

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER
OF EDUCATION

Jason R.

v.

East Greenwich School Committee

DECISION

Held: Substantial evidence exists that this student participated in the spreading of a false rumor, with the knowledge of its falsity, that the spread of this rumor at East Greenwich high school had a serious and adverse impact on students and staff, damaged the school climate and disrupted the educational process at the school. Although the process utilized by the East Greenwich School Committee was flawed, in that it received hearsay evidence in support of allegations against this student, such procedural violation does not, in and of itself, warrant invalidating his suspension.

DATE: June 6, 2001

Travel of the Case

On January 8, 2001 Jason R.'s attorney filed an appeal with Commissioner Peter McWalters challenging a December 8, 2000 decision of the East Greenwich School Committee excluding him from East Greenwich High School for the remainder of the 2000-2001 school year. He had been suspended since November 1, 2000 at which time the principal determined that he had engaged in serious misconduct.

By agreement of the parties, a hearing was convened by the undersigned, designated by the Commissioner to hear and decide this appeal, on February 14, 2001. At that time counsel for both parties requested that the transcripts of the hearings which took place before the School Committee be submitted as evidence before the hearing officer.¹ It was agreed that consideration of this evidence would be de novo, and that the hearing officer would reconsider the objections raised by Mr. R.'s counsel to some of the testimony received which was argued to be hearsay or otherwise inadmissible. In addition, it was agreed that the hearing officer would rule on the legal argument of the appellant that certain procedures utilized by the School Committee invalidated its disciplinary action in this case. The parties agreed that at the conclusion of this process of "sifting through the record" if it was determined that the East Greenwich School Committee followed valid procedures and that its findings as to Jason R.'s misconduct were supported by competent evidence, the parties would at that point present their arguments with respect to the appropriateness of the discipline imposed.² Therefore, the issue of whether the penalty of expulsion was disproportionate to the offense has been raised by the appellant's counsel but deferred for consideration at a later time.

Findings of Relevant Facts

- Jason R. was enrolled at East Greenwich High School in the fall of the 2000-2001 school year. On December 8, 2000 the East Greenwich School Committee found that he was involved in the creation and furtherance of a false rumor that two students planned to bomb and shoot students at a pep rally. Joint Ex.D. December 8, 2000 decision of the School Committee.
- The School Committee further found that the spread of the rumor throughout the school had instilled fear in those faculty and students who believed it to be true and disrupted the educational process at East Greenwich High School over an extended period of time. Joint Ex. D. The Committee found Jason directly responsible for the disruption to the school environment that had resulted. Joint Ex. D.

¹ the parties indicated that this would be the most expeditious method of dealing with what was anticipated to be identical testimony by witnesses, several of whom were students whose educational program would be interrupted by their attendance at the hearing.

² the specifics of the process requested by the parties are set forth in the transcript of the February 14, 2001 hearing. The only caveat raised by the hearing officer in complying with the parties' request to submit evidence in the form of transcripts of prior testimony was that there be no issues with respect to the credibility of witnesses testifying at the hearing before the School Committee. See transcript of the February 14, 2001 hearing at pages 11-12.

