BEFORE LINDA MCCULLOCH, SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

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IN THE MATTER OF JG, PG, Appellant, vs. BOARD OF TRUSTEES, SCHOOL DISTRICT NO. 38, Bigfork Respondent.	)	OSPI 293-03 **DECISION AND ORDER**

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Having reviewed the record below and considered the parties' briefs, the Superintendent of Public Instruction issues the following Decision and Order.

DECISION AND ORDER

The decision by the Flathead County Superintendent of Schools denying Appellant's appeal in this matter dated January 2, 2002 (certificate of mailing dated January 3, 2003) is hereby **AFFIRMED**.

PROCEDURAL HISTORY

This is an appeal by PG on behalf of his son, JG, ("Appellant") of an Order issued by the Flathead County Superintendent of Schools ("County Superintendent") dated January 2, 2002 [sic] and served by the County Superintendent on January 3, 2003.

On October 17, 2002, the Board of Trustees of School District No. 38, Bigfork ("the District") voted to expel JG for the remainder of the semester for violating the District's alcohol policy. Appellant appealed the District's decision by filing a Notice of Appeal with the County Superintendent on October 28, 2002. The District filed an Answer to Notice of Appeal on November 6, 2002. Following discovery an evidentiary hearing was held by the County

Superintendent on December 9, 2002. The County Superintendent served Findings of Fact, Conclusions of Law, Opinion and Order on January 3, 2003, affirming the District's action and dismissing Appellant's appeal.

Appellant, through his attorney, Dean K. Knapton, filed a Notice of Appeal with the Superintendent of Public Instruction ("State Superintendent") on January 14, 2003.

The County Superintendent's Findings of Fact, Conclusions of Law, Opinion and Order are the subject of this appeal and the issues on appeal are:

1. What is the applicable standard of proof in a student expulsion matter?

2. Was the evidence presented at the hearing sufficient to support the County Superintendent's decision?

3. Did the County Superintendent conduct a *de novo* hearing?

STANDARD OF REVIEW

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. §2-4-704 and adopted by the State Superintendent in Admin. R. Mont. 10.6.125. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed to determine if the correct standard of law was applied. See, for example, *Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy Keenan,* 241 Mont. 274, 277, 786 P.2d 1164, 1166 (1990) and *Steer, Inc. v. Dept. of Revenue,* 245 Mont. 470, at 474, 803 P.2d 601, 603 (1990).

The State Superintendent may not substitute her judgment for that of a county superintendent as to the weight of the evidence on questions of fact. Findings are upheld if supported by substantial, credible evidence in the record. A finding is clearly erroneous only if a "review of the record leaves the Court with the definite and firm conviction that a mistake has been committed." *Wage Appeal v. Board of Personnel Appeals*, 208 Mont. 33, at 40, 676 P.2d 194, at 198 (1984).

Conclusions of law are subject to more stringent review. The Montana Supreme Court held that conclusions of law are reviewed to determine if the agency's interpretation of the law is correct. *Steer, Inc. v. Dept. of Revenue,* 245 Mont. 470, at 474, 803 P.2d at 603 (1990).

The State Superintendent may reverse or modify the County Superintendent's decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions

of law and order are (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (g) affected because findings of fact upon issues essential to the decision were not made although requested. Admin. R. Mont. 10.6.125(4).

FACTUAL SUMMARY

1. The following policies were adopted by the District and were in effect on October 5, 2002:

Policy # 3250 Guidelines of Conduct (6-12)

> "Each student has the right to an education in an orderly, safe, and sanitary atmosphere and is expected to contribute to his/her environment by meeting the rules of conduct as presented in the Bigfork Jr./Sr. High School Student Handbook. The Student Handbook is to be reviewed yearly and regarded as a District Procedure with all changes being brought to the attention of the trustees.
> Compliance with these guidelines of conduct is mandatory. Failure of a student to comply with these regulations constitutes an infringement upon the rights of other students."

