THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of LEO P[redacted] by the Whitewater Unified School District Board of Education	DECISION AND ORDER 97/98-EX-13

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 December 8, 1997 order of the Whitewater Unified School District Board of Education to expel the above named pupil from the Whitewater Unified School District from December 4, 1997 through November 9, 1998. This appeal was filed by the pupil's attorney and was received by the Department of Public Instruction on February 4, 1998.

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 interest of the school district demands that the student be expelled.

FINDINGS OF FACT

The record contains a letter entitled "Notice of Expulsion Hearing" dated November 26, 1997 from the district administrator of the Whitewater Unified School District. The letter advised that a hearing would be held on December 3, 1997 which could result in the pupil's expulsion from the Whitewater Unified School District. The letter was sent separately to the pupil and his parents by certified mail. The letter alleged that the pupil 1)engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others; 2) while not under the supervision of a school authority, engaged in conduct which endangered the property, health or safety of others at school or under the supervision of a school authority; and 3) repeatedly refused or neglected to obey school rules. The letter specifically alleged that on November 5, 1997 Leo, a tenth grade student at Whitewater High School, was involved in the purchase of marijuana, with intent to deliver to other students; provided drugs for other students while truant from school; leaving the building and missing a class or study hall without securing a permission to leave the building with a pass from the office; absence without a valid or approved excuse from assigned classes and study halls; smoking, chewing or possessing tobacco or smoking paraphernalia within the building, on school grounds, at any school sponsored event, or at any place during the regular school day; and returned to school under the influence of illegal drugs. The Notice of Expulsion hearing also advised the pupil of his statutory rights as listed in sec. 120.13(1)(c), Stats. Minutes of the school board expulsion hearing are also part of the record.

The hearing was held in closed session on December 3, 1997. The pupil, and his parents appeared at the hearing represented by Attorney Frank Schiro. At the hearing the school district

administration presented evidence concerning the grounds for expulsion. The pupil and his parents were given the opportunity to present evidence, to cross-examine witnesses and to respond to the allegations.

After the hearing, the school board deliberated in closed session. The board found the pupil did engage in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others and that the pupil repeatedly refused or neglected to obey school rules. The school board further found that the interests of the school demand the student's expulsion. The order for expulsion containing the Findings of Fact and Conclusions of Law of the school board, dated December 8, 1997, was mailed separately to the pupil and his parents. The order stated Leo was expelled from December 4, 1997 through November 9, 1998.

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 District.*, 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 District 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.* In a related context, the court of appeals ruled this dictum has now become "embedded in Wisconsin school law." *Madison Metropolitan School District (Lenny G.) v. Wis. D.P.I.*, 199 Wis. 2d 1, 543 N.W. 2d 843 (1995). 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.

The appeal letter and brief raise several issues which require consideration. First, the pupil challenges the sufficiency of the evidence. In challenging the sufficiency of the evidence, the pupil objects to the quantum of evidence produced to prove violations of other school rules; evidence of the stop and seizure of him and the statements made by him to the police and school officials; the sufficiency of the evidence which identified the substance as marijuana; the evidence that he used marijuana; and the use of hearsay to form the basis of the board's decision. Second, the pupil alleges that the use of "extraneous information" at the hearing was in error and prejudicial. Third, the pupil contends that the findings of the board were defective. Lastly, the pupil asserts he was subject to "selective prosecution" and thus his was an unjust expulsion.

I will first address the pupil's arguments regarding the sufficiency of the evidence to support the expulsion decision by the school board. It has been repeatedly held that arguments concerning the sufficiency of the evidence are generally beyond the scope of review. *Brent S. v.*

Mondovi School District Board of Education, Decision and Order No. 290 (May 23, 1996), *Brad A. v. Boyceville Community School District Board of Education*, Decision and Order No. 233 (June 29, 1994), and *Taiwan O. W. v. Kenosha Unified School District Board of Education*, Decision and Order No. 186 (April 7, 1992). Further, a school board's findings will be upheld if any reasonable view of the evidence sustains them. *Daniel A. v. Mauston School District Board of Education*, Decision and Order No. 324 (May 8, 1997) *Courtney R. v. Germantown School District Board of Education*, Decision and Order No. 278 (March 21, 1996) and *Michael Ryan H. v. Clinton Community School District Board of Education*, Decision and Order No. 222 (March 10, 1994).