- As a result of its factual findings, the School Committee concluded that Jason R. had violated two provisions of the Behavior Code governing student behavior at the high school, one relating to “Disruption of School” and the other relating to the making of “False Fire Alarms/Bomb Threats”. Joint Ex. D.
- Based on its factual findings and conclusions, the School Committee voted, 4-1 to accept the recommendation of Superintendent Barbara Sirotn that he be expelled from East Greenwich High School for the remainder of the 2000-2001 school year. The School Committee authorized the Superintendent to find a suitable alternative way of educating Jason during the period of expulsion. Joint Ex. D.
- About two weeks prior to a pep rally scheduled for homecoming weekend at the high school, Jason R. was asked by Student C³ what he knew about an incident rumored to be planned for the pep rally. Jason told him that two other students, Student X and Student Y, were planning to attack the school during the pep rally by setting off a gaseous bomb and shooting people as they fled. Joint Ex. B pp.45-49.
- Student C knew Jason R. to be friendly with Student X and Student Y. Joint Ex B. pp. 48-49.
- Student C had heard this story without “the details” from two other students two or three days prior to speaking with Jason R.. Joint Ex.B. pp. 47-50. Student C gave more credibility to the story when he heard it from Jason R. because he knew him to be friendly with Student X and Student Y. Joint Ex.B pp.52,54,64.
- Student C didn’t know who started this story about Student X and Student Y. Joint Ex.B p.51,71.
- Approximately one to two weeks prior to the pep rally Student F was riding home from the high school on the bus when Jason R. told him not to go to the pep rally, that “something bad is going to happen”. Joint Ex. B p.74
- About a week later Jason R. repeated the warning to Student F, this time discussing with him specifics of the plan of Student X, including facts relating to Student X’s access to weapons and ammunition. Joint Ex. B pp.74,75.
- Jason R. also told Student F that although he had been involved in planning the incident which was to occur at the pep rally, “he wasn’t planning on pulling the trigger”. Joint Ex. B.p.89,90.
- About two weeks prior to the scheduled pep rally Jason R. spoke to Student B in class and told him of plans Student X and Student Y had to set off a chlorine device during the pep rally and shoot people as they evacuated the building. Joint Ex. B p. 99.
- A week later, Jason R. again brought up the subject of the planned explosion and shootings, again in class, and this time in Student X’s presence. Jason asked Student X if he was planning to “go through with this” and Student X denied the existence of any plan. Jason then stated to Student B that he “wasn’t sure whether or not Student X was being truthful”. Joint Ex. B p.100.

³ all of the students other than the appellant had requested that their testimony be taken in closed session before the School Committee and in the transcripts they are referred to by pseudonyms.

- During Assistant Principal Barbara Cullen’s investigation to determine the truth or falsity of the rumor regarding Student X and Student Y’s plan for a violent incident at the scheduled pep rally, Jason R. stated to her that he had been involved in the spread of the rumor as a practical joke which was designed to get Student X “in trouble”. Joint Ex. A. p.31.
- When a policeman joined in the investigation on that same day (November 1, 2000), Jason R. stated in response to police questioning that he had participated in the spread of the rumor regarding a violent incident planned for the pep rally by saying things to Student X in front of other students; the comments to Student X in front of other students were, for example, “so when are you going to start your rampage”. Joint Ex. C. pp.12, 15,20.
- The pep rally scheduled for November 9, 2000 was cancelled, even though the rumor of plans for a violent incident was determined to be false and parents had received assurances that students would be safe, because of a pervasive “feeling of unsafety”. Joint Ex.A. pp.37-42;Joint Ex.C.pp.77-78.
- The effect of the spreading of this rumor at East Greenwich High School included ongoing concerns and fears of students for their safety and disruption of the learning environment at the school for an extended period of time. Joint Ex. C. pp. 56-59; 76-79;91.
- Jason R., at the time of his expulsion, had no prior disciplinary record and was an honor roll student.

ISSUES PRESENTED

- Is the East Greenwich School Committee’s expulsion of Jason R. invalid because he requested that his hearing before the Committee be held in open session and the School Committee took testimony from student witnesses in closed session?
- Is the decision of the School Committee invalid because it is based in part on an adverse inference drawn from Jason R.’s failure to testify at the hearing?
- Is the decision of the School Committee invalid because it is based in part on the testimony of the Superintendent which disclosed communications made to her by Jason R. during a conference on November 14, 2000 at which time it had been agreed that his statements would be “off the record” and not admissible in any subsequent proceedings?
- Is the decision of the School Committee to expel Jason R. invalid because at the due process hearing the members of the Committee were advised by an attorney who is the law partner of the attorney who prosecuted the case against Jason R.?

- Is there sufficient competent evidence to support the charge of misconduct against Jason R., or is the only evidence against him that which should have been ruled inadmissible as hearsay before the School Committee and ruled inadmissible on the same basis before the Commissioner?