Policy #3300 Corrective Actions and Punishment

> "All students shall submit to the reasonable rules of the District. Refusal to comply with written rules and regulations established for the governing of the school shall constitute sufficient cases for discipline, suspension, or expulsion. …"

Policy #3310 Student Discipline

> "… Disciplinary action may be taken against any student guilty of gross disobedience or misconduct, including, but not limited to: … Using, possession, distributing, purchasing, or selling alcoholic beverages. … These grounds for disciplinary action apply whenever the student's conduct is reasonably related to school or school activities, including, but not limited to: On, or within sight of, school grounds before, during, or after school hours or at any other time when the school is being used by a school group; …"

Policy #3335 Chemical Use and Dependency

> "… The Bigfork School District prohibits the use, possession, being under the influence, and distribution of drugs, or substances implied to be drugs, or alcohol on any school district property or any school district sanctioned/sponsored activity including district

authorized transportation. … Students attending school in the District who are in violation of the provisions of this policy shall be subject to disciplinary actions in accordance with the provisions of school rules and/or regulations including, but not limited to, reprimand, suspension and expulsion. …"

Policy #3335P Corrective Action

"Students who are alleged to have violated [Policy 3335] will be subject to an administrative investigation. If the evidence supports the allegation, the student will be subject to the following:

1. Parent(s) or guardian(s) will be notified.
2. Immediate suspension from school, Level III (pending School Board Action)

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4. Recommended for expulsion for a minimum of 90 school days.

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Appropriate school disciplinary action will be taken by the school administrator regardless of law enforcement action."

2. JG testified that he knew he could not bring beer on campus and that it was his responsibility to read the student handbook which stated a prohibition against students being in possession of alcoholic beverages on school premises or at school functions.

3. On October 5, 2002, JG drove his father's 1999 Isuzu Trooper onto school property in order to attend the homecoming dance. Behind the driver's seat of that vehicle was a cardboard 18-pack Budweiser beer carton.

4. JG testified that he placed cans of soda pop in an empty Budweiser carton before coming to the dance. He left the Budweiser carton in his vehicle when he left the dance to attend a party.

5. During a routine check of vehicles in the school parking lot, school officials, Thom Peck, Bigfork High School Principal, and Officer Kip Tkachyk, Bigfork High School Resource Officer, saw the 18 pack Budweiser carton in plain view in the Isuzu Trooper driven to the school grounds by JG.

6. Mr. Peck and Officer Tkachyk determined that the vehicle was registered to PG, JG's father, and after unsuccessfully searching for JG, they reported that they had seen an 18 pack Budweiser carton in the Isuzu Trooper to PG.

7. PG arrived at the parking lot and confirmed the presence of the Budweiser carton, but refused to consent to any inspection or seizure of the carton.

8. PG did not look into the carton to determine its contents while the vehicle remained on school property.

9. On Sunday morning, October 6, 2002, PG called Thom Peck at his home, advised Mr. Peck that JG had not been drinking and that the Budweiser carton contained soda.

10. JG was suspended from school following the incident.

11. JG was represented by his attorney at an expulsion hearing and had an opportunity to present evidence and to offer reasons why he should not be expelled.

12. The school board determined that JG had violated school board policy by bringing alcohol onto school property.

13. On October 17, 2002, the school board voted to expel JG for the remainder of the semester.

14. The County Superintendent determined that the school board had sufficient evidence upon which to conclude that it is more likely than not that JG violated school board policy by having alcohol in his possession on school property.

15. The County Superintendent determined that "the evidence shows that the 18 pack of Budweiser beer Thom Peck and Kip Tkachyk saw in the [PG's] vehicle more closely resembled the new, unopened carton presented by the school district than the used, open carton presented by the [appellants]."

OPINION

Issue 1. What is the applicable standard of proof in a student expulsion matter?

Appellant argues that a "school expulsion is analogous to criminal contempt" and that proof offered to support expulsion must be "beyond a reasonable doubt." Montana statutes and rules do not address the standard of proof in school controversy cases or expulsion actions nor are there any Montana Supreme Court cases that address this issue.

Several jurisdictions apply a "preponderance of evidence" standard of proof. See, e.g., *Beavers v. Anthony Wayne Schools,* 1991 WL 59888 (Ohio 1991); *United Independent School District v. Gonzalez,* 911 S.W.2d 118 (Texas 1995); *John A. v. San Bernardino city Unified School District,* 654 P.2d 242 (California 1982); *Henderson State University v. Spadoni,* 848 S.W.2d 951 (Arkansas 1993); *J.M., L.M., v. Webster County Board of Education,* 534 S.E.2d 50 (Virginia 2000). A preponderance of evidence standard is defined in Black's Law Dictionary as:

> "Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not."

