

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

**J.L. and his natural mother and guardian,
L.L.,**

Plaintiffs,

vs.

**JOHN McLANE, HARVEY WEWEL, THE
BOARD OF EDUCATION OF BROWN
COUNTY SCHOOL DISTRICT 0010,
VETA RICHARDSON, VELMA J.
LUCERO, RICK BIGGINS, LARRY
SANER, BOB SEARS, and DALE
HOLLIBAUGH,**

Defendants.

Case No. CI00-4

JUDGMENT ON APPEAL

DATE OF HEARING: May 17, 2000.

DATE OF RENDITION: May 17, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiffs: Thurman Gay.

For defendants: William T. Wright and Gregory H. Perry.

SUBJECT: Judgment upon appeal pursuant to NEB. REV. STAT. § 79-288
et seq. (Reissue 1996).

PROCEEDINGS: At the hearing, these proceedings occurred:

The record of the board of education was received in evidence. Arguments of counsel were heard on the defendants' suggestion of mootness. The suggestion was denied. Arguments were heard on the merits of the appeal. Summary findings were stated.

FINDINGS: The court finds and concludes that:

1. This is an appeal from the decision of the board of education acting pursuant to the Student Discipline Act (the act). NEB. REV. STAT. § 79-254 *et seq.* (Reissue 1996). The act was previously codified at § 79-4,169 *et seq.*

2. J.L. illegally entered the Ainsworth Public School and took several items, including speakers and cassette players. The middle school principal recommended expulsion for the spring semester. J.L.'s parent requested a hearing. NEB. REV. STAT. § 79-269 (Reissue 1996). The superintendent appointed a hearing officer, who conducted the hearing. The hearing officer made a report and recommendation to the superintendent. NEB. REV. STAT. § 79-282 (Reissue 1996). The superintendent adopted the recommendation of the hearing officer. *Id.* J.L.'s parent appealed the superintendent's decision to the board of education, which held the required hearing. NEB. REV. STAT. § 79-285 (Reissue 1996). The board affirmed the superintendent's decision.

3. In *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997), the Nebraska Supreme Court observed that the act was passed to assure the protection of elementary and secondary school students' due process rights within the educational system. The act accords a right of judicial review of a final decision by the board of education. However, the district court may only reverse or modify the decision

if the substantial rights of the petitioner may have been prejudiced because the board's decision is:

- (a) In violation of constitutional provisions;
- (b) In excess of the statutory authority or jurisdiction of the board;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or
- (f) Arbitrary or capricious.

NEB. REV. STAT. § 79-291(2) (Reissue 1996).

4. The defendants assert that the case is moot. The defendants' suggestion of mootness is not well-founded. First, the semester has not ended. Second, even if it had ended, the case would not be moot. The board policy adopts a system of penalties differentiating between first and second offenses. The possibility of future assertion that the board's action in this case adjudicated a first offense, and seeking to impose expulsion as an automatic penalty, and indeed the sole authorized penalty, for a second "Group D" offense constitutes a continuing controversy, notwithstanding the looming end of the semester. If this court

determined that the plaintiffs' substantial rights were violated upon any of the statutory grounds, the court would not hesitate to reverse the decision to preclude later use of the decision as proof of a "first" offense.

5. The plaintiffs' petition on appeal generally alleges the statutory grounds without any specific claims of error.

6. The plaintiffs claim that the decision violated constitutional provisions.

A. In the context of student discipline cases, no fundamental right to education exists in Nebraska, nor does such a right exist under the federal Constitution. *Kolesnick v. Omaha Pub. Sch. Dist., supra.*

(1) The appropriate level of scrutiny is the rational basis test. *Id.* Under the rational basis test, as long as the official action is directed to a legitimate purpose and is rationally related to achieving that purpose, it is not unconstitutional. *Id.*

(2) Protection of school property to preserve its availability and usefulness for students and teachers constitutes a legitimate purpose. Expulsion of the student rationally related to the board's legitimate purpose. The expulsion did not violate the student's rights under the Nebraska or federal Constitution.

B. Substantive due process limitations on the severity of disciplinary sanctions permit a court to overturn a school district's ruling if there is a shocking disparity between the punishment and the offense. *Id.*

(1) That does not exist here. The discipline policy prohibited stealing or attempting to steal property of substantial value.

(2) Theft constitutes a serious offense. There is no disparity between the punishment (expulsion) and the offense (theft), much less any shocking disparity.

7. The discipline and punishment did not exceed statutory authority.

A. Section 79-267 explicitly authorizes expulsion as a possible consequence of stealing or attempting to steal school property. NEB. REV. STAT. § 79-267(2) (Reissue 1996). The board policy expressly designates expulsion as a possible penalty for the particular violation, and makes the requisite findings. NEB. REV. STAT. § 79-262 (Reissue 1996).

