

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Joseph S. [REDACTED] by the Oak Creek-Franklin Joint School District Board of Education	DECISION AND ORDER 98/99 EX 31
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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 June 30, 1999 order of the Oak Creek-Franklin Joint School District Board of Education to expel the above-named pupil, an eleventh grader, from the Oak Creek-Franklin Joint School District through the 2001-2002 school year. This appeal was filed by the pupil's parent and was received by the Department of Public Instruction on August 2, 1999.

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 May 27, 1999, from the Principal of the Oak Creek High School. The letter advised that a hearing would be held on June 21, 1999 that could result in the pupil's expulsion from the Oak Creek-Franklin School District. The letter stated "The decision on whether or not Joseph may return to school for the 1999-2000 school year will be made at the hearing." The letter alleged that the pupil knowingly conveyed or caused to be conveyed any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives. The letter specifically alleged that he endangered the health and safety of others by being an accomplice to a bomb threat on May 13, 1999. The letter was sent separately to the pupil and his parents by certified mail. A transcript of the hearing is also part of the record.

The hearing was held in closed session on June 21, 1999. The pupil and his parents appeared at the hearing without counsel. 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. The administration recommended that Joseph be expelled through the 2001-2002 school year, with an opportunity for early "probationary" readmission beginning in the fall of the 2001-2002 school year.

After the hearing, the school board deliberated in closed session. The district administrator and the board's attorney remained with the school board during deliberations. The board found the pupil did engage in conduct while not at school that endangered the property,

health, or safety of others.¹ The school board also found that he knowingly conveyed or caused to be conveyed a threat concerning an attempt or alleged attempt being made to destroy school property by means of explosives. The 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 June 21, 1999, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through the 2001-2002 school year with an opportunity for early probationary readmission beginning in the 2000-2001 fall term.

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 that 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)

¹ This ground was not included in the notice of expulsion hearing. Therefore, the board was not authorized to make this a ground for expulsion. While it is preferable to avoid these mistakes, in this case it does not require reversal. One ground was contained in both the notice and the order thus providing a sufficient basis for expulsion.

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 in this case raises one issue that requires consideration. The parent alleges that the school board should have delayed the hearing until after the district attorney made a charging decision. She states that the school board specifically asked about the court process. However, because the district attorney had not yet made a decision, she was not able to answer the board's question. School boards are not required to postpone an expulsion hearing pending the outcome of a juvenile court proceeding. Each proceeding involves different issues and quantum of proof. The district attorney's decision whether to issue charges is not binding upon the school district. See *Earl N. v. Milwaukee School District Board of Education*, Decision and Order No. 111 (March 3, 1983); *John B. v. Milwaukee School District Board of Education*, Decision and Order No. 116 (Oct. 31, 1983); *Carlos M. v. West Allis - West Milwaukee School District Board of Education*, Decision and Order No. 242 (December 21, 1994).

In reviewing the case, however, I find that two procedures used by the school board require reversal of the expulsion. First, the statute requires that the pupil be advised that the expulsion hearing may result in the pupil's expulsion. Sec. 120.13(1)(c)4.c., Stats. This requirement is to give the pupil and his parents notice of what is at stake. In this case, the notice of expulsion hearing did not adequately advise Joseph of the maximum term of expulsion that the

board would consider. The notice stated that "The decision on whether or not Joseph may return to school for the 1999-2000 school year will be made at the hearing." The board then went on to expel him through the 2001-2002 school year.² A school board must adequately and correctly advise the pupil what interests are actually at stake at the expulsion hearing. *Ernesto G. v. Waukesha School District Board of Education*, Decision and Order No. 200 (December 14, 1992).

Secondly, the school board violated the pupil's right to an impartial hearing by allowing the District Administrator to remain with the board during their closed deliberations. Cindy Rockow, a school district employee responsible for assuring that the school board policy, school rules and school regulations are upheld, testified at the request of the District Administrator, Dr. Voorhees. Ms. Rockow also delivered the administration's recommendation to expel Joseph through the 2001-2002 school year, allowing for probationary readmission at the beginning of the fall term in 2001-2002. After the presentation of evidence and summation by the administration and the pupil, the board excused everyone from the room *except the district administrator* and the board's attorney. Following deliberation in closed session, the board revealed its decision to expel Joseph through the 2001-2002 school year and allow probationary readmission in 2000-2001.

