SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
JUDGE

P.O. BOX 746
COURTHOUSE
GEORGETOWN, DE 19947

May 24, 2001

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RE: C.G. v. Cape Henlopen School District Board of Education,
C.A. No. 00A-05-004

DATE SUBMITTED: February 23, 2001

Dear Counsel:

Pending before the Court is an appeal from a decision of the State Board of Education ("State Board") affirming the decision of the Board of Education of the Cape Henlopen School District ("Cape Board") expelling appellant C.G. from school for the remainder of the first semester of School Year 1999-2000 on the grounds that he possessed marijuana and drug paraphernalia. This is the Court's decision upholding the decisions below.

SUMMARY OF PROCEDURAL POSTURE

On October 7, 1999, a bus driver referred C.G., a ninth grade student at Cape Henlopen High School, to the school's office for burning holes in the back of a bus seat. C.G. was searched by two administrators. Among other things, the search produced a baggie

containing what appeared to be marijuana and drug paraphernalia. The School Review Committee met on that date and recommended expulsion. On October 8, 1999, the Central Review Committee met to review the matter, and that committee recommended that the case be presented to the Cape Board recommending expulsion until the end of the school year. A hearing was held before the Cape Board on October 18, 1999. After that hearing, the Cape Board found that C.G. was in possession of marijuana and drug paraphernalia while at the high school and he was in violation of the Cape Henlopen Student Code of Conduct: #41.[1] Based on these findings, the Board concluded C.G. would be expelled from the School District for the remainder of the first semester of School Year 1999-2000.

C.G. appealed that decision to the State Board. A hearing officer considered the matter. That officer submitted a proposed order dated March 20, 2000, wherein he recommended that the Cape Board's decision be affirmed as supported by substantial evidence and free of legal error. The State Board accepted and adopted the proposed order as its decision and final order and affirmed the decision of the Cape Board by order dated April 20, 2000.

C.G. appealed this decision to this Court, and the parties have submitted briefing on the issues.

FACTS

At the hearing on October 18, 1999, both the Cape Henlopen School District ("the District") and C.G. presented witnesses and

[1]In #41 of the Student Code of Conduct, it is clearly stated that possession of drugs and/or drug paraphernalia is prohibited.

evidence. Noteworthy is the fact that David Williams, Esquire, represented the Cape Board at that hearing. He did not undertake any prosecutorial activities.

The evidence presented at that hearing is summarized below.

On October 7, 1999, C.G. rode the bus to school. His bus driver went to Dr. Diane Stetina, Assistant Principal, and filled out an incident report. In that report, he charged C.G. with the following infractions: bringing articles aboard bus of injurious or objectional nature; lighting matches/smoking on bus; tampering with bus equipment; destruction of property. The description of the incident was as follows: "On the Back of the First Seat - Drivers [sic] Side 2 Burned Marks. Saw flash of light from that seat." The bus driver did not testify at the hearing; however, both sides agreed to the admission of the report for the limited purpose of determining whether the District had sufficient grounds to search C.G.

Dr. Stetina and Dr. Sue Dutton, principal of Cape Henlopen High School, searched C.G. The testimony conflicted regarding the search. The testimony of Dr. Stetina and Dr. Dutton was to the effect that they asked C.G. if he had a lighter; he denied having a lighter; he consented to them searching him; they searched his pants and found what appeared to be marijuana in a plastic baggie; and then they searched his bookbag and found three Altoid mint cans (two of which were punctured), a single rolling paper, and a lighter. C.G. testified that they did not ask him if he had a lighter; they did not ask his permission to search him or his

belongings; they searched his bookbag first and located the lighter and Altoid cans; and then they searched his person.

C.G.'s testimony also was as follows. Although after C.G.'s mother arrived at the school, C.G. admitted to burning the back seat of the bus, he denied at the hearing that he ever burned the bus seat. Instead, he contended that his mother coerced him into confessing because the school indicated there was a videotape which would show that he had burned the seat.[2] Once they learned there was no videotape, the true story came out; he had not burned the seat.[3] The bag of marijuana was not his; he had seen it lying on the school grounds that morning, he had picked it up because he thought it was trash, and he had not yet had time to throw it away. He used the Altoid cans to smoke tobacco and he planned to use the rolling paper to smoke tobacco.

