THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of ERIC P[redacted] by the Tomah Area School District Board of Education	DECISION AND ORDER 93-EX-08

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 order of the Tomah Area District Board of Education to expel Eric P[redacted] from Tomah High School from on or about April 15, 1993, through the first semester of the 1993-94 school year. This appeal was filed by Attorney David S. Hellman on behalf of Eric's parents, Dennis and Janice P[redacted] and was received by the Department of Public Instruction on June 18, 1993.

In accordance with the provisions of sec. PI 1.04(5), Wis. Adm. Code, this Decision and Order 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 school board's decision was based upon one or more of the established statutory grounds, and that the school board was satisfied that the interests of the school district demand that the student be expelled.

FINDINGS OF FACT

The record contains a Notice of Hearing from School District Clerk Gary Grovesteen, Tomah Area School District, which indicated that an expulsion hearing was to be held on April 13, 1993. The record also contains an Affidavit of Mailing by certified mail showing timely separate service of the notice by mailing dated March 24, 1993, upon Eric and his parents. The notice properly advised of the time and place of the expulsion hearing, and that the issue would be whether Eric should be expelled. There was no indication of what the possible period of expulsion might be. It also stated that Eric and his parents had the right to be represented by an attorney, the right to present witnesses and to confront and cross-examine those testifying at the hearing with the board, and the right to a closed hearing. It noted Eric's privilege against self incrimination. The notice did not note the board's possible consideration of the pupil's complete disciplinary and academic records and the opportunity to review those prior to hearing.

The notice stated the grounds for expulsion as the engaging in conduct while at school or while under the supervision of school authority which endangered the property, health or safety of others, to wit:

> On or about March 17, 1993, Eric M. P[redacted] while at the Tomah Senior High School, did receive from another student and possess while on school property a .45 caliber semi-automatic pistol and two clips loaded with live ammunition.

The hearing was accordingly held before the board in closed session on April 13, 1993. Eric and both of his parents participated without counsel. The district's case was presented by Attorney Jay S. Carmichael. The administration offered evidence through a single witness, the assistant principal at Tomah High School, Timothy Leibham.

Mr. Leibham testified that on March 17 he had received information from students indicating Eric had been given a gun that day by another student on school premises. Since Eric had gone home ill, Mr. Leibham waited until the next day to interview Eric, although as the record later reflects, prompt action was taken by junior high school staff to locate and secure the gun. In his meeting with Mr. Leibham Eric admitted he had, before the start of school on March 17, received the .45 caliber semi-automatic pistol with two loaded clips and holster from B.L.N. B.L.N. was an intermediary who had received the gun from K.W.R. on the school bus to give to Eric. In the interview Eric said he did not know why K.W.R. wanted to give him the gun but that K.W.R. had given other things to other students as well. Eric admitted he knew it was illegal to have the gun at school and that he could be expelled if caught. Eric said he considered bringing it to the office but thought if he did so he could get in more trouble. Because he had become ill, Eric had, prior to receiving the gun, called his mother to pick him up from school. As a result, while Eric took delivery of the gun outside the school building but on school property, he did not possess the gun on the bus or within the school. When asked by Mr. Leibham what he would have done with the gun had he not become ill, he said he could have kept it all day at the school and taken it home or would have thrown it away somewhere.

Prior to the conclusion of Mr. Leibham's direct examination, Eric's father brought up a three and one-half page typewritten statement Eric had given the police dated March 23, 1993. This document had been prepared by Eric's father based on his conversations with Eric. It was later marked, read by Eric, signed again by Eric in the presence of the board, and received in evidence.

Mr. Leibham's continued direct examination revealed his investigation on March 17 and the information he had obtained from other students. He had determined that Eric had been waiting for delivery of the gun, that a junior high student originally had the gun, and that the exchange had been anticipated for a week or less. Mr. Leibham indicated he had not yet read the written statement referred to, that there was another aspect of the matter that was "perhaps a little different," and that he had heard Eric may have been planning to sell the gun to another student for $100 or trade it for a Chicago Bulls jacket. He indicated neither of those two acts took place because on the night of March 17 a staff person from the junior high school had contacted Mrs. P[redacted] who confronted Eric and confiscated the gun. Mr. Leibham referred to a conversation in the physical education boys' locker room, overheard and reported by other students, which was part of the basis for this additional information.

