Decision and Order No.: 413

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

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| In the Matter of the Expulsion of<br>Kyle J. W.<br>by Viroqua Area School District Board of Education | DECISION AND ORDER<br>Appeal No.: 99/00 EX 10 |

## NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to sec. 120.13(1)(c), Stats., from the order of the Viroqua Area School District Board of Education to expel the above-named eighth-grade pupil from the Viroqua Area School District. This appeal was filed by the pupil and received by the Department of Public Instruction on March 3, 2000.

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), 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 January 24, 2000, from the superintendent of the Viroqua Area School District. The letter advised that a hearing would be held on February 2, 2000 that could result in the pupil's expulsion from the Viroqua Area School District. The letter was served separately to the pupil and his parents by personal service on January 25 and 26, 2000. The letter alleged that the pupil engaged in conduct on or about January 4, 2000 while at school and while under the supervision of school authority which endangered the property, health, or safety of others at school and under the supervision of a school authority and by knowingly conveying a threat concerning an attempt to be made to destroy school property by means of explosives. Specifically, Kyle allegedly posted a note that read "Columbine 3:30 tomorrow." Minutes of the school board expulsion hearing and a transcript of the hearing are part of the record.

The hearing was held in closed session on February 2, 2000. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil, his parents, and his attorney did not appear at the hearing and no one gave evidence on his behalf, cross-examined witnesses, or responded to the allegations against him.

After the hearing, the school board deliberated in closed session. The board found that the pupil engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health, or safety of others. 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 February 3, 2000, was mailed separately to the pupil and his parents on February 18, 2000. The order stated the pupil

was expelled through his 21st birthday. The order also provided that the pupil could apply for early readmission after the end of the 2000-2001 school year upon meeting specified conditions.

**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), Stats., which establishes certain categories of offenses that may be the basis for an expulsion and sets out specific procedures that 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), 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.

Kyle's attorney filed a brief that raised several issues. However, none of these issues were raised at the expulsion hearing. Generally, matters not raised before the school board

cannot be raised for the first time on appeal. *Matthew R. v. Burlington Area School District Board of Education*, Decision and Order No. 383 (May 27, 1999); *Jennifer C. v. Winter School District Board of Education*, Decision and Order No. 264 (December 6, 1995); and *Tony R. v. Lake Geneva J1 School District Board of Education*, Decision and Order No. 259 (August 11, 1995). However, even if the arguments were raised, they would fail to identify an error by the school board that would require reversal of the expulsion hearing.

First, Kyle alleges that he was not properly served with the Notice of Expulsion. A sheriff's deputy served Kyle's mother with her copy of the notice of expulsion hearing on January 25, 2000. On January 26, 2000, a different sheriff's deputy served Kyle's copy on his mother. There was evidence produced at the expulsion hearing that when the sheriff's deputy attempted to serve Kyle, his mother refused to disclose Kyle's location. Kyle argues that he was **not** served because sec. 120.13(1)(c)4, Stats., does not specifically provide for use of section 801.11, Stats., for service of process. He also argues that the substitute service used by the district was not performed properly.

An expulsion hearing is not a court action; the pupil's presence is not required. Section 120.13(1)(c)4, Stats., merely specifies that the notice of hearing be sent to the pupil and, if the pupil is a minor, the pupil's parent or guardian at least five days prior to the hearing. The statute is silent on the issue of how "sent" is accomplished. The school board could have "sent" the notice by regular mail, certified mail, or had it hand-delivered as well as using a process server. As long as this was done within the proper timeframe, the school board is in compliance with the statute.

Second, Kyle alleges that the Findings and Order for Expulsion were not properly "sent" to him since it was not mailed to his court-ordered address, but to his home address. In addition,

the order was sent about 15 days after the hearing. The record of the expulsion hearing clearly shows that no one on the board or in the administration knew Kyle's court-ordered location. Attorney Monson, the district's attorney, advised the board that Kyle's location might be in the juvenile court record, however, it is not available to him or to the public. The record of the hearing does not indicate any communication from Kyle, his family, or his attorney. It was entirely proper to send Kyle's copy of the expulsion order to his usual home (mother's) address. Regarding the alleged error due to the delay in serving the order on Kyle and his mother, the statute does not provide a required timeframe. I have previously upheld an expulsion where the school board sent the expulsion order to the pupil's mother and his attorney but not the pupil himself. In that case, the district, apparently recognizing the error after it received the expulsion appeal, mailed a copy of the order to the pupil. *Adam C. v. Evansville Community School District Board of Education*, Decision and Order No. 340 (November 26, 1997). In the current case, the Viroqua school board sent copies of the expulsion order to both the pupil and the parent, in compliance with the statute.