C.G.'s mother testified, in part, as follows. Other students had lighters on the bus and someone had set C.G.'s shoe laces on fire that morning. She checked and saw his laces were burnt. A week after the expulsion at school, she made C.G. undergo a drug test and the results were negative for all drugs.

Detective Mark Ostroski, who is a member of the Delaware State Police and who was the School Resource Officer, testified as follows. Dr. Dutton turned over to him the items seized from C.G.

[2]C.G.'s mother so testified, also.

[3]This argument confuses me. If he did not burn the seats and if he believed there was a videotape of the incident, then it seems that he would have believed that the videotape would back up his story. Consequently, there would have been no need to confess to something he did not do.

Drugs often are stored in clear plastic bags. Upon opening the baggie, he detected the odor of marijuana. The results of a field test on the substance were positive for marijuana. The substance had been sent to the State Chemist's office for that office to conclusively identify what the substance was; however, there had not been enough time to receive the test results before the hearing.

He further testified as follows. He concluded the two Altoid cans, which had holes and black soot on the holes, were used as pipes to smoke drugs, i.e., they were drug paraphernalia. Although he never had seen Altoid cans used in this manner, the Altoid cans worked as pipes the same as do soda cans.

The Cape Board found and concluded as follows:

> 1. Following a search of his person and book bag, ... [C.G.] was found to be in possession of marijuana and drug paraphernalia while at Cape Henlopen High School.
>
> 2. ... [C.G.] is in violation of the Cape Henlopen Student Code of Conduct: #41, Use or Possession of Alcohol or Drugs (Drug Paraphernalia, Marijuana).
>
> Based on these findings, the Board concludes that ... [C.G.] shall be expelled from the Cape Henlopen School District for the remainder of the first semester of School Year 1999-2000.

C.G. appealed to the State Board. It is noteworthy that a member of Mr. Williams' firm represented the Cape Board in the appeal before the State Board. The State Board, upon adopting the Hearing Officer's proposed order, found and concluded as follows. The District had reasonable suspicion to believe that C.G. burned the bus seat; there was reasonable ground for the District to suspect that the search of C.G. would turn up evidence he had

violated either the law or the rules of the school; and the scope of the search, no matter whose version of the search was true, was reasonable.[4] The State Board concluded that it was not error for the Cape Board not to make a specific finding regarding reasonable suspicion. It further concluded that there was substantial evidence to support the conclusion that C.G. possessed marijuana and drug paraphernalia. Finally, the State Board concluded there was no due process violation resulting from Mr. Williams' representation of the Board at the hearing.

C.G. appealed to this Court. Mr. Williams has represented the Cape Board in the appellate proceedings before this Court. On appeal, C.G. has raised the same arguments as he raised before the State Board. These arguments are:

> 1) When the issue of reasonable suspicion to search a student is fully litigated and the fact finder does not make any findings regarding that issue at all nor issue a legal decision on that matter should the decision of that fact finder be reversed when it is adverse to a student?
>
> 2) Based upon a factual record which indicates no individualized suspicion to search a student since there was no indication that he had been involved in any crime nor likelihood that any evidence would be found on his person may a school district search that student?
>
> 3) May a school board rely upon inadmissible and unreliable evidence of a preliminary drug test to determine whether a substance in question is marijuana?
>
> 4) May a decision of a school district stand when there was no substantial evidence supporting its findings that the items which were found were drugs and drug paraphernalia?

[4]C.G. argued that under his version, where the bookbag was searched first and the lighter was found, the subsequent search of his person was excessive since the lighter already had been found.

5) Is due process violated when attorneys from the same law firm represent a school board at the school board hearing and then advocate the district's position seeking to expel a student from a school on appeal?

DISCUSSION

This appeal has been brought pursuant to 29 Del. C. § 10142. The Court determines whether substantial evidence on the record supports the decision below. 29 Del. C. § 10142(d). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Tulou v. Raytheon Serv. Co., Del. Super., 659 A.2d 796, 802 (1995). If such evidence exists and there were no errors of law, then the Court must affirm the decision below. Mooney v. Benson Mgt. Co., Del. Super., 451 A.2d 839 (1982), rev'd on other grounds, Del. Supr., 466 A.2d 1209 (1983).

I first will address the substantial evidence issue. C.G. argues there was not substantial evidence to support the findings below that C.G. possessed marijuana and drug paraphernalia. I agree that there was not substantial evidence to support a finding that C.G. possessed marijuana. If a student, who disputes that a substance is a drug, is to be punished for possessing a drug, then the evidence must establish that the substance is a drug. Substantial evidence is not established by a field test and a smell test.