Mr. Leibham went on to recommend a period of expulsion minimally for the remainder of the school year because of the danger of involvement with the gun on school property, and in referring to the consideration of selling it to another, "perhaps longer."

Mr. Dennis P[redacted] conducted the cross examination of Mr. Leibham and essentially directed the defense. Mr. P[redacted] is a police officer and the record reflects his familiarity with cross examination techniques and hearing processes. From that point forward, mostly at Mr. P[redacted]'s direction, the focus on the case was on the uncharged possible conduct that Eric may have considered selling or trading the gun. In response to questioning Mr. Leibham further explained the sources of his information, what he had

asked and not asked, the bases for his beliefs, whether there may have been a plan to sell the gun which was later changed, that Eric may have thought about selling, the lack of notice of that charge, Mr. Leibham's personal feelings, interaction and lack of interaction and information sharing by the police and juvenile courts with school authorities, Eric's state of mind and proof or lack of proof of that, that Mr. Leibham's recommendation was only that, a recommendation, and that the length of expulsion was a board decision. During this cross examination, Mr. P[redacted] announced his stipulation to the offense as charged--possession of the gun with the ammunition on school property.

Attorney Carmichael reminded the board it could expel for a period longer than that recommended by the assistant principal. Mr. P[redacted] indicated he was not playing games, that (since the allegations regarding selling or trading were contained, denied, and directly addressed in Eric's written statement dated two weeks earlier) the charges may not be new to him but he questioned their fairness with respect to his son.

Attorney Carmichael also reminded the board that the punishment must be based on proven facts and the difference between the assistant principal's beliefs and proof.

Mr. P[redacted] asked Mr. Leibham whether he had personal knowledge of what disposition of the gun Eric intended to which Mr. Leibham answered: "No." However, he pointed out lack of detail between answers Eric gave him in his interview March 18, 1993, and information later given to police authorities. Mr. Leibham raised issues of whether Eric was lying, and whether even now the whole story was known and that this makes the matter more difficult.

The school administration placed the written statement into evidence and rested. The statement provided much more detail of the transaction than admitted to Mr. Leibham by Eric as described in Mr. Leibham's testimony. It states how K.W.R., prior to March 11, told Eric and others on the bus that he was going to steal a car from a named individual; that K.W.R. met Eric and his brother at their driveway and showed them the gun; and that Eric held the gun and was warned it was loaded; and that when asked where he got it, K.W.R. stated he had stolen it from a person's house. K.W.R. then showed them a stolen knife. When a car approached, K.W.R. drove off. The next day on the bus, Eric and his brother saw the car they believed K.W.R. had stolen and commented to B.L.N. and his brother about the car, the gun, and the knife. It was then that Eric told B.L.N. he wanted the gun. The next week B.L.N. told Eric he had seen K.W.R. on the bus with a gun and four knives. B.L.N. showed Eric one of the knives K.W.R. had given him. B.L.N. said K.W.R. had given knives to some of the boys on the bus and that K.W.R. had said the gun was for Eric. Eric told B.L.N. he would not be riding the bus mornings because of early baseball practice, but that if K.W.R. brought the gun on the bus again, B.L.N. should get it from K.W.R. and give it to him. On March 17, 1993, B.L.N. found Eric in the cafeteria after pre-school morning baseball practice and asked him outside. Eric was ill and had called his mother to pick him up. Once outside, B.L.N. opened his bag, took out his gym clothes, and handed the bag which contained the gun, holster, and two loaded magazines to Eric who placed them in his duffle bag. Eric then sat on the bench until he was picked up by his mother. He put the gun and magazines in a shoe box in his bedroom from which he retrieved them when questioned by his mother after she received

a call from the middle school after work that day. The final two paragraphs recite and deny allegations the police were following up regarding sale or trade of the gun.

Mr. P[redacted] asked the statement be submitted, had his son read it and sign it, and took his son through a series of questions which yielded denials on the subjects of plans to sell or trade the gun, whether he possessed the gun in a school building or made threats to use it, etc. Evidence was presented as to his academic record, lack of prior formal discipline except for being called to the office once, his state of mind, that this would never happen again, and that he was sorry.

Cross examination of Eric elicited information such as his having been aware the gun was stolen, that he had arranged for B.L.N. to obtain it and deliver it on his behalf, that he just liked guns, that he had asked his father for one for his own use (target practice) but his father had refused, that he had heard the rumors at school regarding possible sale or trade of the gun but these were untrue, about his grades ("I should be an 'E' student"), sports, and football, and that the amount of time he might be expelled "was wide open."

Mr. P[redacted] indicated that he had conducted his own investigation separate from the police, and that he had checked with "his contacts" and neither he nor the police had uncovered any verifiable evidence that Eric had intended to sell or trade the gun. Mrs. P[redacted] spoke briefly, and Mr. Leibham, in response to a question, stated he first heard about the entire matter when a student asked him "Is Eric expelled for selling the gun." In answer to a question, Eric stated the gun was a gift, and K.W.R. did not request or receive money from Eric for the gun.

In closing arguments, Attorney Carmichael indicated the board should weigh all factors. He referred to the administration's recommendation with respect to the remaining part of this school year and the option of "next year or any portion" of it. Mr. P[redacted], while agreeing with Mr. Leibham as to the seriousness of the matter, asked the board to balance its interests and those of Eric, but to consider Eric's best interests. He indicated the incident could have been much worse, that the penalty must leave room for other students who might do more by way of acting out, that mere possession was involved here, that there was evidence of mitigation in the immediate confession of Eric when interviewed by school authorities, that more than a slap on the wrist was called for, that he had already seen to it that Eric would not be continuing in sports, and that with the range of alternatives available to the board, expulsion should not be the outcome. Attorney Carmichael indicated the board would go into executive session, decide the matter, and provide written notice within two days. At the parents' request an arrangement was made to provide verbal notice of the decision the next day.

The record contains an Order dated April 15, 1993, expelling Eric for the period stated above. Attached to the order is a two and one-half page board resolution reciting the board findings including that the interests of the school demand Eric's expulsion. Also present are an Affidavit of Mailing and return receipts showing separate service of the order on Eric and his parents.

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 High School Dist., 186 Wis. 342, 353, 202 N.W. 788 (1925). A school board's power to expel students derives from sec. 120.13(1)(c), Wis. Stats., which establishes certain categories of offenses which may be the basis for an expulsion 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 to that set out in sec. 120.13(1)(c), Wis. Stats. In Racine Unified School Dist. v. Thompson, 107 Wis. 2d 657, 667, 321 N.W.2d 334 (1982), the court of appeals *in dicta* 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." Id. It is therefore incumbent upon the State Superintendent in reviewing an expulsion decision to ensure that the required statutory procedures were followed, that the school board's decision is based upon one of the established statutory grounds, and that the school board is satisfied that the interests of the school district demand the pupil's expulsion.

In reviewing the record in this case I find that the Tomah Area School District complied with all of the applicable procedural requisites. I am, therefore compelled to affirm the expulsion decision.

The notice of appeal alleges as the single reason for appeal that the notice of expulsion did not refer to the allegation that Eric planned to sell the gun to another

student, that Eric "was unprepared to deal with these new issues and as a result he did not have the opportunity to fully address the accusation." Briefs submitted on behalf of Eric argue the notice was insufficient and violated due process since it failed to "specify the particulars of the alleged conduct," contrary to sec. 120.13(1)(c), Wis. Stats., and evidence was received concerning possible intent to sell the gun. Additionally, Attorney Hellman presented information on appeal on behalf of Eric and his parents that B.L.N., the intermediary who obtained the gun and ammunition from K.R.W. on the school bus, brought them into school, and delivered them to Eric on school property, was expelled only to the end of the present term, and accordingly the expulsions of both Eric and K.R.W. for an additional semester were excessive.

Attorney Hellman argued in part:

> ". . . there was never any notice given that this [possible gun sale or trade by Eric] would be brought up at the hearing. This was the first that the P[redacted]s or Eric had heard of this accusation from the School Board.
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> . . .
>
> Mr. Leibham turned what was very poor judgement on the part of a student into a large scheme to sell guns in the high school."

P[redacted]' Brief-in-Chief, pp. 4 and 5. (Emphasis added.)

In partial reply, the board has pointed out that B.L.N.'s expulsion hearing was held first, and finally ruled upon prior to Eric's, and that the board had more information available to it, particularly that provided by Eric's own written statement, when it determined the length of expulsion appropriate for the other two students.

First, with respect to the failure of the notice to refer to possible sale or transfer of the gun by Eric, I agree with the Eric and his parents that a large part of the hearing

dwelt on this point. I also agree that the record shows this "other incident" to be just an allegation which was not sufficiently proven and not admitted to. Nevertheless, under all the circumstances in this record, I do not find this to be reversible error. In In the Matter of the Expulsion of Jerrett N. by the Baraboo School District, No. 183, December 23, 1991, the State Superintendent at page 11 outlined the three distinct issues to be determined in every expulsion case: 1) Whether the noticed expellable offense has been proven; 2) if so, whether the board should expel; and 3) if the decision is to expel, for how long. It was further pointed out how the expulsion hearing thus combines in one hearing what in the partially-analogous criminal process arena usually requires two hearings: Trial and sentencing. That case emphasized the importance of advance notice to expulsion hearing participants of anticipated use or reliance upon prior academic and disciplinary records and conduct of the pupil. While Jerrett N. is distinguishable from this matter in that there is unnoticed alleged contemporaneous conduct involved here, the necessary sensitivity to advance notice is similar. On the other hand Jerrett N. is similar to this matter in that even though no advance notice was provided there, because of the totality of the record and facts there, as here, no error was found.

Perhaps the most significant point in this matter is that there is no evidence the board used or relied upon the "possibility" that Eric planned to sell or trade the gun to another student. In In the Matter of the Expulsion of Kevin M. by the Oak Creek-Franklin School District, No. 181, September 13, 1991, the State Superintendent found that "the record is replete with examples of the fact that the board considered and relied on Kevin's prior disciplinary history in deciding whether or not to expel." Further, the board's counsel

there conceded at hearing and on appeal that the board "used" the information about a prior unnoticed suspension of Kevin, later shown to be untrue, in determining the severity of penalty to impose. Prejudice was demonstrable there where it is not here.

Here, both sides fully ventilated the issue. Mr. Leibham admitted he had no personal knowledge and only believed it was possible Eric planned to sell or trade the gun. The legal significance of whether Eric knew for sure this issue would arise before the board or first heard of the accusation from the board only at the board hearing and not in the notice, is lessened somewhat by the information contained in Eric's own written statement authored two weeks prior to hearing. The statement's first paragraph recites that Officer Gadosik interviewed Eric March 17, 1993, and that later the officer called Eric asking him to re-think what he had already said and to talk to his father to see if he wanted to add to or change his statement. This record does not contain Eric's first statement to Officer Gadosik. The first paragraph of the written statement goes on to recite the officer's belief that Eric had received the gun for the purpose of selling it to someone else. The statement does not reveal the basis for the officer's belief. As indicated above, the last two paragraphs are a detailed denial of such a plan.

The record shows Attorney Carmichael contemporaneously repeatedly reminding the board during the hearing of the limitations of Mr. Leibham's evidence on this point. In addition the expulsion order recites, in contrast to the record and order in Kevin M., that the receipt and possession of the gun and ammunition on school grounds "constitute the entire basis" for the board's determination here. Thus while it is argued that it is "impossible for us to determine what the board was thinking or relying on when it made

its decision," this is really a comment about the difficulties of ever proving a mental element. Eric's denial testimony, his father's cross examination of Mr. Leibham highlighting the limitations of proof on the subject, and Attorney Carmichael's admonitions to the board in the same vein all combine to suggest little likelihood of board reliance upon this area. I find that this record does not clearly show the board improperly relied on the unnoticed but unproven sale and transfer evidence. I also note, as a general matter, that though difficult, it is not always "impossible" to show such improper consideration, as was demonstrated in Kevin M..

Further, were error to be found, the record remanded, and the case reheard, it is not at all clear that either side could or would seek to prove more than they sought to prove here. Eric's father did not ask the names of the students who provided the information to school authorities nor did he seek a postponement--the usual procedural remedy for a party claiming prejudice or even technical "surprise" at disclosure of an unanticipated and unnoticed line of inquiry. Under all the circumstances here, while the better and indeed recommended practice would be to provide advance notice where a district expects to be able to prove intent to sell or transfer a weapon or other contraband, I find is no reversible error.

