

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of



by Greenfield School District
Board of Education

DECISION AND ORDER

Appeal No.: 20-EX-08

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 School District of Greenfield Board of Education to expel the above-named pupil from the School District of Greenfield. This appeal was filed by the pupil's mother and received by the Department of Public Instruction on July 13, 2020.

In accordance with the provisions of Wis. Admin. 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 Wis. Stat. § 120.13(1)(c).

FINDINGS OF FACT

The record contains a letter entitled "Notice of Expulsion Hearing," dated June 17, 2020, from the director of human resources and general counsel of the School District of Greenfield. The letter advised that a hearing would be held on July 6, 2020 that could result in the pupil's expulsion from the School District of Greenfield through his 21st birthday. The letter was sent separately to the pupil and his mother by certified mail. The letter alleged that the pupil engaged

in conduct while at school or under the supervision of a school authority which endangered the property, health, or safety of others. The letter also stated, “State law requires that the School Board commence proceedings and expel a pupil from school for not less than one year whenever it finds that the pupil, while at school or while under the supervision of a school authority, possessed a firearm. *Wis. Stat. §120.13(1)(c)2m.*” The letter specifically alleged:

Weapons Violation: Possession of Gun on School Grounds-May 27, 2020: On Wednesday, May 27th at approximately 6:30 a.m., [the pupil] walked onto the grounds of Greenfield High School from the north (Layton Ave.) and proceeded along the east side of the building. At all times, [the pupil] was in possession of a firearm on school grounds while holding the weapon in an assault, or attack-like, position. Approximately 20 minutes later, [the pupil] can be seen on school grounds returning to the north side of the building, across the north parking lot and heading west towards 60th Street. At 7:05 a.m., Greenfield High School initiated a lock-down. Greenfield Police responded to Greenfield High School upon reports of someone with an assault weapon. The Greenfield Police School Resource Office was able to visually identify [the pupil] based on the surveillance camera footage. [The pupil] was later arrested at a nearby gas station. During the arrest, [the pupil] was hostile and vulgar towards the police officers. He was cited for Disorderly Conduct, Possessing an Ignition Device, and Pos[s]ession of Tobacco Product.

The hearing was held in closed session on July 6, 2020. The pupil’s mother and step-father appeared at the hearing without counsel. The pupil did not appear at the hearing. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil’s mother and step-father 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 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 that the pupil possessed a firearm, as defined in 18 U.S.C. § 921(a)(3), while at school or while under supervision of a school authority. The school board further found that the interests of the school demand the pupil’s expulsion. The order for expulsion containing the findings of fact of the school board, dated July

6, 2020, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through his 21st birthday with possible early reinstatement as of the beginning of the 2021-2022 school year subject to conditions. Minutes of the school board expulsion hearing and an audiotape of the expulsion hearing are part of the record.

DISCUSSION

The expulsion statute – Wis. Stat. § 120.13(1)(c) – gives school boards the authority to expel a student when specific substantive standards are met and specific procedures have been followed. *Madison Metro. Sch. Dist. v. Burmaster*, 2006 WI App. 17, ¶ 19, 288 Wis. 2d 771. In reviewing an expulsion decision, the state superintendent must ensure, among other things, 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 interest of the school district demand the pupil’s expulsion.

The appeal letter in this case raises several issues which require consideration. First, the pupil’s mother contends that the pupil did not act in a threatening manner. She claims that the district deceptively used a still shot from a video to make it appear that the pupil was acting aggressively. The board cited Wis. Stat. § 120.13(1)(c)1 and 2m as the bases for the pupil’s expulsion. Neither requires that the pupil act in a threatening manner. The board’s expulsion based on Wis. Stat. § 120.13(1)(c)1 did require a finding that the pupil “endangered the property, health or safety of others.” Previous state superintendents have determined that possession of a weapon at school endangers the health, safety or property of others, even where the pupil does not act in a threatening manner. *See, e.g., Eric H. v. Central/Westosha Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 377 (Mar. 17, 1999) (citing cases). “[T]he reaction to the presence of a gun on school grounds can create a dangerous situation at school. The property,

health, and safety of others may be endangered by the presence of a gun.” *Christopher F. v. Milwaukee Public Sch. Bd. of Sch. Dirs.*, Decision and Order No. 143 (July 2, 1986). Therefore, a reasonable view of the evidence permitted the board to find that the pupil’s possession of the object at school endangered the health, safety, or property of others.

