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AN ILLINOIS TEACHER'S RIGHT TO RETENTION

PART II: PROCEDURAL RIGHTS OF TEACHERS

III. THE PROCEDURAL RIGHTS OF TEACHERS REGARDING DISMISSALS

Procedural rights, to be effective, must be sufficient to protect the substantive rights of the class involved. Since the substantive rights of teachers regarding dismissals are quite extensive, the procedural rights of teachers regarding dismissals must also be quite extensive. The procedural rights of teachers regarding dismissal stem from two sources: (a) tenure legislation and (b) procedural due process of law. Both sources relate to a single question: Was the manner of dismissing a teacher appropriate?

The Illinois Tenure Act

Although the intent of the Illinois tenure act is to provide quality education, the act discriminates among teachers solely on the basis of their experience. First-year teachers shall be retained unless the school board provides the teacher with written notice of dismissal sixty days before the end of the school year. Second-year teachers shall be retained unless the school board provides the teacher with written notice of dismissal, accompanied by the specific reasons for the decision, by registered mail sixty days before the end of the school year. A tenured teacher may be dismissed only if the school board, when the charges are remediable, first supplies the teacher with a written warning. At this time or when the charges are specifically found to be irremediable, the school board must serve the teacher with written notice of the specific charges and of his option to request a bill of particulars and a hearing before the school

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1 See Comment, An Illinois Teacher’s Right to Retention, Part I, Substantive Rights of Teachers, 48 Chi-Kent L. Rev. 80 (1971), hereinafter cited as Part I. Since Part I was written, several relevant cases have been reported. In Downs v. Conway School District, 328 F. Supp. 338 (E.D. Ark. 1971), the court upheld the substantive due process rights of teachers. The teacher in Downs had adopted a teaching method which called attention to physical problems within the school. In Mailloux v. Kelly, 323 F. Supp. 1387 (D. Mass. 1971), a teacher’s use of the word “luck” in class as an example of a taboo word was upheld on the basis of academic freedom. In Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971), the sixth circuit reversed what was an excellent decision by the lower court, 318 F. Supp. 1041 (S.D. Ohio 1970).

2 See Part I.


5 Length of employment seems to be only one of many factors relevant to a teacher’s ability to provide quality education. Such a distinction may constitute unequal protection of law. See Part I., n.41.

6 This fact may be viewed as an intent by the legislature to establish a statutory right to retention even for non-tenured teachers.

7 School year has been interpreted, for this purpose, to mean the end of classes.

8 Supra n.6.

board. Such notice must be served on the tenured teacher sixty days before the end of the school year. At the hearing before the school board, which must be public if the teacher or the school board so requests, the tenured teacher may present evidence and may be represented by legal counsel. Only after following this procedure may a majority of the school board dismiss a tenured teacher.10

Tenure legislation was designed to remedy the abuses which had resulted from school boards' failure to renew teaching contracts. Non-renewal of short term teaching contracts was a potent means for school boards to dismiss teachers and yet avoid remedies for breach of contract. As many Illinois courts have explained, before tenure legislation was adopted, school boards had an absolute discretion11 not to renew a teacher's contract, regardless of the teacher's successful performance of his duties.12 Prior to the adoption of tenure legislation, local politics, personal dislike, and other factors unrelated to a teacher's performance could result in non-retention. Tenure legislation was adopted not only to protect teachers, but to insure quality education: if good teachers were not retained even though they were performing adequately, the quality of education would suffer. However, the procedural protection of tenure was extended only to third-year teachers. Beginning teachers continue to be subject to the abuses tenure legislation was designed to remedy.

Notice of the Specific Charges

The Illinois tenure statute provides tenured teachers with a right to notice of the specific charges which may result in dismissal.13 The statutory procedural rights of non-tenured teachers regarding notice are much more limited. Second-year non-tenured teachers are entitled only to a notice of dismissal which includes the specific reasons for the school board's decision.14 First-year non-tenured teachers are not entitled either to knowledge of the charges or to knowledge of the reasons for dismissal.

The difference between the term "specific charges" and the term "specific reasons" seems primarily to be a difference regarding when the school board must make its decision to dismiss a teacher. The term "specific charges" under the statute, coupled with the right to a hearing prior to final adjudication, seems to mean that the specific charges must be made before the school board is able to dismiss a tenured teacher. On the other hand, the term "specific reasons," available only in conjunction with a notice of dismissal, seems to permit school boards to decide to dismiss second-year non-tenured teachers before they decide what the specific reasons are for dismissal. When "charges" are made, the tenured teacher has various means to answer those charges prior to final adjudication by the school board. When only "reasons" are given, the second-year

10 Id. § 24-12.
11 See Part I (section on school board discretion).
14 Id. § 24-11.
non-tenured teacher has no recourse but to petition the courts since the school board has already made its decision. However, since court actions are expensive and bring publicity which may hinder professional employment opportunities, bringing suit is of limited utility to a teacher who has been dismissed.

