

D. G.

Appellant

v.

BALTIMORE CITY BOARD OF
SCHOOL COMMISSIONERS

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 07-13

OPINION

INTRODUCTION

This is an appeal of the decision of the Baltimore City Board of School Commissioners upholding the expulsion of a student for possession of an explosive in the form of a butane lighter. The local board filed a Motion to Dismiss and for Summary Affirmance maintaining that its decision should be upheld. Appellant filed an opposition to the Motion.

FACTUAL BACKGROUND

On December 5, 2005, D.G., an eleven-year old student in the sixth grade at Rognell Heights Elementary School (“Rognell”), brought a butane lighter to school. During science class, while the teacher was out of the room, he removed a lighter from his backpack. (T. 135). Either he or another student flicked the lighter in the classroom (T. 80-82), and according to D.G., “fire came-up.” (T.136). When the teacher returned to the classroom, she confiscated the lighter (T. 136) and reported the incident to the Vice Principal, Ms. Sharon Faelten. (T. 14).

Ms. Faelten investigated the incident. D.G. reported that he found the lighter in an alley and he was planning to “bust” it when he got home. He stated that the other student took it from him in class and started lighting it. (Statement of D.G.). One student reported that D.G. flicked the lighter. Nine students reported that the other student flicked the lighter. Ms. Faelten believed the report that D.G. was involved in lighting the lighter and noted this as part of her investigation. (T. 37; 80-82).

After consulting a “discipline manual”, Ms. Faelten concluded that possession of a butane lighter on school property constituted possession of an explosive (T.18), a level III offense punishable by expulsion. (See BCPSS Information Guide for Parents and Students 2005-2006). Ms. Faelton suspended D.G. and recommended to the Office of Attendance and Suspension

Services that the suspension be long-term.¹ The Office of Attendance and Suspension Services recommended that D.G. be expelled and referred him to the Juvenile Fire Setter Intervention Program.

On December 21, 2005, Dr. Bonnie Copeland, former CEO of BCPSS, expelled D.G. from school for possession of a lighter, and placed him on home teaching. Dr. Copeland stated that the case would be reviewed in March 2006 for possible reinstatement of D.G. with BCPSS.

D.G.'s parents appealed the CEO's expulsion decision to the City Board. The matter was referred to a hearing officer, Mr. Robert Kessler, who conducted a hearing on February 27, 2006. Mr. Kessler heard testimony from Ms. Faelten, D.G., D.G.'s mother, D.G.'s teacher, and the Juvenile Fire Intervention Coordinator for the Baltimore City Fire Department, Inspector Derek Lamont Ready.

On April 18, 2006, Mr. Kessler issued his decision concluding that the CEO was within her authority to expel D.G. (Ex. 3, p. 12 attached to Appeal). He recognized that, while a butane lighter is not an explosive "in the strictest sense of the word, it contains a flammable substance that can be used as an explosive." *Id.* at p.11. He commented on the "school fire epidemic that has recently plagued our schools" and concluded that it was "sound school board policy to ensure that lighters and matches. . . are not brought into schools. . ." *Id.* at 11-12.

On May 23, 2006, the Board of School Commissioners affirmed the recommendation of the hearing officer. This appeal ensued.

STANDARD OF REVIEW

In student discipline cases, the State Board will not review the merits of the suspension or expulsion unless there are specific factual and legal allegations that the local board has not followed State or local law or policies, has acted in an unconstitutional manner, has violated the student's due process rights or that the decision is illegal for other reasons.

COMAR 13A.01.05.05(G)(2)and(3). An illegal decision is one that:

- (1) Is unconstitutional;
- (2) Exceeds the statutory authority or jurisdiction of the local board;
- (3) Misconstrues the law;
- (4) Results from an unlawful procedure;
- (5) Is an abuse of discretionary powers; or
- (6) Is affected by any other error of law.

¹Ms. Faelten stated that her recommendation for disciplinary action would have been the same whether or not D.G. flicked the lighter because the infraction was based solely on possession of the lighter. (Hearing Officer Report, pp. 3-4).

COMAR 13A.01.05.05(C).

Here, Appellant maintains that the local board decision was illegal because it misconstrued the law and because it was an “abuse of discretion.” In order to find an abuse of discretion you must be convinced that “the decision under consideration [is] well removed from any center mark . . . and beyond the fringe of what [this Board would deem] minimally acceptable.” *Rios v. Montgomery County*, 386 Md. 104, 121 (2205). In short, “an abuse of discretion should be found in the extraordinary, exceptional, or the most egregious case.” *Id.* at 122.

ANALYSIS

Appellant maintains that the local board’s decision affirming the expulsion was illegal because it was based on an out-of-date manual as authority to classify a lighter as an explosive, rather than the statutory definition of an explosive; and because it violated D.G.’s due process rights by failing to provide notice that possession of a butane lighter could result in expulsion.

