IOWA STATE BOARD
OF EDUCATION
(Cite as 14 D.o.E. App. Dec. 185)

In re Don A. Shinn	:	
Barbara Ames,	:	
Appellant,	:	
v.	:	**DECISION**
	:	
Keokuk Community	:	
School District,	:	
Appellee.	:	[Admin Doc. #3816]

The above-captioned matter was heard on October 16, 1996,[1] before a hearing panel comprising Joan Clary, consultant, Bureau of Special Education; Ron Riekena, consultant, Bureau of Food and Nutrition; and Ann Marie Brick, J.D., legal consultant and designated administrative law judge, presiding. The Appellant, Barbara Ames, was present telephonically, represented by Barry M. Anderson of Anderson Law Offices, Keokuk, Iowa. The Appellee, Keokuk Community School District [hereinafter, "the District"] was also present telephonically in the persons of Superintendent David Scala; High School Principal Dr. Thomas Wemette; Board Secretary Joyce Weirather; and Kathy Seibert, board member. Appellee was represented by Drew Bracken of Ahler, Cooley, Dorweiler, Haynie, Smith and Allbee, P.C. of Des Moines, Iowa.

A mixed evidentiary and stipulated hearing was held pursuant to Departmental Rules found at 281—Iowa Administrative Code 6. Authority and jurisdiction for this appeal are found in Iowa Code chapter 290. Appellant filed an affidavit seeking review of a September 23, 1996, decision of the District's Board of Director [hereinafter, "the Board"] to

[1] The hearing was recessed until October 29, 1996, in response to Appellant's request for the tapes of the closed session. Appellant's counsel requested that the tapes of the closed session be sent to the Administrative Law Judge for review. The District asked for additional time to consider whether or not to release these tapes and to actually copy them for submission to the Administrative Law Judge.

expel her son, Don Shinn, from school for a period of one year.

The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and the subject matter of the appeal before them.

I.

FINDINGS OF FACT

When Dr. Wemette arrived at the high school at 7:00 a.m. on the morning of September 6, 1996, he was met by a police officer and the District's head custodian. They reported that an extensive amount of vandalism had occurred at the high school some time between midnight and 5:00 a.m. The incident report presented to the District Board at the time of Mr. Shinn's expulsion hearing describes the extent of the vandalism as follows:

> INCIDENT: On the morning of Friday, September 6, 1996 somewhere between midnight and 5:00 a.m. the above named student along with two other students committed the following acts of vandalism at Keokuk Senior High:
>
> Windows Broken - 23
>
> 1 - Library Office
> 1 - Room 219
> 1 - Conference Room
> 1 - Display Case,Home Ec.
> 2 - Windows each side of doors, Orleans St.
> 4 - 108-109
> 1 - 109 A -Storage Area
> 2 - Windows each side of doors - Staff Room
> 2 - Wood Shop
> 1 - 115
> 1 - Hall Landing-Stairway
> 1 - 127
> 1 - 123
> 1 - 122
> 1 - 110
> 2 - Wood Shop
>
> Other Damage:

4 - Removed and took fire extinguishers
2 - smashed wall hung toilet - girls rest room 3rd floor
2 - damaged controls and nozzle on water fountain
2 - damaged controls and toggle switches on two platform lifts on practice field
1 - broke glass and dials on main gas meter to high school building

*This is a listing of items identified and reported to Keokuk Police Department as of 9/9/96 and does not exclude the possibility of additional items.

(Exh. C, p.2.)

During the course of the police officer's initial investigation, he found a piece of broken glass with blood on it. The officer then proceeded to Keokuk Hospital to see if any one had come in for treatment for an injury to their hands or feet. He learned that a 17-year-old male had come in at 5:12 a.m. with a serious cut on his hand. The suspect told the treating physician that he had cut his hand on a nail.

During first period on that same day, a teacher questioned a student about whether he had been drinking and sent the student down to the home-school liaison who then took the student to the associate principal's office. During the course of being questioned by the associate principal the student indicated that he had spent the night with Don Shinn. The associate principal then called Don down to the office to ascertain if he had also been drinking. There was no evidence that Don had consumed any alcohol. Don returned to class.