DECISION

The Commissioner of Education provides a de novo hearing in matters within his jurisdiction which are appealed to him. In school discipline appeals, many times the issues involve constitutional due process, and the hearing officer is called upon to review the procedures utilized by the School Committee and respond to arguments that because the process was legally insufficient, the disciplinary action is invalid. If the suspension or expulsion is reversible on such basis, the de novo review is many times obviated. If procedural deficiencies in the process utilized by the School Committee are found to exist, but yet do not in and of themselves warrant reversal of the district decision, the hearing officer proceeds to review the facts to determine, de novo, if the disciplinary action is supported by sufficient evidence of misconduct. The hearing officer ordinarily has a new record compiled at the Commissioner's level, a record made under procedures many times unaffected by any deficiencies in prior proceedings. In the case before us the appellate and de novo functions are intertwined because we have been presented at this level with the same record made before the School Committee and asked to consider the effect of alleged procedural deficiencies both on an appellate level (to overturn the local decision) and a de novo level (to determine whether the record, as modified on the basis of these same procedural deficiencies, is sufficient to prove the misconduct). In order to simplify the analysis, we will alter our usual format for this decision and present the parties' arguments followed by our decision as to each issue.

I. Effect of taking student testimony in closed session.

In his memorandum the appellant asserts that our state's Open Meetings Law⁴ provides a student with an absolute right to have his disciplinary hearing conducted in open session. Counsel for the appellant exercised this right, but the Chairperson of the School Committee ruled that the testimony of student witnesses could nonetheless be taken in closed session (Joint Ex.B.p.24). This ruling, and the subsequent taking of testimony of several witnesses in closed session, is alleged to violate the appellant's rights and counsel argues that "there is nothing that prevents the Commissioner from reversing the School Committee's decision on the grounds that it denied Mr. R. the due process inherent in a public hearing" Memorandum of the appellant page 5.

In response, counsel for the School Committee argues that a fair interpretation of the language of R.I.G.L. 42-46-5 (a)(8) is that there is no unconditional right of a student to have his entire hearing conducted in open session. The statute refers only to a right to have the "discussion" held in open session. Furthermore, student witnesses may be included as

⁴ R.I.G.L.42-46-1 et seq.

“affected” students, be entitled to be advised of their right to a public hearing and have their own individual rights to a private hearing. Student witnesses in this matter exercised such right. The School Committee further submits that even if it unintentionally violated the provisions of the Open Meetings law, the proper remedy lies in the filing of a complaint with the Attorney General. The Commissioner has no jurisdiction over enforcement of this statute.

Despite his reference to the element of due process that is “inherent” in a public hearing, counsel has not substantiated a claim that a fair and meaningful hearing is denied to a student whose disciplinary hearing is conducted in closed session. Nor has he pointed out how the taking of student witnesses’ testimony in this particular case out of the presence of the public and the press, worked any unfairness or somehow prejudiced the appellant. Thus, there is no school law premise to the claim that his rights in this matter were violated by closing a portion of the School Committee hearing.

In the course of holding hearings covered by the state’s Open Meeting law, we are frequently called upon to make interpretations of this statute. Hearing officers must rule on requests for hearings to be open or closed to the public, and must also comply with the notice provisions of the Open Meetings law. Other than having the obligation as a public entity to follow this statute in conducting business, the Commissioner and Department of Education have no legal authority to enforce compliance by other public entities governed by the state’s Open Meetings law. This is clearly the prerogative of the Attorney General’s office. Thus, we have no authority to respond to the argument that the East Greenwich School Committee failed to recognize Mr. R.’s exercise of his substantive rights under this Act.

II. The evidentiary impact of Jason R.’s decision not to testify personally before the East Greenwich School Committee.

Appellant’s counsel argues that the School Committee’s decision is defective because it is based in part on an adverse inference drawn from his failure to testify at the hearing conducted. Citing the Commissioner’s decision in The Parents Of A Suspended Student, And The Student, v. The School Committee of the Town of Bristol, decision dated February 1, 1983, counsel argues that in Rhode Island it is well established that in student suspension cases no adverse inference may be drawn from a student’s failure to testify. The School Committee has presented no response to this particular allegation of impropriety.

The record clearly indicates an argument made by the prosecutor before the School Committee that the Committee would be asked to draw an adverse inference from the fact that Jason R. was anticipated to refuse to answer specific questions posed to him, after being called as a witness and placed under oath.(Joint Ex. B, pp.25-30) The record also clearly indicates that what was anticipated in this regard did not, in fact, happen. While Jason R. was called as a witness during the School Committee hearing, he did not take the witness stand and was not placed under oath. His attorney referenced his earlier arguments with respect to the Town of Bristol case, supra, before the School Committee in declining to present him as a witness at the point in time when he was called to testify. Joint Ex. C p.96. The record reflects that the prosecutor remarked in closing argument, “We still haven’t heard from

Jason”, but there is no evidence in the record that he at any time renewed his argument with respect the drawing of a negative inference from Jason’s failure to testify.

In addition, there is no evidence that the members of the School Committee did, in fact draw a negative inference from the appellant’s failure to testify. The record of their deliberations at the conclusion of the hearing was not contained in the record presented at this level. The Committee’s written decision, detailed in the December 8, 2000 letter from Mathias C. Wilkinson to the appellant’s attorney, notes that Jason R. “declined to take the stand”. There is no indication in the letter that the School Committee members drew any adverse inference from this fact. The decision does state that Jason “never denied his involvement in creating, embellishing and furthering the rumor” and goes on to list occasions on which Jason made certain admissions with respect to his involvement in the rumor. We do not interpret the summary of what the Committee perceived as admissions contained in the record, or its overall conclusion that at no point in the investigation of the incident did Jason R. deny involvement, as evidence that they drew a negative inference from his failure to testify.

There is evidence in the record of a certain level of frustration expressed by the members of the School Committee that they would be unable to reach a fair and equitable decision without having “heard from Jason” as to his motivation and intent in the “actions he performed”. Joint Ex.C. pp. 128-129. The School Committee quite understandably, therefore, permitted Jason’s mother to read a written statement in which he gave his own account of his actions and intent, prior to the close of the hearing.

If the School Committee did draw any adverse inference from Jason’s failure to take the witness stand, and we conclude that it did not, such action would violate the “better rule” enunciated in the Town of Bristol case and implicitly adopted by the First Circuit in Gabrilowitz v. Newman, 582 F.2d 100 (1978). Both of these cases show an enlightened approach and have, as we say, withstood the test of time. In considering the record submitted at the Commissioner’s level, we draw no adverse inference from the fact that Jason R. did not testify when called as a witness by the prosecutor.

III. Disclosure of Communications made by Jason R. during the “off the record” conference on November 14, 2000.

An informal hearing or conference was held regarding the Superintendent’s receipt of a recommendation to expel Jason on November 14, 2000. At this conference, it was agreed that to the extent Jason personally participated in the meeting, his statements would be “off the record”. The understanding of the parties was that any statements he made at that time would not be admissible against him at any subsequent hearing before the School Committee. His attorney argues that despite this agreement during the proceedings before the School Committee the Superintendent in essence did reveal the substance of Jason’s comments. The Superintendent testified that she “received no denials” from Jason at that time (Joint Ex.C p.101) and that at the end of the conference, she “had no reason to believe...that Ms. Cullen wasn’t right...”.(Joint Ex.C.p.107). Counsel for the School Committee takes the position that

the Superintendent did not testify in such a way as to reveal any statements Jason made at the November 14, 2000 conference or any impressions she drew from his statements. He characterizes the statement of the Superintendent as a summary of the impressions she received from other evidence presented at the meeting, primarily from the Assistant Principal, Barbara Cullen.

One can spend considerable time and effort analysing the testimony of the Superintendent found at pages 101 through 108 to determine if she conveyed the essence of what Jason said at the meeting on November 14, 2000 by stating that she had no reason to believe that Ms. Cullen wasn't right or if by conveying what he did not say (i.e. he did not deny starting the rumor) that she in fact told the School Committee all they really needed to know about that conversation. If the School Committee did receive this evidence in violation of the agreement that Jason's prior statements would be "off the record", we find this evidence was merely cumulative to the substantial evidence the committee already had on these facts. There was evidence of other occasions on which Jason failed to deny his involvement in the spread of the rumor, and, given the other substantial evidence the committee had before it⁵, we do not find violation of this agreement to warrant invalidating the expulsion. In our de novo review of the record, we have disregarded the disputed portions of the Superintendent's testimony.

IV. Law Partner of the Prosecutor as Legal Advisor to the Chairperson of the School Committee.

Based on the law partnership of the prosecutor and legal counsel to the Chair of the School Committee, the appellant takes the position that the School Committee was not impartial. Hearing before an impartial tribunal is an essential element of due process. It is argued that Attorney Abbott's advice on critical evidentiary and other legal rulings in the case resulted in improper evidence being placed before the members of the School Committee and rulings which prejudiced the appellant. Thus, it is not just the potential for bias of which the appellant complains, but actual bias and prejudice stemming from the legal advice provided to the School Committee. In response, counsel for the School Committee notes that a substantial body of law upholds such dual functioning in the same administrative proceeding by members of the same law firm. Particularly when claims of potential bias are not coupled with specific or overt incidents of bias, he argues, courts have not found a due process violation based solely on the professional relationship of the advisor to the tribunal and the prosecutor appearing before it.

At the outset, we must observe that Mr. R.'s counsel has provided us with no case law to support the proposition that the dual relationship itself, without more, violates due process standards. It may be that notions of fundamental fairness have evolved to the point that many school districts no longer tolerate even the potential for bias on the part of the factfinder or decisionmaker. Such potential for bias exists when a legal partnership binds together the prosecutor and the legal advisor to tribunal providing the due process hearing. While we think

⁵ as we will discuss later, some of the evidence against Jason R. did consist of hearsay, and should not have been admitted or considered by the School Committee.

it a better practice to have independent legal counsel advise the hearing board, particularly when evidentiary rulings will substantially affect the factual basis for the discipline, there is insufficient legal precedent at this time to require this in all cases of long term suspensions and expulsions.⁶ Also, this is not a present requirement established by the Board of Regents in their Regulations Governing Disciplinary Exclusions of Students from School.

We have reviewed the record of proceedings and rulings in this case to determine if the appellant's assertion of actual bias is substantiated. While it is true that most of the rulings were in favor of the prosecutor, the positions taken by the legal advisor to the chair were supportable. The focus of the evidentiary debate was on the School Committee's allowance of hearsay testimony. It is clear that counsel to the Chair shared the view of the prosecutor that hearsay was admissible in such hearings. We will go on to explain our difference of opinion on this issue, however, we find that apart from the hearsay received, there was and is substantial non-hearsay evidence of misconduct, as we will explain below. We cannot conclude, on the basis of this record, that the appellant experienced actual bias, or that his case was substantially prejudiced because of the relationship of the attorneys.

V. Hearsay evidence presented to the East Greenwich School Committee

In the memorandum submitted, the appellant asserts that the School Committee admitted and relied upon hearsay testimony in drawing its conclusions as to Jason R.'s misconduct. The appellant argues:

The evidence in question here- testimony from Vice Principal Cullen and various students about statements that teachers and other students made and Vice Principal Cullen's written report about the incident to Superintendent Sirotin – is clearly hearsay.

Counsel for the appellant takes the position that hearsay evidence is generally inadmissible in judicial proceedings, and in administrative proceedings as well, except when the hearsay evidence in an administrative proceedings meets the requirements set forth in R.I.G.L. 42-35-10. Counsel submits that in those administrative proceedings which deal with the long term suspension of public school students, hearsay is not admissible also because the Commissioner ruled in 1983 that the admission of hearsay evidence violated a student's due process rights. See Parents of a Suspended Student v. The School Committee of the Town of Bristol, supra. Therefore, in this case it is argued that the School Committee violated the specific rule in student suspension cases enunciated in the Town of Bristol case as well as the statutory restriction on the receipt of hearsay evidence in administrative hearings in general.