B. The applicable sections do not mandate use of any particular form of punishment. The wisdom or expediency of a rule adopted by a school board and the motive prompting it are not open to judicial inquiry, where it is within the administrative power of that body. *Kolesnick v. Omaha Pub. Sch. Dist.*, *supra* (citing *Richardson v. Braham*, 125 Neb. 142, 249 N.W. 557 (1933)).

8. The court finds no unlawful procedure.

A. The petition on appeal does not specify any particular procedure claimed as unlawful. The plaintiffs' brief asserts unspecified adverse evidentiary rulings as error.

B. With regard to the hearing before the hearing examiner, the statute expressly states that "the hearing officer shall not be bound by the rules of evidence or any other courtroom procedure." NEB. REV. STAT. § 79-277 (Reissue 1996).

C. The appeal to the board is on the hearing examiner's record, except that "new evidence may be admitted to avoid a substantial threat of unfairness . . ." NEB. REV. STAT. § 79-285 (Reissue 1996).

(1) Obviously, the board review of an informal hearing constitutes, in reality, a further informal hearing.

(2) The hearing remains informal even if the board elects to allow additional evidence.

D. Although the board elected to allow additional evidence, the court finds no showing that such admission was necessary to avoid a substantial threat of unfairness. Allowing the additional evidence constituted no more than harmless error. Moreover, the plaintiffs expressly requested the additional evidence over the principal's objection. The plaintiffs cannot complain of error that they invited the board to commit. *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997); *Norwest Bank Neb. v. Bowers*, 246 Neb. 83, 516 N.W.2d 623 (1994).

E. The only specific argument asserted by the plaintiffs concerns the relevance objection sustained by the board president during the additional evidence.

(1) Obviously, if the additional evidence was not required by statute, no error could result in excluding any portion thereof.

(2) Moreover, the particular question addressed whether the witness “personally fe[lt]” that there was a disparity of punishment between the witness’s child and the subject student. Exhibit 1A, 13:6-14. The board president did not abuse his discretion in conducting an informal hearing.

9. The plaintiffs do not specify any other error of law affecting the decision. The court, upon thorough examination of the record, finds none.

10. The decision clearly is supported by competent, material, and substantial evidence in view of the entire record made on review. In *Kolesnick v. Omaha Pub. Sch. Dist.*, *supra* at 583, 558 N.W.2d at ____, the Supreme Court stated:

[A]n appellate court will sustain the decision of an administrative body if there is evidence in the record to sustain its findings. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). Here, we find the decision of the board to be both within its power and supported by competent evidence. Therefore, the decision to assert the maximum punishment against [the student] was within the statutory authority of [the board].

11. In this case, the plaintiffs do not contest the conduct being punished. Rather, they attack the punishment imposed. The decision in *Kolesnick* teaches that where the punishment is within the board’s power or authority, and is supported by competent evidence, the court will not intervene. Contrary to the plaintiffs’ argument, as a “Group D” offense, expulsion constitutes one of the possible penalties for the student’s undisputed conduct, even for a first offense. The possibility that the board could have chosen a lesser penalty does not affect the validity of the penalty determined by the board.

12. The plaintiffs finally claim that the decision was arbitrary and capricious.

A. An arbitrary action is one which is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion. *Kolesnick v. Omaha Pub. Sch. Dist.*, *supra*; *In re Application of Jantzen*, *supra*.

(1) The board did not disregard the facts and circumstances of the case. Its decision was founded upon a basis which would lead a reasonable and honest person to the same conclusion.

(2) The plaintiffs’ claim of disparity between the punishment in this case and that of other students involved lacks merit. The record shows all concerned students were expelled. The

probationary readmission of the other students upon the parent's cooperation and without continuing disciplinary problems demonstrates a valid and significant difference justifying the board's action.

B. A capricious action is one "guided by fancy rather than by judgment or settled purpose; such a decision is apt to change suddenly; it is freakish, whimsical, humorsome." *Id.*

(1) An agency's judgment must be based on a factual foundation and must give due consideration to all the essential elements involved. *Id.*

(2) If a school board acts within the power conferred upon it by the Legislature, courts cannot question the manner in which the board has exercised its discretion in regard to subject matter over which it has jurisdiction, unless such action is *so unreasonable and arbitrary as to amount to abuse of the discretion* reposed in it. *Kolesnick v. Omaha Pub. Sch. Dist., supra.*

C. The record fails to support the plaintiffs' claim that the decision was arbitrary or capricious. The board did not abuse its discretion. There is no basis for this court to intervene.

13. The decision of the board should be affirmed. All costs were previously paid by the plaintiffs except for the cost of the bill of exceptions of \$82.50, which was paid by the defendants and should be taxed to the plaintiff.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED ORDERED, ADJUDGED, AND DECREED that:

1. The decision is affirmed.
2. Costs on appeal are taxed to the plaintiffs. Judgment is entered in favor of the defendants and against the plaintiff for costs of \$82.50, with interest at 7.197% per annum from date of judgment until paid.

Signed at Ainsworth, Nebraska, on May 17, 2000.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20__ by ____.
- If not already done, immediately transcribe trial docket entry dictated in open court.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge