Decision and Order No.:614

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of M B by the Hudson School District Board of Education	DECISION AND ORDER Appeal No.: 08-EX-05

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stats. § 120.13(1)(c) from the order of the Hudson School District Board of Education to expel the above-named pupil from the Hudson School District. This appeal was filed by the pupil and received by the Department of Public Instruction on February 1, 2008.

In accordance with the provisions of Wis. Adm. Code § PI 1.04(5), 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 § 120.13(1)(c). 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 20, 2007, from the district deputy director of the Hudson School District. The letter advised a

hearing would be held on December 6, 2007, that could result in the pupil's expulsion from the Hudson School District through the pupil's 21st birthday. The letter was sent separately to the pupil and his parents by certified mail. The letter alleged that the pupil engaged in conduct while at school or under the supervision of school authority which endangered the property, health, or safety of others. The letter specifically alleged that on November 1, 2007, the pupil appeared to be under the influence of marijuana at school and later that day was found in a wooded area adjacent to school property suspected of looking for marijuana and, that on November 13, 2007, the pupil attended school under the influence of marijuana.

The hearing was held in closed session on December 6, 2007. The pupil and his parents appeared at the hearing with counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil, his parents, and his attorney 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. 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 11, 2007, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through the 2009-2010 school year. Minutes of the school board expulsion hearing, and audiotapes of the expulsion hearing are part of the record.

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 § 120.13(1)(c), 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 § 120.13(1)(c). 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 in this case raises several issues which require consideration. The pupil alleges that his actions did not violate school rules, and that his expulsion is not within the terms of Wis. Stat. § 120.13. Whether or not the school district had or followed an AODA policy is irrelevant to my review. *See John J. D. v. Whitehall School District Board. of Education,*

Decision and Order No. 406 (February 15, 2000); *Justin S. v. Marshfield School District Board. of Education,* Decision and Order No. 361 (May 27, 1998); *Joshua R. v. Edgerton School District Board of Education*, Decision and Order No. 330 (July 29, 1997); and, *Donald P. v. Westby Area School District Board of Education*, Decision and Order No. 299, (August 9, 1996). Thus, the school district's policy is not determinative or controlling.

The district alleged that the pupil engaged in conduct while at school or while under the supervision of a school authority which endangers the property, health or safety of others, as described in Wis. Stat.§120.13(1)(c). The state superintendent has routinely upheld expulsions based on mere possession of marijuana as conduct that endangered the property, health or safety of others. *Brian M. v. Lodi School District*, Decision and Order No. 425 (October 23, 2000); *Andrew C. v. Milwaukee Public School District,* Decision and Order No. 386 (June 11, 1999); *Julian H. v. Milwaukee Public School,* Decision and Order No. 379 (April 20, 1999); *Shannon T. v. Milwaukee Public School District,* Decision and Order No. 354 (April 16, 1998); *Joshua S. v. Beloit-Turner School District,* Decision and Order No. 307 (January 14, 1997); *Donald P. v. Westby Area School District,* Decision and Order No. 299 (August 9, 1996*); Robin L. v. East Troy Community School District,* Decision and Order No. 253 (June 21, 1995); and *Jared L. v. Menomonee Falls School District*, Decision and Order No. 218 (February 10, 1994). Expulsions based on being under the influence or consuming marijuana have also been routinely upheld as conduct that endangered the property, health or safety of others. *B. M. v. Marshall School District Board of Education*, Decision and Order No. 608 (January, 31, 2008); *D. P. v. Burlington Area School District Board of Education*, Decision and Order No. 554 (July 29, 2005); *D. S. v. Cedar Grove-Belgium Area School District Board of Education*, Decision and Order No. 552 (July 11, 2005); *A. T. v. Oregon School District Board of Education*, Decision and

Order No. 545 (May 27, 2005); *Ben J. v. New Glarus School District Board of Education*, Decision and Order No. 504 (December 19, 2003).

The pupil also challenges the sufficiency of evidence. It has been repeatedly held that arguments concerning the sufficiency of the 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).

The pupil claims that the statement he made to the police on November 13, 2007 should not be considered as evidence because it was not witnessed, it carries a significantly different burden of proof than a statement made to a school official, the pupil was never asked for admission or denial of the charges, the time of the incident is to vague to meet the criteria of Wis. Stat. § 120.13, and reliance on the statement iS contrary to Wis. Stat. §118.127.

First, expulsion hearings are not criminal proceedings; therefore the standards or rules applied in criminal cases are generally not applicable. For example, the exclusionary rule, which in criminal cases may demand the exclusion of illegally obtained evidence does not apply to

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); and, *State ex re. Struzik v. DHSS,* 77 Wis. 2d 216, 221 (1977). This principle has been consistently applied in expulsion hearings. *Jeremy B. v. Waukesha School District Board of Education*, Decision and Order No. 395 (August 16, 1999); *Leo P. v. Whitewater Unified School District Board of Education*, Decision and Order No. 351 (March 31, 1998); *Michael Ryan H. v. Clinton Community School District Board of Education*, Decision and Order No. 222 (March 10, 1994); and, *John C. B. v. Milwaukee School District Board of Education,* Decision and Order No. 116 (October 31, 1983).