From the School Committee's perspective, under Rhode Island law, hearsay is specifically admissible in administrative proceedings. By virtue of R.I.G.L. 42-35-10 it is

⁶ In one of the few cases on this issue, Pittsburgh Board Of Public Education v. MJN, 524 A2d 1385, 39 Educ.Law Rep. 152 (1987) the commingling of prosecutorial and adjudicatory functions that was ruled illegal involved attorneys in a supervisor/supervisee relationship. The record and the arguments of the parties do not place Mr. Abbott and Mr. Robinson in such relationship.

argued that administrative bodies are not subject to the rules of evidence, and that courts have construed this statute to provide that hearsay is always admissible and can be considered in administrative proceedings, including those conducted by local school committees. With respect to student disciplinary proceedings and the rule established in the Town of Bristol case, supra, prohibiting the admission of hearsay against a student, the committee argues (1) the definition of hearsay used by the Commissioner in that case is no longer the definition of hearsay recognized by tribunals throughout the country (2) the Bristol case has been overruled by the Rhode Island Supreme Court's determinations that hearsay is admissible in administrative proceedings and (3) the statements at issue, i.e. those from Assistant Principal Barbara Cullen and other students, are not really hearsay at all because they were not offered to prove the truth or falsity of what was stated. By definition hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted". The statements which are the focus of the appellant's challenge were not offered to prove the truth or falsity of what was asserted, the School Committee argues, and therefore were not hearsay. If they are ruled to constitute hearsay, they are nonetheless admissible.

A review of the recent case law on the constitutional issue of whether the admission of hearsay in proceedings against a student faced with a long term disciplinary exclusion is a violation of due process indicates that courts throughout the country continue to split on this issue.⁷ Courts have uniformly recognized the significance of the property interest in a public education and the serious deprivation which will be experienced by a student at risk of expulsion. However, the balancing of these interests against the need for a process which is fair, but that does not unduly burden school administrators, has caused the rulings on this issue to be split. In Rhode Island, this issue is addressed in the Board of Regents Regulations Governing Disciplinary Exclusions (July, 1976). These regulations comprehensively address procedures which must be utilized in both short and long term student suspensions. The Board of Regents clearly indicates that in suspensions of more than ten days and expulsions, a student will have the right to cross-examine witnesses (F-6.3 (6)(c)). The admission of hearsay evidence deprives the student of the opportunity to cross-examine the witnesses presented against him. It was this provision of the Regulations of the Board of Regents prohibiting hearsay which formed the basis of the Commissioner's 1983 ruling in The Parents of a Suspended Student, and the Student v. The School Committee of the Town of Bristol, decision of the Commissioner, February 1, 1983. The hearing officer noted then, as we do now, the existence of substantial case law that requires the exclusion of hearsay (in long-term suspension hearings) on a constitutional due process basis as well. The Regents' adoption by regulation of the more enlightened approach is binding.

Although we need not spend substantial time addressing the argument that the Administrative Procedures Act, specifically Section 42-35-10, establishes a more liberal rule for administrative hearings generally, even if it did, the Board of Regents acting within its regulatory authority has required local school committees to be vigilant in the type of evidence admitted to form the basis of a decision to exclude a student from school for a substantial period of time. We would also note that Section 42-35-10 reads as follows:

⁷ See, for example Covington County v. G.W., 767 So. 2d 187, 147 Ed.Law Rep.752 (Miss. 2000) and Stone v. Prosser Consol. School Dist. 971 P. 2d 125, 131 Ed.Law Rep.1134 (Wash. 1999)

(a)...The rules of evidence as applied in civil cases in the superior courts of this state shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be submitted (except where precluded by statute) if it is or a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

While the above-quoted language does permit the introduction of what would otherwise be inadmissible hearsay evidence under certain conditions, it has not been interpreted as creating general rule of hearsay admissibility in hearings before the Commissioner, even those unrelated to school suspension. It has created, consistent with our Rhode Island Supreme Court's ruling in DePasquale v. Harrington, 599 A 2d 314 (R.I.1991) and Craig v. Pare, 497 A 2d 316 (R.I. 1985) a flexible rule to receive hearsay evidence, when the conditions of Section 42-35-10 have been satisfied, and when the proposed hearsay is "of a type commonly relied upon by reasonable prudent men in the conduct of their affairs". A good discussion of the Commissioner's use of the rules of evidence, which incorporates the flexibility set forth Section 42-35-10, is found at pages 6-7 of the Town of Bristol case, supra. The statements at issue in this case, and the context in which they arise, do not in our opinion qualify as admissible under Section 42-35-10.

