Decision and Order No.: 829

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of by Neenah Joint School District Board of Education	DECISION AND ORDER Appeal No.: 23-EX-03

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stat. § 120.13(1)(e) from the order of the Neenah Joint School District Board of Education to expel the above-named pupil from the Neenah Joint School District. This appeal was filed by the pupil's father and received by the Department of Public Instruction on February 27, 2023.

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)(e).

FINDINGS OF FACT

The record contains a letter entitled "Notice of Expulsion Hearing," dated October 24, 2022, from the superintendent of the Neenah Joint School District. The letter advised that a hearing would be held on November 3, 2022 that could result in the pupil's expulsion from the Neenah Joint School District through his 21st birthday. The letter was sent separately to the pupil and his parents by certified mail and was also hand-delivered. The letter alleged that the pupil (1)

engaged in conduct while at school or while under the supervision of school authority which endangered the property, health, or safety of others and/or (2) endangered the property, health or safety of any employee or school board member of the district. The letter specifically alleged that:

> on or around October 20, 2022 prior to school [the pupil] received $70 from another student in return for a Glock 17 Replica airsoft gun. [The pupil] had the airsoft gun in his backpack when he rode the bus to school, and in his classroom during period 1, 2 and 3 at Neenah High School. At or around 1:20pm, October 20, 2022, while both students were eating lunch on the campus outdoor patio [the pupil] gave the airsoft gun to the other student, wrapped in two t-shirts. [The pupil] admitted to bringing the airsoft gun to school, accepting money for it and giving it to another student during lunch period.

The hearing was held in closed session before an independent hearing officer on November 3, 2022. 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 hearing officer 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 at school. The hearing officer further found that the interests of the district demand the pupil's expulsion. The order of expulsion containing the findings of fact and conclusions of law of the hearing officer, dated November 4, 2022, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through the end of the 2028-2029 school year, with the ability to apply for conditional early reinstatement at the beginning of the 2023-2024 school year. The decision of the hearing officer was reviewed and approved by the school board on November 15, 2022. Minutes and an audio recording of the expulsion hearing are part of the record.

DISCUSSION

The expulsion statute – Wis. Stat. § 120.13(1)(c) and (e) – 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 demands the pupil's expulsion.

The appeal letter in this case raises several issues which require consideration. First, appellant complains that the pupil was not provided an attorney. Although the pupil has a right to be represented by an attorney at the expulsion hearing, there is no requirement that an attorney be provided to the pupil or appointed at public expense. *A.B. v. West DePere Sch. Dist. Bd. of Educ.*, Decision and Order No. 744 (Nov. 4, 2016).

Second, appellant complains that third party Snapchat pictures were admitted from outside of school without the family's permission. To the contrary, after noting that the pictures were tough to make out, the pupil expressly agreed that the Snapchat pictures could be considered by the hearing officer. Appellant also complains that the independent hearing officer stated that an expulsion hearing does not follow the strict rules of evidence. The hearing officer's statement that the rules of evidence do not apply to expulsion hearings was correct. *See Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 663-64, 321 N.W. 2d 334, 337 (Ct. App. 1982) (quoting *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 701 (5th Cir. 1974)). Hearsay is admissible in expulsion hearings and may be relied upon by school boards. *Racine Unified Sch.*

Dist. v. Thompson, 107 Wis. 2d 657, 668, 321 N.W. 2d 334, 340 (Ct. App. 1982); *Oak Creek-Franklin Jt. Sch. Dist. Bd. of Educ.*, Decision and Order No. 810 (May 13, 2022).

Third, appellant complains that they were not allowed to see the film from school showing the pupil in possession of the airsoft pistol. Although the associate principal testified about viewing security camera footage, the footage was not shown at the hearing. At the hearing, appellant cross-examined the associate principal about what the camera showed; in response to the questions, the associate principal stated that the footage showed an exchange of a package from the pupil to another student and that when the associate principal spoke with the pupil, the pupil indicated to him that that was the transaction of the gun. Because the security camera footage was not introduced at the hearing, there was no requirement that the footage be shared with appellant. To the extent that appellant is arguing that there was insufficient evidence that the pupil was in possession of the airsoft pistol, that argument fails because the pupil admitted possessing the airsoft pistol at school.

Fourth, appellant contends that the independent hearing officer's refusal to consider the pupil's intent and the fact that the hearing officer was paid by the district shows that the independent hearing officer was biased toward the district. It is settled law that due process requires a fair and impartial decision-maker. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). If a decision-maker is not fair or is not impartial, due process is violated. *Guthrie v. Wis. Empl't Relations Comm'n,* 111 Wis. 2d 447, 454, 331 N.W.2d 331, 335 (1983). At the same time, "[t]here is a presumption that public officials discharge their duties or perform acts required by law in accordance with the law and the authority conferred upon them, and that they act fairly, impartially, and in good faith." *State ex rel. Wasilewski v. Bd. of Sch. Dirs. of City of Milwaukee*, 14 Wis. 2d 243, 266, 111 N.W.2d 198, 211 (1961). *See also Heine v. Chiropractic Examining*

Bd., 167 Wis. 2d 187, 194 n.3, 481 N.W.2d 638, 641 n.3 (Ct. App. 1992) (citing *Wasilewiski)*; *Buker v. Labor & Indus. Review Comm'n*, 2002 WI App. 216, ¶ 19, 257 Wis. 2d 255, 650 N.W.2d 864 ("There is a presumption of honesty and integrity in those serving as adjudicators in state administrative proceedings."). In this case, appellant's assertion of bias is insufficient to overcome this presumption. Intent to endanger is not a requirement for expulsion and the hearing officer's statements regarding intent were not evidence of bias. Although a hearing officer may consider the pupil's intent when determining whether to impose an expulsion or the length of an expulsion, the hearing officer is not required to do so. The fact that the district paid the hearing officer to conduct the hearing similarly is not evidence of bias in the absence of any evidence or contention that payment was contingent on a specific outcome.

Fifth, appellant contends that the pupil did not endanger anyone and notes that the airsoft pistol was never seen. Appellant also contends that an airsoft gun is not a firearm as defined in Wis. Stat. § 948.605(1)(ac) and 18 U.S.C. § 921(a)(3). Appellant had the opportunity to make these arguments at the hearing. At the hearing, the school police liaison officer testified that if the gun had been displayed, it would have been considered a deadly force situation in which the officer would have had to draw his duty weapon and point it at the threat. The officer also testified that it would have caused panic and a lockdown for the whole school. The district did not argue and the hearing officer did not find that the airsoft gun was a "firearm" under any definition. The basis for expulsion did not require finding that the airsoft gun met the state or federal definitions of "firearm." Instead, the hearing officer found that the presence of the airsoft gun endangered others at school. Arguments concerning the sufficiency of the evidence are generally beyond the scope of review. *T.S. v. West Allis-West Milwaukee Sch. Dist. Bd. of Educ.*, Decision and Order No. 684 (May 20, 2011); *A.D. v. Silver Lake J1 Sch. Dist. Bd. of Educ.*,

Decision and Order No. 665 (June 28, 2010). A school board's findings will be upheld if any reasonable view of the evidence sustains them. *Muskego-Norway Sch. Dist. Bd. of Educ.*, Decision and Order No. 804 (June 28, 2021); *St. Croix Falls Sch. Dist. Bd. of Educ.*, Decision and Order No. 793 (May 15, 2020). In this case, a reasonable view of the evidence sustains the conclusion that the pupil endangered others by bringing an air pistol that looked like a real gun to school and by giving it to another student at school.

Sixth, appellant contends that the length of the expulsion (which appellant describes as a "1 year expulsion") is excessive. The state superintendent has the authority to "approve, reverse, or modify" the school board's decision. Wis. Stat. § 120.13(1)(e)3. However, because the school board is in the best position to know and understand what its community requires as a response to school misconduct, the state superintendent has historically chosen not to second-guess the appropriateness of a school board's determination. *See, e.g.*, *Appleton Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 820 (Nov. 15, 2022); *Sun Prairie Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 811 (May 26, 2022); *Madison Metro. Sch. Dist. Bd. of Educ.*, Decision and Order No. 786 (Nov. 7, 2019). I see no extraordinary circumstance here that would prompt me to overrule the determination of the board regarding the length of the expulsion. The Department of Public Instruction encourages districts to provide alternative education to expelled students, and it appears that the district provided the pupil an opportunity to earn graduation credits through on-line learning modules administered by the district and made the pupil's academic progress in such program a requirement to apply for conditional early reinstatement.

However, an issue not raised by appellant requires reversal of the expulsion. The notice of expulsion hearing provided to the pupil failed to comply with the requirements of Wis. Stat. § 120.13(1)(e)4. It has long been precedent that the notice requirements of the statute are

mandatory in nature, and failure to comply with the statutory requirements renders the expulsion void. *See, e.g.*, *Milwaukee Bd. of Sch. Dirs.*, Decision and Order No. 806 (Dec. 7, 2021); *Janesville Sch. Dist. Bd. of Educ.*, Decision and Order No. 797 (July 28, 2020); *Alex H. v. Eleva-Strum Sch. Dist. Bd. of Educ.*, Decision and Order No. 438 (July 20, 2001). Among other things, the notice must state the following:

> f. That the hearing officer … shall keep a full record of the hearing and, upon request, the hearing officer … shall direct that a transcript of the record be prepared and that a copy of the transcript be given to the pupil and, if the pupil is a minor, the pupil's parent or guardian.

Wis. Stat. § 120.13(1)(e)4.f. The only reference to a record of the hearing in the notice of expulsion hearing is the statement, "The School Board shall keep written minutes of the hearing." If the hearing had been held before the school board pursuant to Wis. Stat. § 120.13(1)(c)(3), that language would have been sufficient. *See* Wis. Stat. § 120.13(1)(c)4. However, the hearing in this case was held before an independent hearing officer and different notice requirements apply. Compare Wis. Stat. § 120.13(1)(e)4.f with Wis. Stat. § 120.13(1)(c)4.f. The sentence stating that the school board will keep written minutes did not notify the pupil that a full record, not simply minutes, would be kept and it did not notify the pupil of his right to request a transcript of the hearing, as required by Wis. Stat. § 120.13(1)(e)4.f. Failure to include the required statement requires reversal. *Milwaukee Bd. of Sch. Dirs.*, Decision and Order No. 806 (Dec. 7, 2021); *Janesville Sch. Dist. Bd. of Educ.*, Decision and Order No. 797 (July 28, 2020); *Z.Y. v. Wauwatosa Sch. Dist. Bd. of Educ.*, Decision and Order No. 690 (Jan. 11, 2012).

In addition to the notice requirements in Wis. Stat. § 120.13(1)(e)4, the following requirements apply to an expulsion hearing conducted by an independent hearing officer:

> The hearing officer … shall keep a full record of the hearing. The hearing officer … shall inform each party of the right to a complete record of the proceeding.

> Upon request, the hearing officer … shall direct that a transcript of the record be prepared and that a copy of the transcript be given to the pupil and, if the pupil is a minor, the pupil's parent or guardian.

Wis. Stat. § 120.13(1)(e)3. In its response brief, the district states "[t]hat the Independent Hearing Officer maintained a full record of the hearing and a transcript was prepared and provided to the student and his parents." Even if this statement were true,[1] it would not excuse the absence of the required language in the notice of expulsion hearing or the hearing officer's failure to inform the parties of their right to a complete record of the proceeding. During the hearing, the hearing officer told the parties that a tape recorder was making a recording of the proceedings, but failed to inform each party that they had a right to a complete record of the proceeding or that they could request that a transcript of the record be prepared. This violation of Wis. Stat. § 120.13(1)(e)3 also requires reversal.

In reviewing the record in this case, I find the school district and the independent hearing officer did not comply with all of the procedural requisites. I, therefore, reverse this expulsion. This decision does not condone the pupil's conduct, nor does it suggest that the school board's decision was inappropriate. However, I must uphold the requirements set forth in the statutes. If the school district chooses, it may remedy the procedural errors by providing proper notice of the expulsion hearing and rehearing the expulsion. *See, e.g., Somerset Sch. Dist. Bd. of Educ.*, Decision and Order No. 807 (Feb. 7, 2022); *Janesville Sch. Dist. Bd. of Educ.*, Decision and Order No. 797 (July 27, 2020).

[1] No transcript is part of the record that was submitted by the district. The cover letter from the district that was sent with the record lists as an attachment "Hearing Transcript (separate audio file)." The separate audio file is a recording of the hearing and is a full record of the hearing as required by Wis. Stat. § 120.13(1)(e)3, but it is not a transcript.

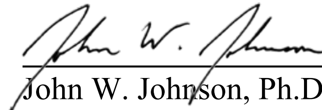
CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the school district and the independent hearing officer failed to comply with all of the procedural requirements of Wis. Stat. § 120.13(1)(e).

ORDER

IT IS THEREFORE ORDERED that the expulsion of [redacted] by the Neenah Joint School District Board of Education is reversed.

Dated this 25th day of April, 2023



John W. Johnson, Ph.D.
Deputy State Superintendent of Public Instruction

APPEAL RIGHTS

Wis. Stat. § 120.13(1)(e) 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:

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