Dr. Wemette testified that the parents of the student who had been drinking were contacted and the student left. In the meantime, the officer investigating the vandalism returned and was informed that a student had just been sent home for drinking before school. The officer went out to see who the student was and found the student in a vehicle with the motor running. The officer then arrested the stu-

dent for operating a motor vehicle while under the influence. When that student was taken to the police station, he gave a statement regarding what had taken place the night before. By the end of the day, the student had made a statement implicating two other people in the vandalism incident, and one of them was Don Shinn. All of this took place on Friday, September 6th.

Late on Sunday, Mrs. Ames, Don's mother, called Dr. Wemette at home. She asked him if he would meet with her younger daughter at school on Monday because Don had been charged with the vandalism incident at the school. During the course of this conversation, she indicated that this would be hard on her daughter, she additionally stated that she thought it was time that Don accepted responsibility for his actions. By Sunday evening, all three students involved in the vandalism had been sent to juvenile detention.

By noon on Monday, Dr. Wemette had had conversations with the parents of all three students. He advised them that he would be suspending the students for ten days and that he would be sending a recommendation to the superintendent for an expulsion hearing. Dr. Wemette testified at the appeal hearing that during the course of this investigation,

he "confirmed through a number of sources that Don was, in fact, responsible for some of the vandalism at the school." (Tr. at 9.) During his investigation and conversation with Don's family, the principal never got any indication from Don or his family that Don was not responsible for the damage done at the school. Id.

On September 9, 1996, Dr. Wemette sent a letter to Appellant stating that he had requested a hearing with the Board of Education to consider Don's expulsion for violation of school rules. Among other things, the letter stated that Dr. Wemette would be recommending expulsion for the remainder of the first semester of the 1996-97 school year with the option of readmission for the second semester. (Exh. D.) Along with this letter, Dr. Wemette sent a copy of his memorandum to the superintendent containing his recommendation for expulsion; the school rules which had allegedly been violated; and an itemization of the damages to the

school property as had been identified and reported to the Keokuk Police Department as of 9/9/96. (Exh. C.) Mrs. Ames signed Exhibit D and returned it to Dr. Wemette as directed. Her signature indicated that she wanted a closed hearing and she wished to attend the hearing. In addition, it acknowledged that she had been advised of the charges and the procedures governing the expulsion hearing. (Exh. D.)

At the Board meeting on September 23, 1996, the Board held separate closed sessions to consider the expulsions of the three students charged with the vandalism of the school. Don's was the second hearing held. Before the hearing, Mrs. Ames was advised that she could waive her right to a hearing and accept the recommendation of the administration. Mrs. Ames declined. Instead, she exercised her rights to a hearing before the Board and to be represented at the hearing by counsel. On the advice of his counsel, Don Shinn chose not to attend the hearing.

At the hearing, Dr. Wemette offered the findings and conclusions which were based on his investigation, and submitted to the Board his memorandum detailing what he had found. (See, Exh. C.) Mrs. Ames appeared at the hearing but offered very little testimony. The student's attorney at the Board hearing did not cross-examine Dr. Wemette regarding his findings and conclusions. The student's counsel also declined to call any witnesses on the student's behalf. The only statement made by Mrs. Ames was that her son had been transferred to adult court, but he had pled not guilty and that trial was pending on the criminal charges.

Besides the damage done to the school property, Don and his fellow students were charged with other acts of vandalism as well. They were also charged with shooting out 36 car windows throughout town. One of the cars belonged to school board member Kathy Seibert. Prior to the Board meeting on September 23, 1996, Ms. Seibert had been asked by the Lee County Attorney to sign an estimate of damage to her vehicle. The damage estimate form named three defendants, Don Allen Shinn was one of them. The damage estimate to her car

was $349.15. (Exh. E.) The damage estimate specified that the total amount of the damage had been covered by insurance. (Id.)

At the appeal hearing, Ms. Seibert was asked by Don Shinn's attorney why she had not abstained from voting on whether or not the students should be expelled. Ms. Seibert testified that she had disclosed the information about the damage report to the superintendent; but also stated that she did not feel that this prejudiced her toward these young men because it had not been proven that they were responsible for the vandalism at the high school. At the appeal hearing, Ms. Seibert was also cross-examined by counsel for Mr. Shinn regarding statements made by her daughter, who attends Keokuk Senior High School, that appeared in *Smoke Signals*, the school newspaper. The newspaper was dated September 26, 1997, three days after the expulsion hearings. The Board member's daughter was quoted as stating: "I was really disappointed when I found out that our car had been vandalized. I don't see the fun in going out and getting drunk, then breaking windows and toilets. …It is senseless and I hope they learn their lesson from it." (Exh. F.)

