IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

JOSHUA ABEL, et. al.	:	**CASE NO. 07-CV-63794**
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	**JONATHAN P. HEIN, Judge**
	:	
MISSISSINAWA VALLEY BOARD OF EDUCATION	:	
	:	
	:	**DECISION AND**
Defendant/Appellee.	:	**JUDGMENT ENTRY**

This matter came before the Court for trial pursuant to the Notice of Appeal filed by Appellants from the decision of the Mississinawa Valley Board of Education. The Plaintiffs appeared pro se. The Defendant is represented by Richard M. Howell, the Prosecuting Attorney.

For the reasons explained herein, the Court heard the testimony of various witnesses and admitted various exhibits. Additionally, the record provided by the Defendant/Appellee was filed and considered. The matter was taken under advisement by the Court for written decision.

Nature of the Case

This administrative appeal is brought by Randy Abel, the parent of Joshua Abel. The Plaintiffs/Appellants appeal to this Court from the decision of the Board of Education wherein it

upheld the superintendent's decision for an eighty (80) day expulsion of Joshua, who at the time was a student at Mississinawa Valley High School.

The conduct for which Joshua was disciplined involved his comments at the end of a seventh period class to another student, John Oliver, on Friday, March 30, 2007. Joshua made a statement about strapping explosives and ammunition to himself. [As Plaintiffs/Appellants point out, the context of the comments was not known – whether about a movie, or a current event, or even retaliation for a fight in which Oliver was involved.] Nonetheless, Kent Moneysmith and Kyle Beuter overheard the comment and reported it to the teacher, Mrs. Conway, who told the boys to talk appropriately and to not talk any more about that subject.

After school ended, the high school principal, Clarence Perry, was called about the conduct by a parent. His inquiry about the situation did not commence until the following Monday when he called the Darke County Sheriff's Department and also began his own investigation, including talking with students and Mrs. Conway about the comments, searching Joshua's locker, and listening to a portion of Joshua's statement to Capt. Steve Stebbins of the Sheriff's Department.

As a result of his investigation, Mr. Perry suspended Joshua from school for 10 days. Further, he recommended to the Superintendent, Joe Scholler, that Joshua be expelled from school. Mr. Scholler reviewed the reports and information about the incident. In spite of the Plaintiffs/ Appellants arguments, Mr. Scholler possessed no duty to separately investigate the principal's findings. A hearing was held on April 17, 2007 after which Mr. Scholler adopted the principal's recommendation and expelled Joshua for 80 days. The expulsion contained an option for Joshua to return to school at the commencement of the 2007-2008 school year if he completed a "Psychology

Evaluation" for review by the school administration to determine if he would be re-admitted.

From the superintendent's decision, an appeal was filed by the parents with the Board of Education. All Board members were notified about the May 3, 2007 special meeting to consider the appeal of the expulsion. Only three of the five board members attended. After nearly three hours of hearing the matter, the three members voted unanimously to uphold Mr. Scholler's expulsion of Joshua. It is from the decision to expel Joshua for 80 days that this appeal was filed.

Procedural Matters

I.

After an appeal is filed, R.C. 2506.02 places a burden upon the Board of Education (as it does to all other administrative agencies), as follows:

> Within forty days after filing the notice of appeal, the officer or body from which the appeal is taken, upon the filing of a praecipe, **shall prepare and file** in the court to which the appeal is taken, **a complete transcript of all the original papers, testimony, and evidence offered, heard, and taken into consideration** in issuing the final order, adjudication, or decision appealed from. The costs of such transcript shall be taxed as a part of the costs of the appeal. (Emphasis added.)

The purpose of the transcript is to allow the Court to determine whether the decision to terminate employment was based upon a "preponderance of substantial, reliable and probative evidence." See R.C. 2506.04; Sell v. Adams Twp. Bd. of Zoning Appeals (Dec. 22, 2000), Darke App. No. 1518.

It is clear that the Board of Education did not provide a typed or recorded transcript of the hearing which it conducted on May 3, 2007. The Board did provide academic and prior disciplinary records of Joshua [Defendant Exs.3, 5], and the DCSO report [Defendant Exs. 6, 8]. The Board's disciplinary hearing lasted about 2 3/4 hours and, based upon the trial testimony, it is

clear that many arguments of law and fact were presented. However, without a written or oral transcript, the Court is unable to fully review the matters which the Board of Education used to make its decision, including a review of whether the procedural requirements of R.C.2506.03(A)(2) were fulfilled [eg. the opportunity to present testimony, under oath; the opportunity to cross-examine accusers; the opportunity to make arguments of law and fact; etc.].

If a typed or recorded transcript of the Board's hearing had been filed, this Court would have been required to presume that the Board's decision was reasonable and valid and would have been obligated to give deference to the Board's decision. Amser Corp. v. Village of Brooklyn Heights (May 6, 1993), Cuyahoga. App. No. 62140; In Re: Application of Watkins (February 18, 2000), Montgomery App. No. 17723. Without a complete transcript, the Court cannot review the Board's decision to determine whether it was based upon substantial, reliable, probative evidence. Instead, the Court is required to permit the Plaintiffs/Appellants to provide additional testimony at trial, and the Court must consider the matter *de novo;* the decision of the Board of Education can not be given any deference in this Court's review. Woerner v. Mentor Exempted Village School Dist. Bd. of Edn. (1993), 84 Ohio App. 3d 844.