The administration presented evidence of Leo's misconduct through Assistant Principal Mike Cipriano. Mr. Cipriano testified that at about noon, on November 5, 1997, he and Police Officer Dave Haberman met to discuss an article regarding the extraction of codeine from over the counter medications for the purpose of gaining a "euphoric" state that Leo had left behind in a classroom the day before.[1] Before meeting with Mr. Cipriano at noon, Officer Haberman observed a group of kids, including Leo, who were having an intense conversation and then left for lunch together. This raised Officer Haberman's suspicions. Officer Haberman saw a couple of the kids from this group return to school, however, he did not see Leo or several other return. Officer Haberman reported this information to Mr. Cipriano at the noon meeting. Mr. Cipriano then checked Leo's attendance and found that he was not in his fifth hour class as scheduled. Mr. Cipriano and Officer Haberman proceeded to attempt to locate Leo by going to his home. After getting no response at Leo's home, Cipriano and Haberman went to McDonalds. As they turned

[1] A copy of this article, as well as a essay apparently written by Leo about legalizing marijuana entitled "An Ode to an Herb", were submitted to the board.

onto Elizabeth Street, they observed Leo and five other students walking on Elizabeth Street towards the high school. They stopped the students on the street. Three students were told to go directly to school, three students, including Leo, were transported to school in the squad car. With consent, Officer Haberman searched each student before he or she got into the car. When he searched Leo, he found a bag of suspected marijuana. As he pulled out the bag, he said "Leo, you've got some marijuana!" Leo replied "yeah" and got into the back of the squad. Each student was searched more thoroughly by Officer Haberman when they arrived at the school.

Upon return to the school, the students were questioned individually. The students admitted they and three others (nine total) were at Leo's hose on the back porch. A couple of students admitted smoking cigarettes and a couple admitted going into the house for various reasons. Three of the students left Leo's house and returned to school in time for their class. The remaining six students went to the gas station and McDonald's.

As observed by Mr. Cipriano, Officer Haberman performed a field test on the substance found on Leo. It tested positive for marijuana. After the marijuana was tested, Mr. Cipriano and Officer Haberman continued questioning the six students. One student indicated that Leo had some marijuana and that they had all taken a couple of hits of the marijuana. Upon questioning the five students excluding Leo, four of the five agreed that Leo told them on the way to his house that he had some marijuana. That they went to Leo's house to smoke the marijuana. That Leo supplied the marijuana, made a pipe from tin foil, lit the pipe and began to smoke the marijuana and pass it around the group. The pipe was refilled once by Leo. Leo went into the Express Lane alone and attempted to use his UW-W ID to buy cigarettes for another student back at school. Mr. Cipriano testified that he believed these students to be truthful as they were

separated during the entire time of the interview and were consistent on these points. After getting this information, Mr. Cipriano attempted to notify Leo's father of the situation, however he was unable to speak to him. Leo's father did come to the school at approximately 3:00 pm.

When Leo's father arrived, Mr. Cipriano and Officer Haberman resumed questioning of Leo. Leo corroborated the information elicited from four of the five students as listed above. Leo admitted that he got the marijuana from another student in his fourth hour Geography class The deal had been set up on November 3 and delivery took place on November 5 at school. Leo admitted to buying cigarettes for other students in the past using his UW-W ID. He also admitted he had gotten high with some other students when he was truant the previous week.

Mr. Cipriano further testified that based upon his investigation he came to the conclusion that Leo 1)purchased drugs at school, 2) told other students that he had drugs and that they could go to his house to get high, 3) created a tinfoil pipe for the purpose of smoking marijuana, 4) provided drugs to other students while truant from school, 5) encouraged other students to be truant form school, 6)consumed drugs during the school day while truant from school and 7) previously consumed drugs while truant from school.

In addition to violating the school rules regarding drug purchase, delivery and use, Mr. Cipriano also indicated that Leo's truancy from 5th hour was a violation of school rules. Upon questioning by the pupil's attorney, Mr. Cipriano indicated that during the search on November 5, Leo had a cigarette lighter and that this violated the school rule regarding smoking paraphernalia.