After considering the evidence submitted by Dr. Wemette during the hearing, the Board voted to expel Don Shinn for the remainder of the 1996-97 school year. The principal's recommendation for expulsion for the remainder of the first semester was overruled by the Board. Testimony at the State Board hearing indicated that the length of the expulsion was based upon both the kind of misconduct involved and also the amount of misconduct involved. The other two students were also expelled for the remainder of the 1996-97 school year for their part in the incident at school.

Appellant raises basically three issues in this appeal: The first pertains to the burden of proof. Is the burden of proof on the school board to prove that Don Shinn committed the acts of vandalism as charged, or is the burden of proof

on the student to prove that he is innocent? The second issue concerns the amount of evidence presented to the Board. Appellant contends there was insufficient evidence to expel Don Shinn for the remainder of the school year when the principal himself had only recommended expulsion for the remainder of the semester. And, finally, Appellant questions the impartiality of the decisionmaker because one of the Board members had been personally affected by the vandalism of the students under consideration for expulsion.

II.
CONCLUSIONS OF LAW

Iowa statutory law is relatively terse regarding student expulsions. It is clear, however, that the School Board and only the Board, has the right to expel. "The board may, by a majority vote, expel any student, for a violation of the regulations or rules established by the board, or when the presence of the student is detrimental to the best interest of the school. …" Iowa Code §282.4 (1997). The Code does not spell out what constitutes an expulsion, nor does it address the rights of a student facing expulsion. Rather, those issues have been litigated over a period of time before the state and federal courts of this country. The State Board of Education has also had numerous opportunities to reflect on the judicial decisions and articulate its expectations for the rights of students facing suspension and expulsion from school.

In 1993, the State Board thoroughly reviewed the case law and summarized the elements of Due Process for students facing expulsion. See, In re Joseph Childs, 10 D.o.E. App. Dec. 1, 12-14(1993). These Due Process principles were recently reaffirmed in the expulsion case of In re Isaiah Rice, 13 D.o.E. App. Dec. 13(1996). They are:

A. Notice

1. The student handbook, board policy, the **Code of Iowa**, or "commonly held notions of unacceptable, immoral, or inappropriate behavior," may serve as sources of notice to the students of what conduct is impermissible and for which discipline may be imposed.

2. Prior to an expulsion hearing, the student shall be afforded written notice containing the following:

a. the date, time and place of hearing,

b. sufficiently in advance of the hearing (suggestion: a minimum of three working days) to enable the student to obtain the assistance of counsel and to prepare a defense,

c. a summary of the charges against the student written with "sufficient specificity" to enable the student to prepare a defense,[2]

d. an enunciation of the rights to representation (by parent, friend, or counsel), to present documents and witnesses in the student's own behalf, to cross-examine adverse witnesses, to be given copies of documents which will be introduced by the administration, and to a closed hearing unless an open hearing is specifically requested.

B. Hearing Procedures

1. The student will have all of the rights announced in the notice, and may give an opening and closing statement in addition to calling witnesses and cross-examining adverse witnesses. (This is "a full and fair opportunity to be heard.")

2. The decision making body (school board) must be impartial. (No prior involvement in the situation; no stake in the outcome; no personal bias or prejudice.)

3. The student has a right to a decision solely on the basis of the evidence presented.

2**Inherent in this right is the fact that no new charges will be brought up at the expulsion hearing that were not in the notice.**

4. There must be an adequate factual basis for the decision. This assumes that the evidence admitted is reasonably reliable. A "preponderance of the evidence" standard is

sufficient to find the student violated the rule or policy at issue.[3]

C. Decision Making Process/Creating a Record

1. No one who advocated a position at the hearing should be present during deliberations unless the other party or parties are also permitted to attend the deliberation phase.

2. Following the decision in deliberations, the Iowa Open Meetings Law (chapter 21) requires that decisions be made in open session. (§21.5(3).)

3. The student is entitled to written findings and conclusions as to the charges and the penalty.

In the present appeal, Appellant does not raise any issues involving the principles of "notice" or of the "decisionmaking process." The gravamen of Appellant's complaint concerns the hearing procedures. All of Appellant's complaints involve the "rights" detailed in these four principles so each one will be addressed separately.