Second, the pupil’s mother contends that prior to the expulsion hearing, Greenfield High School Assistant Principal David Williams separately assured her and her husband that the pupil was not going to be expelled and that the hearing was simply a formality that they had to go through. The district states that Mr. Williams denies making such assurances. Because the notice of expulsion hearing that the pupil and his mother received after the alleged conversations with Mr. Williams clearly stated that state law required expulsion for not less than a year whenever it finds that the pupil possessed a firearm and that the “hearing may result in [the pupil]’s expulsion from the schools of the School District of Greenfield, which may extend to the pupil’s 21st birthday,” the district provided the requisite notice that the pupil may be expelled.

Third, the pupil’s mother contends that her son deserves a normal teenage high school experience since he completed a rigorous treatment program. Although the board may choose to take into account the student’s completion of a rigorous treatment program when determining whether expulsion is appropriate, it is not required to do so. The state superintendent has the authority to “approve, reverse, or modify” the school board’s decision. Wis. Stat. § 120.13(1)(e)3. However, the state superintendent has consistently held that it would be inappropriate, absent an extraordinary circumstance or a violation of procedural requirements, to second-guess the appropriateness of a school board’s determination. *Madison Metro. Sch. Dist. Bd. of Educ.*, Decision and Order No. 786 (Nov. 7, 2019); *C.T. v. Milwaukee Public Schs.*, Decision and Order No. 718 (May 22, 2014); *A.M. v. West Allis-West Milwaukee Sch. Dist. Bd.*

of Educ., Decision and Order No. 703 (Feb. 18, 2013). School boards are afforded wide latitude in determining whether an expulsion is an appropriate response to alleged conduct. *T.R. v. Nicolet School Dist. Bd. of Educ.*, Decision and Order No. 707 (Dec. 17, 2013). In this case, the school board was entitled to determine the appropriate weight, if any, to accord the pupil's post-incident treatment.

Fourth, appellant complains that a school board member did not know what an expulsion means for the pupil's ability to attend another public school and that it is unfair and unjust for a school board member to vote on an expulsion without understanding the consequences of that vote. Although it is desirable that school board members understand the effect of an expulsion, there is no legal requirement to that effect. Fifth, appellant complains that no one would take steps to help the pupil end his drug abuse until the incident that led to the expulsion. Despite appellant's frustration, the district and board had no responsibility to help the pupil end his drug abuse. Finally, the pupil's mother states that it is unjust that the pupil did something serious enough to be expelled yet the school district did not notify them that expulsion was a risk for over three weeks after the incident. As pointed out by the district in its response, the only time requirement in Wis. Stat. § 120.13(1)(c) is that the pupil receive not less than 5 days' written notice of the hearing. Wis. Stat. § 120.13(1)(c)4. There is no requirement that the notice be sent within any specific time period following the incident.

An issue not raised by appellant must be addressed. Several findings of fact cited in the Findings of Fact and Order are not supported by the record. First, Findings of Fact ¶ 4 states that the pupil did appear at expulsion proceedings even though the audio recording of the expulsion hearing is clear that the pupil was not present. More significantly, Findings of Fact ¶ 7 erroneously states "[t]hat based on the conduct described in attached Exhibit A and from the

facts at hearing, ... the pupil possessed a firearm, as defined in 18 U.S.C. § 921(a)(3), while at school or while under supervision of a school authority.” The evidence submitted at the expulsion hearing was undisputed that the object carried by the pupil during the incident was a BB gun.¹ The term “facsimile firearm” was also used to describe the object at the expulsion hearing. Although 18 U.S.C. § 921(a)(3) is cited in the Findings of Fact and is explicitly referenced in Wis. Stat. § 120.13(1)(c)2m, which was itself cited in the Notice of Expulsion Hearing, there was no discussion at the hearing as to the federal statute’s definition of “firearm” or whether the object the pupil was carrying fell under that definition.

A “firearm” is defined as “any weapon ... which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” 18 U.S.C. § 921(a)(3)(A). Use of a replica or toy gun is not sufficient to convict of an offense involving a “firearm.” *Cf. United States v. Jones*, 222 F.3d 349, 351 (7th Cir.2000) (implicitly acknowledging that a BB gun is not a “firearm”).

United States v. Lawson, 810 F.3d 1032, 1039 (7th Cir. 2016). The undisputed evidence that the object was a BB gun indicates that it was not a firearm as defined in 18 U.S.C. § 921(a)(3).

