Decision and Order No.: 706

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of J[redacted] S[redacted] by Beloit Turner School District	DECISION AND ORDER Appeal No.: 13-EX-04

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stat. § 120.13(1)(c) from the order of the Beloit Turner School District Board of Education to expel the above-named pupil from the Beloit Turner School District School District. This appeal was filed by the pupil's parent (appellant) and received by the Department of Public Instruction on August 1, 2013.

Pursuant to Wis. Admin. Code Ch. 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 Wis. Stat. § 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

At the request of the state superintendent, the school district submitted the hearing record to the department. The record contains: a letter entitled "Notice of Pupil Expulsion Hearing"; an expulsion order; proof of separate mailings of the notice and order to the pupil and the pupil's parents; the minutes of the expulsion hearing; a digital audio recording of the expulsion hearing; and copies of the exhibits introduced at the expulsion hearing. The notice of expulsion hearing, dated July 1, 2013, advised the pupil and the pupil's parents that a hearing would be held on July 16, 2013 that could result in the pupil's expulsion from the Beloit Turner School District School District through the pupil's 21st birthday. The notice was sent separately to the pupil and his parents by certified mail. The notice 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 and/or engaged in conduct which endangered the property, health or and [sic] safety of an employee of the school district." The basis for the allegations was that the pupil possessed "drug paraphernalia on school grounds on Thursday, June 30, 2013" and that the pupil was a "party to the damage of property of a school employee on Thursday, June 20, 2013."

The hearing was held in closed session on July 16, 2013. The pupil and his parents appeared at the hearing without counsel. During the hearing, the school district administration presented evidence concerning the grounds for expulsion. The evidence included, among other things, photographs of the pupil's drug paraphernalia and testimony by the high school principal, middle school principal, and assistant high school principal. The pupil and his parents were given the opportunity to present evidence, to cross-examine witnesses, to respond to the allegations, and present statements to the school board. The school board also had the opportunity to ask questions of all witnesses.

After the hearing, the school board deliberated in closed session. The school 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 and/or engaged in conduct which endangered the property, health or safety of an employee of the school district." The school board further found that the interests of the school demand the pupil's expulsion. The order for expulsion, dated July 23, 2013, contained findings of fact and conclusions of law. The order was separately mailed to the pupil and the pupil's parents. The order stated the pupil was expelled through the pupil's 21st birthday. However, the pupil may seek readmission to the school district beginning in the 2015-16 school year on the condition that the pupil meets various requirements, including an AODA assessment and counseling.

By a letter dated July 30, 2013, the appellant submitted an appeal to the department. On August 12, 2013, the school board, by its attorney, Douglas Witte, requested a briefing schedule. On August 14, 2013, the department informed the parties that: the appellant could file an initial brief, which must be postmarked no later than August 26, 2013; the respondent could file a brief, which must be postmarked no later than September 9, 2013; and the appellant could file a reply brief, which must be postmarked no later than September 16, 2013. The appellant did not file any briefs. On September 9, 2013, Attorney Witte submitted a timely brief on behalf of the school district.

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 state superintendent is tasked with, among other things, ensuring 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. *See Madison Metropolitan School District (Lenny G.) v. Wis. D.P.I.*, 199 Wis. 2d 1, 543 N.W. 2d 843 (1995).

In the appeal letter dated July 30, 2013, the appellant raises three issues which require consideration. First, the appellant alleges that the middle school principal, Corey Everson, was a witness at the hearing, but that he "did not state his name as all attendees were required to do" so. The appellant also alleges that Mr. Everson did not raise his hand when witnesses were sworn in. Mr. Everson was one of the main witnesses for the school district, both in his capacity as the pupil's principal and as the victim of the pupil's actions. Specifically, it was alleged that the pupil and his friends were responsible for lewd chalk drawings on Mr. Everson's driveway. It was further alleged that one week later, on or about June 20, 2013, the pupil and different group of friends used gasoline to destroy Mr. Everson's mailbox. The arson incident formed one of the two bases for expulsion.

In its brief, the school district asserts that Mr. Everson did introduce himself. As support for this assertion, the school district asserts that it is standard practice for all witnesses to state their names. Further, the school district claims that a brief moment of silence in the digital recording of the expulsion hearing is where Mr. Everson stated his name. The school district also argues that the pupil and the pupil's parents knew Mr. Everson, and that there is no requirement for witnesses to state their names in the expulsion statute.

It is not clear from the audio recording whether or not Mr. Everson introduced himself at the beginning of the expulsion hearing as the other hearing participants did. Regardless, the pupil's due process rights have not been infringed upon, even if Mr. Everson failed to state his name. The process due to a student in a disciplinary action is determined by balancing the deprivation at stake with the efficiency possible in the hearing, and the ability of the school board to implement those protective measures. *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 662, 321 N.W.2d 334, 337 (Ct. App. 1982). Ensuring that all witnesses state their names at the beginning of an expulsion hearing would not impede the efficiency of the hearing, nor would it be difficult for the school board to implement such a measure. However, the pupil was not deprived of due process even if Mr. Everson failed to state his name.

While it is preferable that witnesses clearly identify themselves, especially for the purposes of creating a clear record for review, there can be no doubt that the pupil and the pupil's parents knew who Mr. Everson was.[1] As a result, the pupil and the pupil's parents were not prejudiced in any manner if Mr. Everson failed to introduce himself at the beginning of the expulsion hearing. As such, the pupil's right to due process was not violated by this minor oversight.