Mr. Cipriano also testified that Leo was truant from 5th period one day during the previous week. He further addedthat Leo was found in possession of some liquids in a Tupperware container that were suspected of being related to the article regarding the extraction

of Codeine. Board member Messmer indicated that information about this substance was irrelevant to the charges facing the board. The pupil's attorney, however, disagreed and argued that it was material. Leo's attorney also asked Mr. Cipriano about Leo's behavioral records. Mr. Cipriano responded with information about being truant on November 5, during 5th hour. Mr. Cipriano also distributed information to the board relating to Leo's behavioral and academic records at the school. Dr. Negley, district administrator cautioned the board that these records do not form the basis for the expulsion but that they are to be considered for context and to show that Leo did not have a special education need.

The pupil presented a urinalysis report of a urine sample taken from Leo on November 10, 1997 which was prepared by Dr. Kenneth Kidd. This report was negative for amphetamines, barbiturates, benzodiazepine, cannabinoid, cocaine, opiates and phencyclidine. The report also included Dr. Kidd's conclusions that there was no significant cannabis (marijuana) use after November 1, 1997 to November 3, 1997. Dr. Kidd did not testify. The pupil's father and mother addressed the board airing there concerns about the discipline proposed, circumstances of students harassing their family and home and the academic program at the high school. Leo did not testify as advised by his attorney due to pending juvenile court matters.

There was sufficient evidence produced at the hearing to support the board's conclusion that Leo was guilty of 1) involvement in the possession of, purchase and with intent to deliver to other students, drugs while on school grounds, 2) Absence without a valid or approved excuse from assigned classes and study halls and 3) possession of smoking paraphernalia within the building. Evidence of these violations was presented through Mr. Cipriano's testimony which included his own observations as well as statements attributed to Leo and corroborated by other

students. These violations constituted a repeated refusal or neglect to obey school rules and was conduct while at school or under school authority which endangered the property, health or safety of others.

The pupil challenges his search, seizure and interrogation. This matter was not raised at the hearing. Even if it had been raised at the hearing, it was not improper for the school board to rely on the evidence that resulted from the stop, search and interrogation of the pupil. Expulsion hearings are not criminal proceedings. The exclusionary rule, vaguely referred to by the pupil applies to criminal proceedings, not administrative expulsion hearings. *See e.g. In the Interest of Thomas J.W.*, 213 Wis. 2d 264, 276 (Ct. App. 1997); *State v. Carpenter*, 197 Wis. 2d 252, 541, N.W. 2d 05 (1995); *State ex re. Struzik v. DHSS*, 77 Wis. 2d 216, 221 (1977). Furthermore, no evidence was produced at the hearing to suggest that the procedures used were contrary to the Fourth, Fifth or Sixth Amendment. Searches conducted by school officials or police officers who are acting "at the request of or in conjunction with school officials" are subject to a "reasonableness" standard rather than a "probable cause" standard. *State v. Angelia B.*, 211 Wis. 2d 140, 546 N.W. 2d 682 (1997). Mr. Cipriano and Officer Haberman acted reasonably. There was sufficient reason to suspect that Leo and the others were truant from class, thus it was reasonable to stop them when they did. It was reasonable and consistent with officer safety and police procedure to search Leo and the others before placing them in the squad. Finally, there is no evidence that Leo was subject to "custodial interrogation" when he was questioned by Officer Haberman and Mr. Cipriano. When the subject is not "in custody", there is no need for "Miranda" warnings. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Oregon v. Mathiason*, 429 U.S. 492, 495(1977); *State v. Clappes*, 117 Wis. 2d 277, 287 (1984); *State v. Pheil*, 152 Wis. 2d

523, 531 (Ct. App. 1989). Therefore, the statements made by Leo were properly considered by the school board.

The pupil also challenges the board's finding that the substance he possessed was marijuana. The field testing and subsequent identification of the substance as marijuana was completed by Officer Haberman, in the presence of Mr. Cipriano. The pupil presented a letter from Dr. Kidd that there was no significant use of marijuana by Leo between November 1 and November 3. The board could reasonably rely upon the field test completed by Officer Haberman, the witnesses' corroboration and Leo's admission that the substance was marijuana to conclude that Leo possessed marijuana. As the board did not make a finding that Leo used marijuana, the pupil's argument that there was insufficient evidence of such, is not relevant to this appeal.