Classification of Lighter as Explosive

Clearly, the central issue in this case is whether a butane lighter is an explosive. The BCPSS Student Discipline Code lists possession of an explosive as an expellable offense. It states:

Possessing, handling, transmitting, concealing, or using explosive devices (or substances that can be used as explosives) and weapons or instruments such as rifles, guns, knives, brass knuckles, chains, pipes, nonchuks, or look-alikes. This includes using as a weapon, or in any manner likely to cause injury to another person, any object that is permitted in school.

The Code does not define what the explosive devices or substances are.

In reaching her decision on possession of an explosive, after reviewing the BCPSS Student Discipline Code, the Vice Principal looked for guidance to the 2003-2004 Maryland State Department of Education Data Collection Manual for Suspensions, Expulsions and Health Related Exclusions to determine that a butane lighter was indeed an explosive. (T. 18). The Data Collection Manual provides the following examples of explosives:

Bullet	Firecrackers	Molotov cocktail
Butane lighters	Gas odor bomb	Poppers
Cherry bomb	Gun shells	Shotgun shell

Dry ice in bottle	M-80	Smoke bomb
Exploding pen	Model rocket fuel	Stink bomb

(2003-2004 Suspensions, Expulsions, and Health Related Exclusions Data Collection).

The Data Collection Manual serves as guidance to local school systems to ensure consistent reporting to the Statewide disciplinary data system. The Maryland Students Records System Manual (“MSRSM”), which is promulgated as a regulation,² establishes this data system. Although the local school systems develop their own disciplinary policies, they must provide for consistent conversion of data they collect with regard to disciplinary offenses when reporting to the State, following the requirements set forth in these documents. Thus, the definitions of disciplinary offenses in the MSRSM and the Data Collection Manual carry weight.

The Appellant asserts that reliance on the 2003-2004 Data Collection Manual was misplaced because the event occurred in 2005 and the 2005-2006 Data Collection Manual does not list a lighter as an example of an explosive. We have looked at the 2005-2006 Data Collection Manual. It does in fact contain the identical list of explosives as the 2003-2004 version.

Statutory Definition

The Appellant argues that the local board should have considered the more limited definition of explosive contained in the Public Safety Article which states:

(1) “Explosives” means gunpowder, powders for blasting, high explosives, blasting materials, fuses other than electric circuit breakers, detonators, and other detonating agents, smokeless powder, and any chemical compound or mechanical mixture that contains oxidizing and combustible units or other ingredients in such proportions, quantities, or packing that ignition by fire, friction, concussion, percussion, or detonation of any part of the compound or mixture **may and is intended to cause any explosion . . .**

(3) **“Explosives” does not include fixed ammunition for small arms, small arms ammunition primers, small arms percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, friction primers, fireworks, or common matches when used in their original configuration.**

²The Maryland Students Records System Manual is incorporated by reference into COMAR 13A.08.02.01, thereby having the force and effect of law.

MD Pub. Safety Code Ann § 11-101. (Emphasis added).

There is nothing that requires the school system to follow statutory definitions of explosives. Neither the Criminal Law Article nor the Public Safety Article necessarily inform school-related discipline decisions. On the other hand, the Data Collection Manual is prepared by MSDE and serves as guidance in the implementation of a consistent reporting mechanism of student discipline across all 24 school systems. Indeed, in our view, the Data Collection Manual, is a more authoritative source of information about student discipline issues. In our opinion, using the definitions in the Manual to determine that a butane lighter was an explosive was not arbitrary and capricious. It certainly was not “beyond the fringe” of acceptability in this type of case.

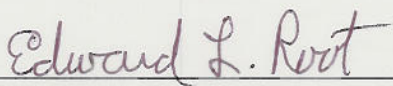
Due Process Claim for Lack of Notice

Appellant contends that he did not have notice that a butane lighter is an explosive under the BCPSS Student Discipline Code because it is not expressly listed as such. While the policy does not list examples of explosive devices or explosives, it clearly puts students on notice that possession of such items will result in disciplinary action.

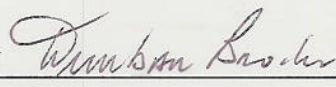
We do not believe that there is a valid due process claim here. The policy need not list specific examples of explosives in order for students to be on notice of their prohibition. A butane lighter contains a flammable substance that can be used as an explosive. Officer Ready testified that an individual can bust the casing of the lighter, for example by stomping on it or throwing it, which causes a spark that ignites the butane. (T. 217). Crushing the lighter, in essence, causes a mini-explosion. Appellant admitted at the hearing before the hearing examiner that he was planning on busting the lighter. (T. 118). He also testified that he knew that he should not have a lighter on school grounds. (T. 138). Based on the record in this case, there was no due process violation.

CONCLUSION

Because we find no due process violations or other illegalities in the proceedings, we affirm the expulsion decision of the Baltimore City Board of School Commissioners.



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March 27, 2007