II.

The Plaintiffs/Appellants question whether the Board of Education possessed authority to reach a decision on the merits of the suspension since only three of the five board members attended the disciplinary hearing on May 3, 2007. The language which the Plaintiffs/ Appellants call into question is found in R.C. 3313.66(E) as follows: "The board, **by a majority vote of its full membership** or by the action of its designee, may affirm the order of suspension or expulsion, reinstate the pupil, or otherwise reverse, vacate, or modify the order of suspension or

expulsion." [Emphasis added.]

The Plaintiffs/Appellants interpret this language to mean that all members of the Board of Education must attend before any action can be taken. However, consistent with other law regarding the actions of public governing bodies, the Court interprets this language to mean that a majority of the board must vote for the action. In other words, 3 of the 5 members must vote for a particular outcome under R.C. 3313.66 – as opposed to a majority of a quorum of the board which would be only 2 of 3 members. The Court finds no irregularity in the proceeding by the board.

Decision

From the testimony and exhibits presented at trial, the Court finds that the comments of Joshua Abel were inappropriate and disruptive to the school to the educational environment, especially in view of today's school circumstances where instances of violence are increasingly common and garner great public attention. The Court's conclusion is based upon the testimony of Debbie Beuter who expressed her concern about the statement; the testimony of Kent Moneysmith that he was somewhat afraid at the time; the testimony of Mr. Perry that a parent called him after school with concerns about the statement; the actions of Mrs. Conway – albeit brief – to correct the students and to advise them to make no further statements. Joshua's conduct is found to violate school policies 15.30(A)(12), (13), (14), (23) and (23). [See Defendant Ex.1 at page 18.]

Since the Court cannot defer to the judgment of the Board of Education due to the lack of a complete transcript, the Court is now left with the unenviable task of deciding what amount of punishment should be imposed. This task is made difficult by the lack of any evidence about the extent of progressive discipline [see Defendant Ex. 1, policy 15.40] that was imposed on

others for disciplinary violations as well as the amount of discipline necessary to make future changes to Joshua's behavior. Also, it would have been appropriate to more fully investigate the following issues in order to impose appropriate discipline: whether the comment was directed at a particular student, teacher, location, etc.; whether there was a motive or explanation for the comment, including any retaliation or apparent mental health / stress indicators; whether the comments were merely a recital about a movie, television program or current event topic. However, the investigation about the context of Joshua's statements was too perfunctory.

Instead, the only facts relevant to discipline that are sufficiently reliable are that Joshua was previously suspended on two prior occasions for 10 days each [Defendant Ex. 3] and that Mr. Perry suspended Joshua for 10 days for this conduct (which suspension is not a matter for review during this appeal). An understanding of the context of the statement would have greatly increased the likelihood of imposing only enough discipline to motivate appropriate behavior in the future without undue harm to Joshua's educational opportunities. Without further evidence, the 80 day expulsion appears too harsh.

On the other hand, the parents could have mitigated the length of the expulsion by cooperating with the school to obtain a Psychological Evaluation to provide information about Joshua to assist the school in his re-entry. Theoretically, with a prompt evaluation and report, Joshua could have returned to school after the 10 day suspension – although given the temperaments of the involved persons, it is unlikely this brief expulsion would have occurred. More realistically, with mutual cooperation between the school administration, parents and student, Joshua could have been ready to return at the start of the 2007-2008 school year. Indeed, the failure of the parents to return Joshua to school on October 2, 2007 pursuant to the Court's order after the Psychological

Evaluation was completed causes the Court to question whether trying to vindicate the child was worth the possible loss in educational instruction that may have resulted as a result of the expulsion.

Conclusion

The Court finds that Joshua Abel violated Mississinawa Valley High School policies 15.30(A)(12), (13), (14), (23) and (23) by his statement about strapping explosives and ammunition to himself. Based on the subsequent 10 day suspension by the principal, the Court finds that Joshua violated school policy 15.30(A)(33). Finally, the Court finds sufficient basis for the Board of Education's decision to uphold the expulsion of Joshua from school.

Because of an inadequate investigation, based on the incomplete transcript, and in view of the trial evidence, the 80 day expulsion is determined to be excessive. The Court finds expulsion through the beginning of the 2007-2008 school year to be the appropriate sanction, with the requirement that Joshua should provide a Psychological Evaluation as a condition to re-admission.

However, the failure of the parents to cooperate with the school to mitigate Joshua's expulsion results in no further remedy being available to the Plaintiffs/Appellants. As the Court announced at the commencement of trial, the Defendant/Appellee's motion to dismiss the demand for monetary damages was granted and claims for monetary relief were denied. Their request for re-instatement into school and remedial educational training is denied.

IT IS THEREFORE ORDERED AND DECREED that the 80 day expulsion of Joshua Abel by the Mississinawa Valley Board of Education is modified to an expulsion until the beginning of the 2007-2008 school year with the requirement that Joshua Abel was to obtain a Psychological Evaluation. As previously ordered on October 2, 2007, Joshua may return to school

should his parents choose to do so.

Costs taxed half to the Plaintiffs and half to the Defendant. FINAL APPEALABLE ORDER.

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Jonathan P. Hein, Judge

cc: Randy Abel, Plaintiff pro se
Richard M. Howell, Prosecuting Attorney for Defendant

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