Secondly, it is argued that the period of expulsion is excessive in general and in particular when contrasted to the lesser period given the intermediary, B.L.N.

Generally the Department has found that the proper duration of expulsion is a matter left to the discretion of the board. Ricardo S. by the School District of Wisconsin Rapids Board of Education, No. 145, September 5, 1986, and Jesse K. by the School

Board of Joint District No. 2 of Sun Prairie, et al., No. 131, June 17, 1985. The Department recently confirmed that on certain facts a board may expel for a period constituting the student's entire constitutional entitlement. Brandon H. D. by the DeSoto Area School District, No. 206, May 3, 1993, p. 6. Attorney Carmichael reminded the board during hearing that it could expel for a period longer than that recommended by the school administration. The record here was fully developed, both with respect to the serious nature of the misconduct as well as the academic and disciplinary record of the pupil. I find no reason why the general rule should not apply.

Lastly, the Eric and his parent's argue that because B.L.N. received an expulsion only to the end of the current school year, Eric should also have received that length of expulsion. They argue that B.L.N. transferred the gun and ammunition from one pupil to another and possessed it on the bus, in the school building, and outside the building on school property. They infer that B.L.N. is at least as culpable as Eric or that Eric is no more culpable than B.L.N. The board responded that they had less information when B.L.N.'s case was heard the day before Eric's and infers a) that they did not then have Eric's written statement with its much greater detail than Mr. Leibham's investigation had uncovered, and b) had they had that information, B.L.N. would have received a lengthier expulsion.

Assuming the State Superintendent has discretion to review and modify the length of an expulsion, I would not exercise that discretion on this record. In light of the fact that as a general rule this agency has not reviewed the lengths of expulsions but has left that issue to the sound discretion of local school boards, every inference in favor of the length

of expulsion should be indulged. The full hearing records in B.L.N. and K.W.R. are not before me thus an exact comparison is not possible. (Compare Ocanas v. State, 70 Wis. 2d 179, 233 N.W.2d 457 (1975), in which two brothers jointly committed a crime for which one judge sentenced the brother arguably more culpable to three years and another judge sentenced the other brother to 20 years, where the records of both cases were before the trial and supreme courts and no error was found.) The record here convincingly shows that the administration received new, more detailed information about Eric and the other two boys' conduct through Eric's written statement than it possessed prior to the hearing in this case. It is thus fair to conclude, in agreement with the inferences suggested by the district's position, that B.L.N. was fortunate--his case was heard first when the district had less information about the planning and detail of involvement of the boys, which arguably support a more lengthy period of expulsion.

In addition there are other reasonable bases upon which the board could rest a decision to impose the length of expulsion it did upon Eric. First, it could have determined Eric was more forthcoming to the police than he was to Mr. Leibham and could have given that weight. Second, although unlikely here, at least hypothetically it may have determined to be lenient to B.L.N., perhaps because of other background, academic, disciplinary, or other bases distinguishing his disposition from Eric's under the totality of the circumstances. In other words, individuals are different. The same violation may call for the same punishment in different individuals but it need not as a matter of law. A multitude of variables may come into play when rendering a decision on length of expulsion. Here, however, the violation is not the same. The board may have

believed an intermediary is less culpable than an initiator or the ultimate recipient who involved the intermediary in transferring the property from its origin to its destination.

On the totality of this record I find no basis on which to alter the Departmental practice of not reviewing the lengths of expulsions imposed by districts.

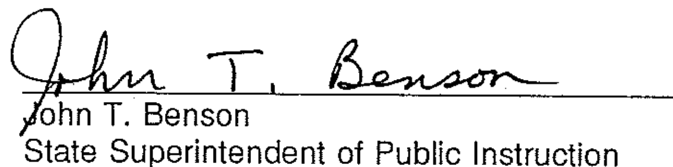
CONCLUSIONS OF LAW

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.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Eric P[redacted] by the Tomah Area School District Board of Education is affirmed.

Dated this 12TH day of August, 1993.



John T. Benson
State Superintendent of Public Instruction