Based on the foregoing, the East Greenwich School Committee should not have admitted many of the statements from its Assistant Principal and others, particularly teachers, as to what other students told them about Jason's involvement in spreading the rumor. Its receipt of this evidence violated the Regulations of the Board of Regents and infringed on his rights to due process. If this evidence were the only evidence on which the School Committee relied in expelling Jason R., its decision would be subject to reversal. However, standing independently from this incompetent evidence, is substantial competent evidence of Jason's involvement in the spread of the rumor. The record contains several statements Jason made to students C, F, and B which do not fall within the definition of hearsay because the statements were not offered to prove the truth of the matter asserted. Under Rule 801 of the Rhode Island Rules of Evidence, hearsay does not include statements by an out of court declarant offered solely to prove that the statement was made. See Rhode Island Rules of Evidence, Rule 801, and the Advisory Committee's Notes at page 997. It was the act of making these statements to these particular students which constituted the spreading of the rumor and which was the purpose of offering them, not whether the statements themselves were true or false. We believe the statements to be "verbal acts" constituting the misconduct of which Jason was alleged to be guilty. It is these statements which are outlined in our findings of fact.

In addition, two statements made by Jason himself fall within an exception to the hearsay rule, set forth under Rule 804, and known as a "statement against interest". This exception requires that the declarant be unavailable, and in that Jason exercised his right not to testify he was, and is, unavailable. Thus his statement to Ms. Barbara Cullen when she called Jason into her office to investigate the story about the plan to bomb the pep rally, and his later statement during the police investigation that same day constitute statements against interest and are admissible against him despite their character as hearsay.

The record submitted at this level and modified on the basis of the evidentiary rulings indicated in this decision, demonstrates by substantial evidence that Jason R. participated in the spread of the rumor that Student X and Student Y had a plan to set off a bomb and shoot students at the pep rally scheduled for November 9, 2000 at East Greenwich High School. There is also substantial evidence that he knew that this rumor was false. Joint Ex.C pp.141-144, statement of Jason dated November 1, 2000 and read into evidence at the time of the School Committee hearing. Although there is some indication in the record that Jason “admitted” to starting the rumor or failed to deny starting it, we find this fact not to be supported by substantial evidence. Two of the three students who testified at the hearing indicated that they did not know who started the story, but that the specifics provided by Jason, along with the fact that he knew Student X, gave the story a great amount of credibility at the point at which they heard it from him. Although he may have been identified as the “source” of the rumor, this was established in part through inadmissible hearsay testimony. It is an almost impossible task to prove the source of a rumor which by definition is “unverified information of uncertain origin usually spread by word of mouth”⁸ or “talk or opinion widely disseminated with no discernible source”⁹.

We do not intend to imply by the fact that there is insufficient evidence that Jason R. was the origin of the rumor that his conduct in substantially furthering the rumor was not serious or that it failed to provide justification for a lengthy disciplinary exclusion. Since the parties have deferred any reconsideration of the penalty to the second stage of our de novo review in this matter, we will afford them adequate opportunity to submit their arguments on this issue. Our preliminary determination of procedural flaws in the hearing process may be relevant to the penalty issue. Although we have not accorded Jason the remedy he has requested for any procedural violations (voiding his expulsion¹⁰), such violation may affect modification of the length of his disciplinary exclusion in that our finding as to the precise nature of the misconduct varies from that of the School Committee.

We request that the parties agree to a schedule for the submission of any further arguments in this matter.

For the Commissioner,

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

June 6, 2001
Date

⁸ The American Heritage College Dictionary, third edition, Houghton Mifflin Company, 2000.

⁹ Webster’s New Collegiate Dictionary, G & C Merriam Co., 1977.

¹⁰ A remedy the Commissioner deemed appropriate in Montecalvo v. School Committee of the Town of Johnston, December 1974.