In its brief, the district states that the parent’s admission that the pupil brought an air rifle onto district property “is more than sufficient to support the Board’s determination that the Student possessed a firearm, as defined [in] 18 U.S.C. § 921(a)(3), while at school or while under school supervision.” (Br. on behalf of the Greenfield Sch. Dist. at 7.) However, the district provides no explanation as to why it believes an air rifle is a firearm as defined in 18 U.S.C. § 921(a)(3). Case law does not support its position. *See, e.g., United States v. Crooker*, 608 F.3d 94, 96 (1st Cir. 2010) (“The federal statute under which Crooker was charged defines “firearm” in pertinent part as a weapon that expels a projectile “by the action of an explosive,” 18 U.S.C. §

¹ The pupil’s mother referred to the object as an airsoft gun. For purposes of this decision, any distinction between a BB gun and an airsoft gun is unimportant. Based on Officer Thornton’s testimony at the hearing and the police report, it appears that the object was a BB gun.

921(a)(3)(A), and this self-evidently does not include an air rifle such as that in Crooker's package which operates by compressed air.”) No reasonable view of the evidence supports the board’s conclusion that the pupil possessed a firearm as defined in 20 U.S.C. § 921(a)(3) while at school or while under the supervision of a school authority. Therefore, this finding cannot be upheld.

The district’s contention that the pupil possessed a firearm as defined in 20 U.S.C. § 921(a)(3) and that the board was therefore required to commence proceedings and expel the pupil under Wis. Stat. § 120.13(1)(c)2m was inextricably intertwined with the district’s presentation of the case at the expulsion hearing. The district’s opening statement began, “No one wants to be here because it’s an unfortunate situation but it’s required by law that we do this.” The administration continued:

On May 27, [the pupil is] on the property at Greenfield High School with a firearm, the manner in which he was carrying and the appearance of the weapon looked to be an assault weapon. Wisconsin Statute 120.13(1)(c)2m requires that a school board commence proceedings and expel a student for not less than one year when it finds that the pupil while at school or under the supervision of a school authority possessed a firearm. So based on the evidence and testimony tonight you understand why the administration makes the recommendation for expulsion.

In its closing argument, the administration stated:

As I mentioned earlier, this is not something we as an administration that we want to be involved in. We’re required by law to do this. We do appreciate the parental support, and I don’t think there’s a person here who doesn’t sympathize with the family and recognize the challenges they were dealing with here but obviously we do have a statute that requires us to commence proceedings when there’s a firearm on school ground. So the law requires it ... I think the facts that we demonstrated today were that [the pupil] was on school property with a firearm or a facsimile firearm that was intended to look like a firearm... For all purposes, it was a firearm. It was all under the supervision of a school authority- it certainly endangered the health, property and safety of others at school, it endangered the potential safety of employees at school. Based on that, the interests of the school demand that we expel [the pupil]. Now, as to the duration of that, I think based on the circumstances there’s a strong argument that it could be through age 21, I would defer to the board to take into consideration the fact that we’re required to

commence proceedings and to look at that and come up with what I think is a decision that it believes is fair.

These statements made by the administration and the fact that the board allowed the possibility of early reinstatement only after one year indicate that the board believed it was required by Wis. Stat. § 120.13(1)(c)2m to expel the student for not less than one year if it found he possessed a firearm at school. Furthermore, in addition to the mistake regarding whether the object met the federal definition of firearm, even if the pupil had possessed a firearm as defined in 18 U.S.C. § 921(a)(3)(A), the school board still had the authority to modify the requirement under Wis. Stat. § 120.13(1)(c)2m on a case-by-case basis. Wis. Stat. § 120.13(1)(g).

The district contends that the pupil's mother waived the right to have her arguments considered because she failed to raise them at the expulsion hearing. In general, matters not submitted to the board at the expulsion hearing will not be considered in an expulsion appeal. In any event, as discussed above, none of the arguments raised by the pupil's mother merit reversing the expulsion. However, the board and administration's apparent misunderstanding and misapplication of Wis. Stat. § 120.13(1)(c)2m is a significant mistake of law that cannot be separated from the board's expulsion order and irrevocably taints that order. I therefore reverse this expulsion. If the board composition is the same as it was at the time of the decision, it may cure the error by reconvening, deliberating and making findings that are based on a correct understanding of the relevant law. If the board determines that expulsion is appropriate, it may continue with the expulsion by creating a new expulsion order and sending it to the pupil and his mother. Alternatively, if the district chooses, it may rehear the expulsion.

ORDER

IT IS THEREFORE ORDERED that the expulsion of [REDACTED] by the Greenfield School District Board of Education is reversed.

Dated this 10th day of September, 2020



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

APPEAL RIGHTS

Wis. Stat. § 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 Wis. Stat. § 227.53 is required. In any such appeal, the State Superintendent of Public Instruction shall be named as respondent.

Parties to this appeal are:

[REDACTED]

[REDACTED]

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