decision, then came back into closed session and announced its decision to Jerrett and his father as above recited.

The two and one-half page expulsion order dated October 14, 1991 makes the appropriate findings with respect to the notice, the facts of the September 12, 1991 incident, that such conduct endangered the property, health and safety of students and staff at the school, the interests of the district demand the expulsion of Jerrett, and an order of expulsion conditioned upon the findings of the multi-disciplinary M-team evaluation. If Jerrett was found not to have exceptional educational needs or had such needs but the misconduct proven was not related to his exceptional educational needs, he would be expelled for the balance of the 1991-92 school year and an alternative educational program would be provided; if the M-team concluded that Jerrett had exceptional educational needs and the proven misconduct was related to those needs, the expulsion order would be stayed so long as Jerrett participated in the special education program recommended and such order and condition would terminate at the end of the 1991-92 school year.

The balance of the record reflects the M-team reports, considerations, opinions and results. At its initial meeting on September 26, the four members present were split 3-1 in favor of a determination that Jerrett was not EEN at that time. It was pointed out that Jerrett's history of misbehavior at the school had generally involved poor impulse control, poor anger control and physical aggression. The pipe bomb incident did not appear to involve any of those components. The M-team decided to obtain further information and reconvene at a later date.

On the same day, September 26, a psychological evaluation was done by the school psychologist. The two and one-half page report dated October 2, 1991 pointed out that Jerrett was repeating his 8th grade year due to the amount of school he had missed as a result of misbehavior and school suspensions previously. It concluded recommending that Jerrett be considered for placement in the ED program.

The M-team reconvened in a second session on October 23, 1991 with five members present plus a social worker and Mr. N[redacted]. Information was received that Jerrett's public defender had advised that a psychologist in Madison had concluded that Jerrett was "not LD or ED." The M-team voted unanimously in its report dated November 7, 1991 that Jerrett is not EEN primarily for the reason Jerrett's misbehavior generally occurs only in school, not at home nor in the community. There was therefore insufficient information on which to conclude that the severe, chronic and frequent problems occurring at school, not at home or in the community, were sufficient to show that Jerrett be determined to be EEN in the area of emotional disturbance. Effect was thus given to the expulsion order condition related to the finding of non-EEN.

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 sec. 120.13(1)(c), Wis. Stats., which sets forth 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 sec. 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 stated "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." (emphasis added). It is, therefore, the role of the state superintendent in reviewing an expulsion decision to ensure that the statutory procedures were followed.

In this case the record shows that the procedures set forth in sec. 120.13(1)(c), Wis. Stats., were followed and that the school board's decision was based on established statutory grounds.

Jerrett and his parents have not submitted further argument or grounds to contest the school board's expulsion. However, the facts of this case raise an issue which requires a closer look at the rationale behind earlier department cases on the question of the absence in the expulsion notice of the school board's plan to consider a pupil's previous academic, discipline and attendance records. Prior precedent suggests that no such notice is required, either constitutionally or statutorily.

In In the Matter of the Expulsion of Kelly B., Decision and Order No. 100 (8/23/82), the expulsion notice referred to two incidents: giving marijuana to another and smoking marijuana at school during the noon hour. At the hearing, the student admitted two other incidents, one in which she purchased marijuana and gave it to another student in the downtown area of the city, and another instance of admission of possession of marijuana on the high school premises. In referring to the unnoticed possession in the downtown area, in footnote 1, the state superintendent found that appellant "is incorrect in its [her] assertion that she was expelled for such possession. The record, including the board's minutes of its hearing dispels any doubt that there was sufficient evidence of reasonable probative evidence to support the charges contained in the board's notice." With respect to the unnoticed possession of marijuana on the high school premises, footnote 2 stated:

> Because this incident was not included in the Notice it could not be considered in determining the merits of the expulsion, however, it could be considered by the board in determining whether the interest of the school demanded her expulsion.

In In the Matter of the Expulsion of Joshua S., Decision and Order No. 170 (6/22/90), the decision stated:

> Joshua's second assertion of inadequate notice is also without merit. Joshua's academic, attendance and disciplinary records do 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. (p. 7.)

In light of the importance a board may place on prior misconduct, and also because such histories may be serious and lengthy, as here, I think these precedents should be looked at more closely. In neither of these cases was a constitutional, due process fairness, prior notice analysis done. Nor was there discussion that if the required statutory finding that the school board "is satisfied that the interest of the school demands the expulsion," itself in part relies on evidence and consideration of the pupil's unnoticed prior academic, discipline [and attendance] records, indeed the expulsion notice should contain an advance warning to the pupil and his or her parents that such consideration will take place.

It may be helpful to point out that at an expulsion hearing, three discreet decisions must be made: 1) whether the noticed expellable offense has been proven; 2) if an expellable offense has been noticed and proven, should the board expel or not [does the interest of the school demand expulsion]; and 3) if the decision is to expel, how long should the expulsion period be.