I understand that the need for a prompt hearing may conflict with the ability to obtain test results from the Medical Examiner's Office. I also recognize this ruling could have some negative ramifications unless I provide some guidance on possible issues.

Thus, I provide some direction below.

If a student intends to dispute that the seized material is a drug, then he or she must notify the Board before the hearing of this dispute. The hearing then will be held as soon as the test results are returned. If the student does not dispute the results of the test before the hearing, then the student is deemed to concede that the seized material is a drug. The test results may be testified to by the police officer; a member of the medical examiner's office does not have to testify at the hearing. A positive field test result obtained by a police officer provides a sufficient basis for the District to take action and make recommendations regarding a student found to be in possession of what appear to be drugs during the period of time before the hearing is held.

To repeat, I conclude that there was not substantial evidence to support a conclusion that C.G. possessed marijuana. Because the Board did not make a determination that the seized material was a drug-like substance, I will not address the Board's contention that the decision to expel may be upheld on that ground.

However, I conclude there was substantial evidence to find that C.G. possessed drug paraphernalia. C.G. conceded the cans were his and he used them as pipes. The only conflict concerned the substance put into the cans; he contended he put tobacco in them, while the detective testified that the two Altoid cans with holes in them were used to smoke drugs. The Detective's testimony constituted substantial evidence to support the conclusion that the

cans were drug paraphernalia. Pursuant to #41 of the Code of Conduct, a student may be expelled for possessing drug paraphernalia. The Board's findings were supported by substantial evidence and its conclusions were valid.

C.G. argues that because the Cape Board failed to make findings on significant issues, then this Court must reverse its decision. I take this opportunity to reprimand the Cape Board for failing to make findings of fact regarding the reason to search C.G; regarding the search itself; and regarding the credibility of the various witnesses. The Board's job is to make findings of fact. There is no excuse for its failure to do so. By failing to do its job, the Board has made the jobs of the State Board and the Court harder than need be. Although, as is evidenced below, the Court can resolve this case by inferring the facts leading to the Board's conclusions, it may not be able to do so in the future. A student should not be expelled from school without the Board fulfilling its duties and obligations.

I look to law in the area of workers' compensation to address whether the failure to make specific factual findings on certain matters is fatal. If the Court can infer underlying findings from a conclusion, then there is no need to remand a case for the Board to make such findings. Haveq Ind., Inc. v. Humphrey, Del. Supr., 456 A.2d 1220, 1222 (1993); Keith v. Dover City Cab Co., Del. Super., 427 A.2d 896, 899 (1981).

In this case, the Court can infer from the Cape Board's conclusion that the Board found the District had reasonable

suspicion to search C.G. and that the search itself was reasonable. The bus referral, which was entered into evidence without objection, renders it undisputed that C.G. was referred to the District because the bus driver believed C.G. had burned the back of the bus seat. That referral gave the District reasonable suspicion, as is required by New Jersey v. T.L.O., 469 U.S. 325 (1985), to search C.G. Even if C.G.'s testimony regarding the search is accepted, the search was reasonable and not excessive. The District located the Altoid cans in the bookbag. Because I uphold the decision to expel based upon the finding of the drug paraphernalia, the rest of C.G.'s arguments on this issue become moot.

The final argument is a due process argument. C.G. asserts that he was deprived of due process because Mr. Williams represented the Cape Board at the October 18, 1999, hearing. Mr. Williams did not act as a prosecutor during the October 18, 1999, hearings; he advised the Cape Board during the proceedings. C.G.'s only argument is that it was a clear conflict of interest for Mr. Williams to represent the Board at the hearing when his firm and he have represented the Cape Board on appeal.

It is the Board which must be the impartial decision maker. Hope v. Charlotte-Mecklenburg Board of Education, N.C. App., 430 S.E.2d 472, 474 (1993). In order to show a violation of due process by the Court, C.G. must overcome a presumption of fairness on the part of the Cape Board. Dillard v. Unemployment Ins. App. Bd., Del. Supr., 445 A.2d 335 (1981); Withrow v. Larkin, 421 U.S. 35, 47

(1975). He has not done so. This claim fails.

Based on the foregoing, I conclude that substantial evidence supports the decisions below and there was no error of law.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

cc: Prothonotary's Office