I. The student will have all of the rights announced in the notice, and may give an opening and closing statement in addition to calling witnesses and cross-examining adverse witnesses. (This is "a full and fair opportunity to be heard.")

It has generally been held that a student may be required to testify even if criminal proceedings are pending against him. See, e.g., Madera v. Bd. of

---

3A "preponderance" is enough to outweigh the evidence on the other side; enough to "tip the scales of justice one way or the other"; 51% of the total evidence suggests guilt or innocence.

Educ., 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S.1028 (1968); Furutani v. Ewigleben, 297 F.Supp. 1163 (N.D.Cal. 1969); Johnson v. Bd., 310 N.Y.S.2d 429 (1970); Brands v. Shelton Comm. Sch., 671 F.Supp. 627 (N.D. Iowa 1987). This is because the protection against self-incrimination afforded by the Fifth Amendment to the Constitution applies only to criminal cases. It has been suggested that the student should

testify and then object in a subsequent criminal trial to the admission of the incriminating statements made at the disciplinary hearing. Furutani v. Ewigleben, supra, 297 F.Supp. at 1170. When the Fifth Amendment to the Constitution does not apply, an adverse inference may be drawn from a student's failure to testify at his disciplinary hearing. Boynton v. Casey, 543 F.Supp. 995 (D.Maine 1982).

In the present case, Mr. Shinn was given "a full and fair opportunity to be heard." He chose not to exercise it. He was not denied the opportunity to call witnesses in his behalf. Once the principal made his recommendations based on the investigation of the vandalism, Mr. Shinn was allowed the opportunity to present any proper evidence to rebut the charge or mitigate the gravity of the matter. For example, had Mr. Shinn been at home in bed that evening, witnesses could have been presented to testify to that fact. Had the reliability of the student who reported Mr. Shinn as one of the "co-vandals" been unreliable, that student could have been called for impeachment before the Board. This is not to shift the burden of proof to the student as counsel for Appellant complains; it is simply to emphasize that the student has some responsibility in the hearing to proffer a defense. Once the opportunity is given for such a defense by the school district, the student cannot then complain that he was deprived due process because he didn't show up or he pled not guilty.

II. The decisionmaking body (school board) must be impartial. ("No prior involvement in the situation; no stake in the outcome; no personal bias or prejudice.")

The vote to expel Don Shinn for the remainder of the school year was a unanimous vote. Nevertheless, Mrs. Ames charges that Board Member Seibert may have been biased against her son because of the damage to her car. Although it would have been better for this board member to abstain from the vote to avoid any appearance of bias, she was not legally required to do so under the circumstances. In order to disqualify a board member from sitting on a hearing panel, it is necessary to prove actual bias on behalf of the board member against the individual involved. The Iowa Supreme Court requires more than "familiarity" with the facts underlying a particular case. A board member should not be involved in the investigation, recommendation, or prosecution of a case. More to the point, the Iowa

Supreme Court has held that a board member is not disqualified from sitting on a hearing panel unless the board member feels personal knowledge would prevent him or her from reaching a fair decision. Bishop v. Keystone Area Education Agency No. 1, 275 N.W.2d 744 (Iowa 1979).

The only evidence submitted at the State Board hearing to support Mrs. Ames' claims is that Kathy Seibert filed a damage report relative to her own automobile. That damage report indicated that Don A. Shinn was "charged" as a "defendant." Mrs. Seibert's signature on the form only indicated the amount of the damage and that it was all covered by insurance. There was no indication that she believed Don Shinn was responsible for that damage – it could have been one of the other two students. There is no indication that had Board Member Seibert abstained from voting that the outcome for Don Shinn would have been any different. But because it creates the "appearance of bias," it is often better for board members to err on the side of caution or at least make full disclosure of any personal knowledge or involvement they have on a case before them. Ms. Seibert did disclose this information to the superintendent, and she testified that she did not think it prevented her from making a fair decision.

III. The student has a right to a decision solely on the basis of the evidence presented.

Evidence includes the proof presented at a hearing through witnesses or documents. In the present case, the only proof presented was the investigative report of Principal Wemette, along with his recommendation for expulsion. There is no indication that the decision to expel Don Shinn was based on anything other than this. Although counsel for Appellant raises the issue of bias because of the extensive article about the vandalism that appeared in the student newspaper, *Smoke Signals*, this was not published until three days after the expulsion hearing. (Exh. F.) There is nothing to show that the Board's decision was based on anything other than the evidence presented at the hearing.