Secondly, while the district presented the pupil's signed statement to the police, it clearly did not rely solely on the document. At the expulsion hearing associate principal Huffman testified regarding the events of November 1, 2007. After the pupil arrived at school that day he and other students left school grounds but remained within eyesight. While the pupil was off school grounds, he was seen near a tree. The pupil was returned to school and the associate principal observed that his eyes were dilated and blood shot. A bag of marijuana, a lighter and a make shift pipe were found after the students left the tree. Later the same day, another student told Mr. Huffman that the pupil had approached him earlier in the day and asked him to go smoke marijuana. The associate principal testified that the pupil skipped class later that day. He and the other student were found looking around the trees where the marijuana had been found. The assistant principal testified that based on his observations that day, he believed the pupil was under the influence of marijuana in the morning of November 1, 2007. Following this incident, the pupil was suspended for five days and allowed to return to school.

Associate principal Langer testified regarding the November 13, 2007 incident. She testified that another teacher had seen some students in the same wooded area engaged in behavior that looked like it could be related to drug activity. As a result five students were identified, including the pupil. While the associate principal was investigating the incident, she talked to the pupil's county social worker who was at school to obtain a urine sample for drug testing. When she went to interview the pupil, his social worker was present. At first the pupil denied to the associate principal that he smoked marijuana before coming to school. However, the social worker indicated to the associate principal that the pupil had admitted to him that he had smoked marijuana that day and that he was unable to provide a urine sample because of this. When confronted with this information, the pupil admitted that he smoked marijuana before school. In addition, the pupil signed a statement to the police admitting he smoked marijuana before coming to school. The pupil did not testify at the expulsion hearing and neither his attorney nor his father, who did testify, disputed the fact that the pupil smoked marijuana before coming to school on the November 13, 2007.

The pupil also alleges that, during the hearing, the district gave misleading statements to the school board. The pupil claims that the Hudson High School Vice Principal presented incorrect information about him, and that his parents were falsely accused by the district of not providing complete results of the pupil's drug test. The record reflects that the pupil, his parents, and his attorney were given the opportunity to introduce evidence, cross-examine witnesses, and give testimony at the hearing; therefore, if the pupil, his parents, or his attorney didn't agree with something presented at the hearing, they should have raised their issue at that time. *Travis J.M. v. Deerfield Community School District Board of Education*, Decision and Order No. 423 (September 25, 2000); *Matthew R. v. Burlington Area School District Board of Education*,

Decision and Order No. 383 (May 27, 1999); *Tony R. v. Lake Geneva J1 School District Board of Education*, Decision and Order No. 259 (August 11, 1995) and *Jennifer C. v. Winter School District Board of Education*, Decision and Order No. 264 (December 6, 1995).

The board was in the best position to resolve any conflict in testimony. It is within the board's discretion to give weight to the evidence and arguments, 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). A reasonable view of the evidence sustains the board's findings.

The pupil claims that the district's attorney introduced previous DPI expulsion decisions at the hearing that are not relevant to the appeal at issue. However, the previous DPI expulsion decisions that the district's attorney presented at the hearing are based on a pupil either possessing marijuana on school property or being under the influence of marijuana while on school property. Therefore, the DPI decisions that were introduced were relevant to the issues at the expulsion hearing.

The pupil also alleges that the school board was biased against him because of statements made by the district's attorney and because the school board received the record before the hearing. Again, matters not raised before the board cannot be raised for the first time on appeal. *Travis J.M. v. Deerfield Community School District Board of Education*, Decision and Order No. 423 (September 25, 2000); *Matthew R. v. Burlington Area School District Board of Education*,

Decision and Order No. 383 (May 27, 1999); *Tony R. v. Lake Geneva J1 School District Board of Education*, Decision and Order No. 259 (August 11, 1995) and *Jennifer C. v. Winter School District Board of Education*, Decision and Order No. 264 (December 6, 1995).

Furthermore, the law presumes that school board members, as public officials, will discharge their legal duties in accordance with the authority conferred upon them and that they will act fairly, impartially and in good faith. *See Heine v. Chiropractic Examining Board,* 167 Wis. 2d 187 (Ct. App., 1992), citing *State ex rel. Wasilewski v. Board of School Directors,* 14 Wis. 2d 243, 266 (1961), *appeal dismissed and cert. denied*, 370 U.S. 720 (1962). In this case, I find the pupil's assertion of bias or conflict insufficient to overcome this presumption. The record contains no evidence of actual bias or conflict, nor does it reflect circumstances that would lead to a high probability of bias or conflict. *See Nicholas E. v. Lodi School District Board of Education*, Decision and Order No. 303 (October 17, 1996); and, *Kathleen W. v. Tri-County Area School Board of Education*, Decision and Order No. 130 (May 10, 1985).

The pupil claims that the district did not give prior notice to his parents of the violations that would be considered by the school board at the expulsion hearing. The record reflects that the pupil and his parents were provided with a Notice of Expulsion Hearing, dated November 20, 2007, which states the specific offenses committed by the pupil. The record also includes copies of certified mail receipts which prove that the pupil and the pupil's parents received the notice. Therefore, the pupil and his parents were in fact informed of what would be discussed at the hearing.

The pupil also alleges that the district communicated with his out-patient treatment center without disclosure consent forms authorizing them to do so. This allegation is beyond the state superintendent's scope of review under §120.13(1)(c).

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 comply with all of the procedural requirements of §120.13(1)(c).

ORDER

IT IS THEREFORE ORDERED that the expulsion of M B by the Hudson School District Board of Education is affirmed.

Dated this 31st day of March, 2008.

Anthony S. Evers, Ph.D.
Deputy State Superintendent of Public Instruction