I have repeatedly cautioned school boards about the appearance of impropriety that arises when members of the administration are allowed to be with the board during closed deliberations. *Russel B. v. Muskego-Norway School District Board of Education*, Decision and

² The board's order allows Joseph to apply for probationary readmission in the fall of the 2000-2001 school year, however, the term of expulsion is through the 2001-2002 school year. This is not equivalent to terminating the expulsion period at the beginning of the 2000-2001 school term.

Order No. 175 (February 29, 1991); *Bradley P. v. Menasha Joint School District Board of Education*, Decision and Order No. 197 (August 21, 1992); *Marc G. v. Maple School District Board of Education*, Decision and Order No. 213 (December 20, 1993); *Benjamin L. v. Maple School District Board of Education*, Decision and Order No. 214 (December 28, 1993). There is no reason for the district administrator to be present during deliberations. His mere presence, even if he did not utter a word, could intimidate or otherwise affect the school board. I would like to be able to assume that the presence of the administrator had no affect but because the board went into closed session, I am in no position to indulge in that assumption. It could be that the administrator even made comments that were favorable to the pupil. Regardless, if the administrator made comments, Joseph and his parents were entitled to hear them and respond to them. The practice engaged in here was a critical violation of the concept of a fair hearing before an impartial tribunal.

Because the presence of the district administrator has tainted the entire deliberative process, the school board can no longer be presumed to be unbiased. If the school board chooses to re-hear the expulsion case, it must use an independent hearing officer or independent hearing panel, pursuant to sec. 120.13(1)(e), Stats. The expulsion process must be started from the beginning, including an adequate notice of expulsion hearing that correctly advises the pupil and his parents of the interests at stake. The board can then act to ratify the independent examiner's recommendation.

This decision should not be construed to condone the pupil's conduct. However, he is entitled to correct and adequate notice of the charges to be considered by the board and the interests at stake as well as an impartial hearing. Because the school board's procedures did not provide these, I am compelled to reverse the expulsion.

I find the school district did not comply with all of the procedural requisites. I therefore reverse this expulsion.

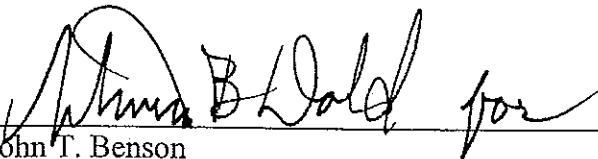
CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the school board did not comply with all of the procedural requirements of sec. 120.13(1)(c), Wis. Stats.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Joseph S [redacted] by the Oak Creek-Franklin School District Board of Education is reversed.

Dated this 1st day of October, 1999.



John T. Benson
State Superintendent of Public Instruction

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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

OAK CREEK-FRANKLIN JOINT SCHOOL DISTRICT,

Petitioner,

v.

Case No. 99-CV-008859

JOHN T. BENSON and RONALD and WENDY SEPPI
and JOSEPH SEPPI,

Respondents.

DECISION REVERSING THE STATE SUPERINTENDENT'S
REVERSAL OF THE EXPULSION ORDER

FILED
MAY 10 2000
JOHN BARRETT
Clerk of Circuit Court

Introduction

This is a proceeding for judicial review of the State Superintendent of Public Instruction, John T. Benson's reversal of the Board of Education of the Oak Creek-Franklin Joint School District's decision to expel Joseph Seppi. The expulsion was pursuant to Wis. Stat. § 120.13(1)(c) for a bomb threat. The State Superintendent reversed the expulsion on the grounds that the school board did not comply with all of the procedural requirements of Wis. Stat. §120.13(1)(c). Specifically, the State Superintendent stated that 1) the notice of the expulsion hearing did not explain the maximum term of the expulsion and therefore, did not put the pupil and his parents on notice of what was at stake, and 2) the school board violated the pupil's right to an impartial hearing by allowing the superintendent of the school district, John Voorhees, to remain with the board during its closed deliberations. This court finds that the pupil's right to an impartial hearing was not violated and the State Superintendent's interpretation of Wis. Stat. § 120.13(1)(c) is not reasonable and reverses the decision