IV. There must be an adequate factual basis for the decision. This assumes that the evidence admitted is reasonably reliable. (A "preponderance of the evidence" standard is sufficient to find the student violated the rule or policy at issue.)

Counsel for Appellant asserts that he does extensive work in the criminal justice system. Although he admits that proof beyond a reasonable doubt is not required in a student disciplinary hearing, he argues vehemently that "some proof" is required. He maintains that the administration presented no evidence that came from the personal knowledge of the witnesses, like the police officer or the other students. What he is really complaining about is the fact that the evidence presented by the administration is "hearsay" evidence. Hearsay is evidence which does not come from the personal knowledge of the witness, but from the mere repetition of what he has heard others say. Hearsay is generally inadmissible in judicial proceedings because the statement is not subject to cross-examination. However, hearsay is admissible in student disciplinary proceedings if it has "rational, probative force" and there is no direct contradictory evidence. Brands v. Shelton Comm. Sch., 671 F.Supp. 627, 42 Educ.L.R. 753

(N.D. Iowa 1987). Counsel for Appellant suggests that the school board "clearly could have offered police reports; they could have offered investigations; they could have offered statements from other people who they wanted to. They chose not to." (Tr. at 39.) A similar argument was considered and dismissed in Boykins v. Bd. of Educ., 492 F.2d 697, (5th Cir. 1974), *cert. denied* 420 U.S. 962 (1975), where the court stated:

> There is a seductive quality to the argument – advanced here to justify the importation of technical rules of evidence into administrative hearings conducted by laymen – that since a free public education is a thing of great value, comparable to that of welfare sustenance or the curtailed liberty of a parolee, the safeguards applicable to these should apply to it. … In this view we stand but a step away from the application of the *strictissimi juris* due process requirements of criminal trials to high school disciplinary processes. And if to high school, why not to elementary school? It will not do. Basic fairness and the integrity of the fact-finding process are the guiding stars. Important as they are, the rights at stake in a school

> disciplinary hearing may be fairly determined upon the "hearsay" evidence of school administrators charged with the duty of investigating the incidents. We decline to place upon a board of laymen the duty of observing and applying the common-law of evidence.

Id. at 701.

> Even though the school principal may not have had direct, first-hand knowledge of Don A. Shinn's involvement in the destruction at the high school, he was the person ultimately responsible for enforcing the District's policies and rules at the high school. He was responsible for student management, as well as facility management. He was also the responsible authority to present the administration's findings.
>
> The principal was available for cross-examination at the hearing before the school board. If his testimony and if his findings and conclusions were not reliable or credible, cross-examination would certainly have revealed these deficiencies. There was no cross-examination, however, and no other evidence was submitted to indicate that the principal's findings and conclusions were unreliable. Indeed, there is no evidence whatsoever which contradicts the principal's findings and conclusions. Even at the State Board appeal, which is held *de novo*, no evidence was ever submitted to contradict the principal's findings.[4]

In conclusion, a "preponderance of the evidence" exists when there is enough evidence to "tip the scales of justice one way or the other" or enough evidence is presented to outweigh the evidence on the other side. In the absence of any evidence presented by Appellant to contradict the evidence presented by Principal Wemette before the Board, and because the evidence presented before the Board is the same type of evidence constituting "probable cause" for the police to file charges against Don Shinn and the other students, we cannot say that the principles of fair hearing

[4] Since there is no justification for Mrs. Ames' argument that the Principal's recommendation of a one-semester expulsion is binding on the Board, that contention will not be addressed. Had Mrs. Ames waived her right to a hearing upon reliance of the Principal's recommendation, the issue might have been raised. However, she clearly declined his offer and cannot be said to be prejudiced by any reliance thereon.

have been violated. Absent any credible contradictory evidence, the Board was justified in its findings and conclusions against Don A. Shinn. Any motions or objections not previously ruled upon are hereby denied and overruled.

III.
DECISION

For the reasons stated above, the decision of the Keokuk Community School District Board of Directors made on September 23, 1996, is recommended for affirmance for substantial compliance with the hearing guidelines enunciated in In re Isaiah Rice, 13 D.o.E. App. Dec. 13, 21-22 (1996).

_____ _____

DATE ANN MARIE BRICK, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

_____ _____

DATE CORINE HADLEY, PRESIDENT
IOWA STATE BOARD OF EDUCATION