The pupil also alleges that the board improperly relied upon hearsay and that his right to confront witnesses was violated because Officer Haberman did not testify. I have repeatedly found that a school board is permitted to consider and base its decision upon the testimony of a school official who relates the results of his investigation, including the statements of other people, when there are factors establishing the reliability and probative value of such testimony. *Aron E. P. v. Sturgeon Bay School District Board of Education,* Decision and Order No. 341 (December 17, 1997); *Carlos M. v. West Allis-West Milwaukee School District Board of Education,* Decision and Order No. 242 (December 21, 1994); *Joshua S. v. D.C. Everest School District Board of Education,* Decision and Order No. 170 (June 22, 1990); *John C. B. v. Milwaukee School District Board of Education,* Decision and Order No. 116 (October 31, 1983). Mr. Cipriano testified that he was with Officer Haberman during all significant portions of the

investigation. Officer Haberman's testimony would have been merely repetitive. Mr. Cipriano adequately explained why he believed the student witnesses. Thus, the reliance on Mr. Cipriano's testimony was reasonable.

The pupil argues that "extraneous" information such as other attendance problems and the possession of the liquids in the Tupperware unfairly prejudiced him. As it relates to Leo's school records, the pupil was advised in the November 26, 1997 Notice of Expulsion hearing that:

> "If it is found that the conduct as alleged is proved, the Board may consider information relating to your grades and disciplinary record, which may help the Board to determine what the appropriate penalty should be. Pupil records are available for your review as outlined in Sec. 118.125, Stats."

Thus, the board was also allowed to use this information in determining the length of expulsion. This was emphasized by Dr. Negley's advise to the board that this information was not being provided as further grounds for expulsion. Furthermore, I note that the pupil's attorney asked Mr. Cipriano about the pupil's behavior records before the administration brought up the subject.

As it relates to the information concerning the possession of liquid in a Tupperware, board member Messmer, specifically ruled that the information was irrelevant to the board's determination. There is no evidence that this conduct, which was not included in the grounds or notice of expulsion, was relied upon by the board.

The pupil also challenges the adequacy of the findings of fact made by the board. The findings of fact and conclusions of law prepared by the school board are adequate. The factual findings are clearly stated and are supported by the evidence. The statutory grounds are clearly and properly stated. It is not necessary for all grounds alleged in the notice of hearing to be accepted by the board, however, the notice of expulsion and the finding of facts and conclusions

of law are must be based upon at least one common statutory ground. *See Justin E. v. Antigo School District Board of Education*, Decision and Order No. 329 (July 24, 1997). The Administration alleged that Leo's conduct, while on school grounds, endangered the property, health, or safety of others and that his conduct constituted repeated refusal or neglect to obey school rules. The Board found that these two grounds for expulsion were proven. [2] Finally, the Board made the necessary finding that the interests of the school demanded expulsion of Leo.

Lastly, the pupil alleges that he his expulsion was not consistent with the discipline of other pupils. It has repeatedly been held that the decision to expel a pupil and a determination of the length of the expulsion are both within the discretion of the school board as long as the board complies with the procedural requirements set out at sec. 120.13(1)(c) Wis. Stats. *Nathaniel S. v. Wausau School District*, Decision and Order No. 350 (March 25, 1998); *Troy Y v. Burlington School District Board of Education*, Decision and Order No. 309 (January 21, 1997); *Tony R. v. Lake Geneva Joint No. 1 School District Board of Education*, Decision and Order No. 294 (June 24, 1996); *Brandon H. v. DeSoto Area School District Board of Education*, Decision and Order No. 206 (May 3, 1993). With respect to the fairness and unevenness of disciplinary measures imposed by schools, I am without authority to address those issues. *Nathaniel S. v. Wausau School District*, Decision and Order No. 350 (March 25, 1998); *Danielle W. v. Barron Area School District Board of Education*, Decision and Order No. 310 (January 1997); *Douglas S. v. Neenah School District Board of Education*, Decision and Order No. 162 (May 23, 1989); *Roy*

[2] The notice of expulsion included a third ground - "while not under the supervision of a school authority, engaged in conduct which endangered the property, health or safety of others at school or under the supervision of a school authority". The conclusions of law did not include this ground but did include the two other grounds alleged in the notice of hearing.

H. v. Blair School District Board of Education, Decision and Order No. 159 (September 26, 1988).

In reviewing the record in this case I find the school district complied with all of the procedural requisites. I therefore affirm this expulsion.

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 Leo P[redacted] by the School District Board of Education is affirmed.

Dated this 31st day of March, 1998.

John T. Benson
State Superintendent of Public Instruction