Background

On May 12, 1999, Joseph Seppi, a student at Oak Creek High School was an accomplice to a bomb threat by driving a friend to a phone booth to place the threat. A "Notice of Expulsion Hearing," dated May 26, 1999, was sent to Joseph and his parents. The Notice stated that 1) an expulsion hearing would be held on June 21, 1999, 2) they had the right to be represented by counsel at the hearing, 3) they had the right to a closed hearing and the Board of Education had elected to convene the hearing in closed session 4) the Board of Education will keep written minutes of the hearing, 5) the action of the Board may result in his expulsion pursuant to Wis. Stats §120.13(1), 6) they had the right to appeal the decision if Joseph was expelled, and 7) the decision on whether Joseph may return to school for the 1999-2000 school year would be made at the hearing.

The expulsion hearing was held on June 21, 1999. During the closed deliberations of the school board, the superintendent of the school district, John Voorhees, remained in the room. There is no evidence that Voorhees made any recommendations or comments in favor of either party during the deliberations. The school board found that Joseph was an accomplice to the bomb threat in violation of Wis. Stat. § 120.13(1)(c) and the Student/Parent Handbook of the Oak Creek High School.

closed deliberations on other subject.

An Order of Expulsion, dated June 30, 1999, was sent to Joseph and his parents indicating that he was expelled for the 1999-2000, 2000-2001, and 2001-2002 school years from the Oak Creek-Franklin Joint School District. The Order, however, stated that Joseph would be eligible to return to school, on a probationary basis, as of the 2000-2001 school year.

The expulsion order was appealed to the State Superintendent of Public Instruction on the basis that the school board should have delayed the hearing until after the district attorney made a decision in charging Joseph for criminal conduct. The State Superintendent granted the appeal, however, the appeal was granted on the grounds that the school board did not comply with all of the procedural requirements of Wis. Stat. §120.13(1)(c) and Joseph's due process rights were violated.

Standard of Review

No material facts are in dispute on this appeal. Interpretation of Wis. Stat. § 120.13(1)(c) and the question of whether the Joseph's due process rights have been violated are questions of law. On a petition for judicial review under ch. 227, a circuit court is not bound by an agency's conclusions of law. *Wehr Steel Co. v. DILHR*, 106 Wis. 2d 111, 117 (1982). However, a court will ordinarily defer to the agency's construction and application of a statute if it is reasonable. *See, Jenks v. DILHR*, 107 Wis. 2d 714, 720 (Ct. App. 1982). On judicial review, there are three levels of deference which may be given to an administrative agency's conclusions of law and statutory interpretations, depending on the agency's experience, technical competence, and knowledge in regard to the question presented: great weight, due weight, and de novo review. *See, Kelley Co., Inc. v. Marquardt*, 172 Wis. 2d 234, 244-45 (1992) The "de novo" standard "is only applicable when the issue before the agency is clearly one of first impression," or where the "agency's position on an issue has been so inconsistent [that it provides] no real guidance" *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 285 (1996). The "due weight" standard is appropriate when an "agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position [than the

court] to make judgments regarding the interpretation of the statute." *Id.* at 286 Under the due weight standard, a court will not overturn a reasonable interpretation "that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available." *Id.* at 286-87. In order for an agency interpretation of a statute to be accorded "great weight" deference, four conditions must be met: (1) the agency must have been charged with the duty of administering the statute; (2) the agency's interpretation must be one of long-standing; (3) the agency must have employed its expertise in forming that interpretation; and (4) the agency's interpretation must advance the goals of uniformity and consistency in the application of the statute. *Id.* at 284. Under the great weight standard, "a court will uphold an agency's reasonable interpretation that is not contrary to the clear meaning of the statute, even if the court feels that an alternative interpretation is more reasonable" *Id.* at 287.