Other jurisdictions apply a substantial evidence standard. See, e.g., *Kolesnick v. Omaha Public School District,* 558 N.W. 2d 807 (Nebraska 1997); *Labrosse v. St. Bernard Parish School Board,* 483 So.2d 1253 (Louisiana 1986); *Springdale Board of Education v. Bowman,* 740 S.W.2d 909 (Arkansas 1987); and *Consolidated School District Number 2 v. King,* 786 S.W.2d 217 (Missouri 1990). Substantial evidence is defined in Black's Law Dictionary as:

> "Such evidence that a reasonable mind might accept as adequate to support a conclusion. … evidence possessing something of substance and relevant consequence and which furnishes substantial basis of fact from which issues tendered can be reasonably resolved. … Evidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance."

A search of the standard of proof used by other jurisdictions in expulsion actions failed to indicate that school districts elsewhere are required to prove the facts "beyond a reasonable doubt." This is not a criminal action with criminal penalties at stake and therefore the District should not be held to a criminal standard of proof.

The County Superintendent applied a preponderance of evidence standard in determining that "the 18 pack of Budweiser beer Thom Peck and Kipp Tkachyk saw in [appellants'] vehicle more closely resembled the new unopened carton presented by the school district than the used, opened carton presented by [appellants]" and that it was "more likely than not that JG violated School Board Policy No. 3250, 3310 and 3335 by bringing alcohol onto school property on October 5, 2002."

The State Superintendent affirms the County Superintendent's use of a preponderance of evidence standard in this matter.

Issue 2. Was the evidence presented at the hearing sufficient to support the County Superintendent's decision?

The State Superintendent's duty in this matter is to determine if substantial credible evidence exists to support the County Superintendent's findings. Administrative Rule

10.6.125(4) provides that the "State Superintendent may not substitute his/her judgment for that of the county superintendent as to the weight of the evidence on questions of fact."

Whether or not JG was in possession of alcohol on school property is a question of fact. The State Superintendent finds that there is substantial credible evidence in the record to support the County Superintendent's finding that "it is more likely than not that JG violated School Board Policy … by bringing alcohol onto school property."

Kip Tkachyk and Thom Peck testified that they saw an 18 pack Budweiser beer carton in JG's vehicle and that the carton appeared to be new and unopened. Mike Sward and PG testified that they saw a Budweiser container in JG's vehicle.

The County Superintendent made the determination that PG was not an objective party and that it was reasonable to discount his testimony as to the contents of the Budweiser carton.

The State Superintendent finds that the County Superintendent had substantial credible evidence to support the finding that it was more likely than not that JG brought alcohol onto school property.

Issue 3. Did the County Superintendent conduct a *de novo* hearing?

Appellant states in his brief that the County Superintendent "did not render her opinion based on a de novo hearing…". Appellant does not further explain this allegation or indicate in what manner he feels that the County Superintendent did not conduct a *de novo* hearing. A *de novo* hearing is "'[a] new hearing or a hearing for the second time, contemplating an entire trial in [the] same manner in which [the] matter was originally heard and a review of previous hearing. On hearing 'de novo' [the] court hears [the] matter as court of original and not appellate jurisdiction.'" *Phillips v. Trustees, Madison School District No. 7*, 867 P.2d 1104 (Montana 1994).

As required by applicable law the County Superintendent conducted a hearing in this matter at which both parties had an opportunity to introduce evidence and question and cross-examine witnesses. The County Superintendent's Findings of Fact and Conclusions of Law were based on the testimony and evidence introduced at that hearing. Inasmuch as Appellant's allegation that the County Superintendent did not conduct a *de novo* hearing is not supported by any facts or legal argument, the State Superintendent determines that this allegation is without merit.

CONCLUSION

The decision by the Flathead County Superintendent of Schools denying Appellant's appeal in this matter is hereby AFFIRMED.

Dated this 30th day of June, 2003.

/s/ Linda McCulloch
LINDA MCCULLOCH
Superintendent of Public Instruction

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 30th day of June, 2003, I caused a true and exact copy of the foregoing "DECISION AND ORDER" to be mailed, postage prepaid, to the following:

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