The appellant also asserts that Mr. Everson failed to take an oath at the beginning of the expulsion hearing. All of the potential hearing witnesses were asked to take an oath at the beginning of the hearing as a group. The minutes of the expulsion hearing states, "All of the potential witnesses were sworn to tell the truth during the proceeding." Assuming, *arguendo*,

[1] Mr. Everson was the pupil's principal for three years. Mr. Everson also testified at length about the steps he and other school personnel took to help the pupil improve academically. Mr. Everson also testified about personal interactions he had with the pupil involving disciplinary matters. These interactions were further documented by the pupil's disciplinary record, which was introduced as evidence at the hearing. Finally, Mr. Everson was directly addressed by name throughout the expulsion hearing. Taken together, it is clear that the pupil and his parents knew who Mr. Everson was.

that Mr. Everson did not testify under oath, this would not make the expulsion hearing defective. The state superintendent has consistently held that oaths are not required in expulsion hearings. *Chad S. by the Hartford Union School Dist.,* (273) Feb. 9, 1996; *Aron P. by the Sturgeon Bay School Dist.,* (341) Dec. 17, 1997; *Michael E. K. by the Burlington Area School Dist.*, (449) Feb. 13, 2002. While testimony under oath is preferable, there is not a statutory or constitutional obligation to do so in an expulsion hearing. *Justin B. by Central/Westosha High School Dist.,* (494) May 8, 2003; *Tyler H. by Milton School Dist.,* (498) June 23, 2003. Therefore, I do not find that the expulsion hearing was defective due to Mr. Everson, allegedly, not introducing himself at the beginning of the expulsion hearing or not testifying under oath.

Second, the appellant alleges that the "expulsion was based on an incident that was not outlined in the Notice of Hearing or Findings of Pupil Expulsion letters." In other words, the appellant alleges that the expulsion was based, in part, on the graffiti incident. As a result, the appellant claims that "we had no way to adequately prepare to discuss this."

In its brief, the school district concedes that the graffiti incidence was discussed during the hearing and that it was not listed in the Notice of Pupil Expulsion. However, the school district asserts that this was permissible because the school board did not base its expulsion on this incident, the Notice of Pupil Expulsion contained language that the school board may consider the pupil's complete disciplinary records, and the pupil and the pupil's parents did not object to the evidence being introduced.

The state superintendent has consistently held that allegations of misconduct not included in the notice of expulsion may not be used for the purposes of determining expulsion. *Kelly B. by the School Dist. of Three Lakes,* (100) Aug. 23, 1982; *Joshua S. by the D.C. Everest School Dist.,* (170) May 22, 1990. However, a school district may use such information, even if not included

in the notice of expulsion, if it is used as background information on the student, and not as ground for expulsion. *Kevin M. by the Oak Creek-Franklin School Dist.*, (181) Sept. 13, 1991.

As mentioned above, the expulsion notice and expulsion order were based on the allegations that the pupil "1) knowingly possessed drug paraphernalia on school grounds on Thursday, June 20, 2013; and, 2) was a party to the damage of property of a school employee on Thursday, June 20, 2013." After reviewing the entire record as a whole, it is clear that the school board based the pupil's expulsion on these two stated reasons. The minutes of the hearing show that there was a successful motion to find, among other things:

> That J.S. is guilty of the conduct alleged in the notice of pupil expulsion hearing; that is, that J.S. 1) knowingly possessed drug paraphernalia on school grounds on Thursday, June 20, 2013; and, 2) was a party to the damage of property of a school employee on Thursday, June 20, 2013

Further, the school district's notice clearly stated that the "the Board may also consider the pupil's *complete disciplinary*, attendance and academic records." (Emphasis added). As such, I do not find it reversible error for the school district to have introduced the evidence in question.

Third, the appellant alleges that pupil did not bring drugs or drug paraphernalia to the school. The state superintendent has consistently held that arguments as to the sufficiency of the evidence are beyond the scope of review of the state superintendent. *Nancy Z. by the Janesville School Dist.*, (139) May 23, 1986; *Jeremy B. by the Waukesha School Dist.*, (395) Aug. 16, 1999. Even if the state superintendent were to review the sufficiency of evidence, the record contains ample evidence that the pupil brought drug paraphernalia to school, including: an incident report containing a hearsay statement from the pupil in which he admits bringing drug paraphernalia to school; a student witness statement in which the witness states that the pupil had "weed" and "weed things"; a picture of the "pot box" confiscated from the pupil on June 20, 2013, which included a "grinder" used to break-up marijuana, a marijuana pipe, and two lighters; and a

picture of an "Axe bowl," which was used by the pupil for smoking Axe Body Spray. Most importantly, during the expulsion hearing, the pupil admitted to bringing drug paraphernalia to school. There is no evidence in the record that the pupil did not bring drug paraphernalia to school.

In reviewing the record in this case, I find the school district complied with all of the procedural requisites. Therefore, I affirm the pupil's 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 §120.13(1)(c).

ORDER

IT IS THEREFORE ORDERED that the expulsion of J[redacted]S[redacted] by the Beloit Turner School District Board of Education is affirmed.

Dated this 27th day of September 2013

Michael J. Thompson, Ph.D.
Deputy State Superintendent of Public Instruction

Parties to this appeal are:

[redacted]

Dennis McCarthy
District Administrator
Beloit Turner School District School District
1237 Inman Parkway
Beloit, WI 53511

Douglas Witte
Melli Law, S.C.
PO Box 1664
Madison, WI 53701-1664

APPEAL RIGHTS

Wis. Stats. § 120.13(1)(c) specifies that an appeal from this Decision and Order may be taken within 30 days to the circuit court of the county in which the school is located. Strict compliance with the service provisions of § 227.53 is required. In any such appeal, the State Superintendent of Public Instruction shall be named as respondent.

COPIES MAILED TO:

[redacted]

Dennis McCarthy
District Administrator
Beloit Turner School District School District
1237 Inman Parkway
Beloit, WI 53511

Douglas Witte
Melli Law, S.C.
PO Box 1664
Madison, WI 53701-1664