This court finds, and it is not disputed, that the interpretation and application of Wis. Stat. § 120.13(1)(c) is entitled to due weight. Whether the school board's procedures denied Joseph due process of law involves a question of constitutional fact that this court reviews independently as a question of law. *Hakes v. LIRC*, 187 Wis. 2d 582, 586 (Ct. App. 1994). Therefore, the de novo standard applies to the due process issue.

Decision

In the present case, the specific issues are 1) whether Joseph and his parents received proper notice of the hearing, and 2) whether Joseph's due process rights were violated by the presence of the superintendent of the school district during the closed deliberations of the school board.

The first issue on review is whether the State Superintendent erroneously interpreted Wis. Stat. § 120.13(1) that resulted in his decision to reverse the expulsion.

The Wisconsin Court of Appeals has construed Wis. Stat. § 120.13(1) as follows:

The only applicable statute setting forth school board powers is sec. 120.13(1), Stats. Particularly pertinent is subsection (c), which authorizes a school board to expel a pupil for, among other reasons, conduct which endangers the property of others. The statute then sets forth the procedural standards which the school board must follow: (1) The student is entitled to notice of a hearing; (2) The student is entitled to counsel at the hearing; (3) The hearing may be closed at the student's request; (4) The board must keep written minutes of the hearing; (5) If expulsion is ordered, such order shall be mailed to the student; and (6) An expelled student may appeal the expulsion to the state superintendent.

Racine Unified School Dist. v. Thompson, 107 Wis. 2d 657, 665-67, 321 N.W.2d 334 (Cr. App. 1982).

Under the "due weight" standard of review, this court must determine whether the State Superintendent's interpretation of the requirements for a notice of hearing under Wis. Stat. § 120.13(1)(c) is a reasonable one, unless there is a more reasonable interpretation available. The Notice of Hearing sent to Joseph and his parents states that Joseph may be expelled. The school board ordered that Joseph be expelled for three years. As stated in their notice, the order of the Board provided that Joseph could return on a probationary status for the 2000-2001 school year.

The Notice of Hearing was not misleading and was procedurally correct under Wis. Stat. § 120.13(1)(c). The Notice clearly stated that Joseph may be expelled. Wis. Stats. §120.13(1)(c) provides only that the notice state that "the hearing may result in the pupil's expulsion." All of the requirements of Wis. Stats. §120.13(1)(c) were met by the notice. There is no evidence that the pupil or the parents were misled in any way by including in the notice that the decision on whether to allow the pupil to return to school

for the 1999-2000 school year will be made at the hearing. It is reasonable to believe that anyone reading the notice would be aware that expulsion from school would be considered. That the Board might allow re-entry to school on conditions does not detract from the requirements of the statute.

The next issue, is whether Joseph's due process rights were violated by the superintendent of the school district being present during the deliberations of the school board. This court is persuaded by the U.S. Supreme Court holding that there is a presumption that public officials, such as the superintendent of a school district, will conduct himself/herself with honesty and integrity. See, *Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 497 (1976). Absent allegations that the superintendent of the school district attempted to bias the deliberations, there is no evidence that he was acting in nothing more than a clerical capacity. The State Superintendent has not provided any law showing the prohibition of the superintendent of the school district to be merely present during the deliberations. Therefore, this court finds that the presence of the superintendent of the school district during the deliberations did not violate Joseph's due process rights of an impartial hearing.

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CONCLUSION AND ORDER

Upon the records, files and proceedings had herein and giving due weight to the findings and decision of the State Superintendent of Public Instruction, it is the judgment of this court that the Superintendent's interpretation of §120.13(1) on the facts in this case is not reasonable. The court further finds that the presence of the administrator with the local school board during the Board's deliberations did not violate the pupil's due process rights. It is ORDERED therefore that the decision of the State Superintendent of Public Instruction shall be and is hereby REVERSED. The matter is remanded to the Oak Creek-Franklin Joint District Board of Education for proceedings consistent with this opinion.

Dated this 10 day of May, 2000, at Milwaukee, Wisconsin.

BY THE COURT:

Victor Manian

Judge Victor Manian
Circuit Court
Branch 13

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Department of Justice
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