What the Kelly B. and Joshua S. precedents seem to say is that since unnoticed prior conduct is RELEVANT to the necessary board finding that the interest of the school demands expulsion, it was not error to receive that evidence. These cases also seem to assume that since department practice is not to review the length of expulsion, so long as there has been adequate proof of one of the four statutory grounds for expulsion, there can be no

prejudice or error if a district may have relied on the unnoticed other misconduct of the student in determining the LENGTH of the expulsion period. These considerations however fail to directly address the issue of simple fairness, the underpinning of constitutional due process analysis and the issue that, assuming relevance for the necessary finding that the interest of the district requires the expulsion, there be advance notice of the evidence to be received to support that finding purely as a statutory matter.

Although the technical rules of evidence do not generally apply in expulsion proceedings, analogies to traditional criminal and civil practice may be helpful. If an expulsion hearing were compared to the criminal process, one would have to combine the trial of the charged criminal offense hearing, with the sentencing hearing to achieve the proper comparison. In nearly all serious criminal cases, these are two proceedings, not one. After conviction at trial, serious criminal cases are postponed for at least a month in order that a presentence investigation may be conducted to inquire into the individual's complete criminal, educational, employment, and social background, sec. 972.15, Wis. Stats. Advance disclosure of the contents of the investigation to the defendant and his or her attorney is mandatory, sec. 972.15(2), Wis. Stats. Courts have held that resentencing may be appropriate if there has been insufficient time for a defendant to prepare to rebut allegations in the presentence report, U.S. v. Robin, 20 Cr L 2123 (2nd Cir. 1976). Waddell v. State, 24 Wis. 2d 364, 369, 129 N.W.2d 201 (1964),

Gardener v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.E.2d 393, 402-404 (1977).

In civil cases, liability is commonly tried along with damages, but in complex cases, even these two issues are tried separately. Even in cases where they are tried together, the jury will first answer questions with respect to liability and go on to damages only when liability has been determined. The usual manner is by written special verdict, taking one question after the other and moving to subsequent questions only if permitted by the court's instructions, sec. 805.12(1), Wis. Stats.

It is not difficult to see that if care is not taken to distinguish between the three types of issues being considered in an expulsion hearing, how there may be confusion. Since prior academic, disciplinary and attendance records of a student may indeed be relevant, not to the charged offense, but rather to the mandated finding that the district's interest requires expulsion, and also to the length of expulsion, these comparisons suggest prior notice should be given. These considerations strongly suggest that better practice calls for every Notice of Expulsion to include a short provision, in substance, as follows:

> PLEASE TAKE FURTHER NOTICE that in considering whether to expel, and if so for how long, the board may consider the student's complete prior disciplinary, academic and attendance record. These records are available for review prior to hearing.

As a legal matter, advance notice of conduct to be considered as a basis for depriving a child of a serious

constitutional right, goes to the heart of procedural due process. In other words, it is difficult to understate the significance of this concept legally. As a practical matter by comparison, it is an insignificant imposition on a school district to add such a warning on the expulsion notice. In other words, the risk of error from lack of prior notice is great for the pupil, while the task of providing such notice by the district is minimal.

In this case, I find it is unnecessary to reverse the decision of the school board for the following reasons: 1) there was no objection to the practice by Jerrett and his parents; 2) Jerrett and his parents, when receiving notice of the prior conduct at the hearing, did not express surprise nor question the accuracy of any of the 77 incidents nor their characterization with respect to aggression, etc.; 3) there has been no suggestion let alone proof of prejudice that any of the prior misconduct information was erroneous and was relied on (although certain constitutional and statutory analyses might presume prejudice/1); and 4) the district was following department precedent.

The department has recently made available sample forms for Notice of Expulsion and Findings and Order of Pupil Expulsion, the former of which contains the above referenced recommended advance notice provision. The districts are encouraged to review these sample forms and consider their use in future cases.

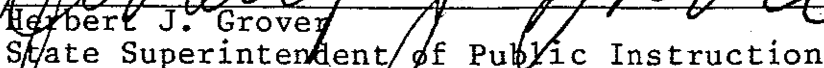
CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the school board complied with all of the procedural requirements of sec. 120.13(1)(c), Wis. Stats., that the board's decision was properly based on established statutory grounds and prior precedent, that there is no prejudicial error demonstrated on this record, and that the board found that the interest of the school demanded that the student be expelled.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Jerrett N[redacted] by the Baraboo School District Board of Education is affirmed.

Dated and mailed this 23rd day of December, 1991.



Herbert J. Grover
State Superintendent of Public Instruction

Footnote:

1/ In *In the Matter of the Expulsion of Kevin M.*, Decision and Order No. 181 (9/13/91), the state superintendent concluded that the board there did in fact rely on the unnoticed prior disciplinary conduct of the student in making its decision on the second question, that is, whether or not to expel. However, the State Superintendent further found that this unnoticed prior disciplinary information was in part erroneous and therefore reliance upon it by the board on this second question was in fact prejudicial. *Kevin M.* is thus factually distinguishable from both *Kelly B.* and *Joshua S.* Because *Kevin M.* is factually distinguishable, the sentence on page 7 of that decision which reads "To the degree that case [*Joshua S.*] is contrary to the ruling in this case, *Joshua S.* is hereby modified," is hereby withdrawn as unnecessary to the result and shall have no effect.