Third, Kyle contests the sufficiency of the evidence used to expel him. It has been repeatedly held that arguments concerning the sufficiency of evidence are generally beyond the scope of review. *Leo P. v. Whitewater Unified School District*, Decision and Order No. 351 (March 31, 1998); *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. *Leo P. v. Whitewater Unified School District*, Decision and Order No. 351 (March 31, 1998); *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).

Kyle alleges that no physical evidence, fingerprints, eyewitnesses, or other evidence was gathered that proved he was the person who wrote the note. He alleges he was expelled based on the inaccurate testimony of the investigating police officer and the testimony of a fellow student, Kevin, who related a conversation he had with Kyle. In his brief, Kyle also refers to evidence such as police reports and a crime lab report that were never presented to the board nor were they available to the school board. Viroqua Police Officer David Mattice produced a copy of the note found taped to the wall in the teachers' lounge on January 4, 2000. The note said "Columbine 3:30 tomorrow." Officer Mattice testified the original note had been sent to the state crime lab for handwriting analysis and the results were not back yet. He also testified that he interviewed two students who implicated Kyle. One of the students, Kevin, was in school and in the teachers' lounge area during the time the note was posted. Officer Mattice testified Kevin told him that on January 5 the boys had discussed the closing of school and the reason for its closing. Officer Mattice indicated Kevin told him Kyle admitted writing the note and that it was found in a teacher's room or the teachers' room. Officer Mattice also testified that Kevin said he and Kyle discussed whether there would be school the next day. Kyle said, "Not if they find a brown bag with a bomb in it." According to Officer Mattice, Kevin also said Kyle told him (Kevin) that he would not tell anyone that Kevin made the threat if Kevin did not tell anyone that Kyle made the threat.

Officer Mattice also testified he spoke with another student, JPR. JPR told Officer Mattice that Kyle called him on January 5 at approximately 10 a.m. and said school was called off because a note was found in the teachers' lounge. Officer Mattice testified the location of the note had not been released prior to Kyle and JPR's conversation. The officer also testified Kyle denied writing the note.

Kevin also testified at the hearing. He stated during his testimony that Kyle told him "I did it," and a few seconds later Kyle said, "not." Kevin was asked, "As far as the way he understood the conversation, he (Kyle) did admit to you that he did write the note?" Kevin answered, "I assume so."

Kyle alleges that Officer Mattice's testimony was in error, because he omitted that Kyle added the word "not" a moment or so later in his conversation with Kevin, thus leading to the conclusion that Kyle was saying he did not write the note. However, the board heard this testimony through Kevin.[1] The board was in the best position to resolve this conflict in testimony. It is within the board's discretion to give weight to the evidence as it deems appropriate and to judge the credibility of witnesses. See, e.g., *State ex rel. DeLuca v. Common Council*, 72 Wis. 2d 672, 242 N.W. 2d 689 (1976); *State ex rel. Wasilewski v. Board of School Directors*, 14 Wis. 2d 243, 111N.W. 2d 198 (1961). See also *Jeremy B. v. Waukesha School District Board of Education*, Decision and Order 395 (August 16, 1999); *Tracy M. v. Random Lake School District Board of Education*, Decision and Order No. 244 (January 11, 1995); and *Kathleen W. v. Tri-County Area School District Board of Education*, Decision and Order No. 130 (May 10, 1985).

[1] Kyle also claims that the state crime lab report exonerates him and the district attorney dismissed the juvenile petition. First, Kyle did not present this evidence to the board. Second, as the district notes in its brief, the report did not completely eliminate Kyle as the writer. Finally, delinquency petitions and criminal charges are dismissed

By refusing or neglecting to attend his expulsion hearing, Kyle has forfeited the opportunity to cross-examine witnesses or point out inconsistencies. The expulsion hearing is the appropriate place to identify issues, not an appeal that reviews procedural compliance. A reasonable view of the evidence supports the board's conclusions; therefore, the board's findings will not be overturned.

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), Stats.

## ORDER

IT IS THEREFORE ORDERED that the expulsion of Kyle J. W by the Viroqua Area School District Board of Education be affirmed.

Dated at Madison, Wisconsin on 4-27-, 2000.

John T. Benson
State Superintendent of Public Instruction

for many reasons. The district attorney's decision is not binding on a school board or the state superintendent's expulsion decision.