A few Illinois courts have emphasized the importance of the term "specific reasons" as applicable to second-year non-tenured teachers. The Illinois Supreme Court has ruled that the requirement of giving specific reasons is mandatory, not permissive.\footnote{Donahoo v. Board of Education, 413 Ill. 422, 109 N.E.2d 787 (1953).} Another Illinois court has written:

We define [specific reason] to mean that [the school board] must fairly appraise the teacher of the alleged deficiency upon which the employer-school board bases its action, and with sufficient specificity to enable the teacher to refute the charge.\footnote{Wade v. Granite City Community Unit School District No. 9, 71 Ill. App. 2d 34, 36, 218 N.E.2d 19, 20 (1966).}

The application of this definition, however, is not free from problems. In the same case, a dissenting justice\footnote{Justice Moran dissented in the case.} questioned whether the specific reasons upheld by the majority were sufficiently "specific."

Despite the value placed upon the term "specific reasons" by some courts, such notice seems to serve little purpose. If the school board has unilaterally completed its decision-making process and has already decided to dismiss a teacher, even though it has not permitted the teacher to know or to answer the charges raised against him, information pertaining to the specific reasons seems rather unimportant: the teacher has lost his job.

The Illinois tenure act requires that notice of the specific charges or notice of dismissal be given sixty days before the end of the school year.\footnote{Ill. Rev. Stat. ch. 122, § 24-12 and § 24-11 (1969).} The sixty-day time limit serves two functions. First, it provides even non-tenured teachers with some small assurance that after the time limit has passed, they will be retained. Second, it provides the teachers who are dismissed with an opportunity to seek other employment.

\textit{Written Warning of Dismissal}

The Illinois tenure act requires that tenured teachers must be provided with a written warning under certain circumstances. The statute provides:

Before service of notice of charges on account of causes that are considered remediable, the teacher shall be given reasonable warning in writing, stating specifically the causes which if not removed, may result in charges.\footnote{Id. at § 24-12.}

This section requires that tenured teachers be given an opportunity to correct their own mistakes. Also, the requirement insures the smooth operation of the
state’s educational institutions in two ways. First, the requirement assures tenured teachers that they cannot be dismissed for reasons which could have been remedied if the administration or school board had only called the problem to the teacher’s attention.\(^{20}\) Second, the section requires school boards and administrators to mitigate any damage which may result to the students or to the school from a teacher’s wrongful conduct. If the administration or school board, although devoted to quality education, has not questioned a teacher’s past conduct, the charges may be invalid.\(^{21}\)

The statute however does not require that a warning be given in every case. A written warning need not be given a tenured teacher if the teacher’s conduct is not remediable. One Illinois court explains:

> A cause for dismissal is irremediable where damage has been done to the students, the faculty or the school itself and the damage could not have been corrected if warnings had been given by the teacher’s superiors when they learned of the cause.\(^{22}\)

Although this definition seems somewhat vague,\(^{23}\) the Illinois courts have clearly ruled that problems of discipline and class control are remediable grounds for dismissal which entitle tenured teachers to a written warning.\(^{24}\)

Although the statute does not mention when the warning should be given, the purpose of the statute was to require that the warning be given to tenured teachers early enough to permit them to remedy their conduct. However, regardless of a non-tenured teacher’s skills or performance, the statute does not provide the non-tenured teacher with any sort of warning of impending dismissal.\(^{25}\)

**A Hearing Before the School Board**

The Illinois tenure act provides tenured teachers with the statutory right to a dismissal hearing before the school board.\(^{26}\) The legislature, in providing the requirement of a hearing, seems to recognize that the interests of a tenured teacher require providing him with an opportunity to answer the charges raised against him. The statute provides the following procedural protections for teachers regarding the hearing before the school board.\(^{27}\)

1. Ten days notice is required for the hearing.

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\(^{20}\) Boards of education must be particularly careful to avoid problems of selective enforcement of their rules. Selective enforcement of rules may be a basis for unequal protection of the law. *See Comment, 1970 Wis. L. Rev. 162.*

\(^{21}\) Oral warning seems insufficient if the charges are believed severe enough to warrant dismissal.

\(^{22}\) *Wells v. Board of Education, 85 Ill. App. 2d 312, 315-16, 230 N.E.2d 6, 8 (1959).*

\(^{23}\) *See Jepsen v. Board of Education, 19 Ill. App. 2d 204, 153 N.E.2d 417 (1958).*

\(^{24}\) *Werner v. Community Unit School District No. 4, 40 Ill. App. 2d 491, 190 N.E.2d 184 (1963).*


\(^{26}\) *Id. § 24-12.*

\(^{27}\) *Id.*
2. The hearing must be public if either the school board or the teacher so requests.\textsuperscript{28}
3. The school board is authorized to issue subpoenas.\textsuperscript{29}
4. The teacher may be present and be represented by legal counsel.
5. The teacher may present witnesses and other evidence.
6. Witnesses must be sworn and may be cross-examined.
7. A stenographic record of the proceedings must be kept.

The hearing which the tenured teacher is entitled to under the tenure statute is endowed with all the trappings of a formal hearing.\textsuperscript{30} Nonetheless, the statute leaves some very important questions about the nature of the proceedings unanswered.

First, the statute does not clarify which party has the burden of proof at the dismissal hearing. Although the statute implies that the school board itself initially brings the charges against the teacher, the board seems ill-equipped to bring charges at the hearing since it functions as the finder of facts. At least one Illinois case has ruled that the superintendent of schools should not act as prosecutor.\textsuperscript{31} Yet in view of a teacher's extensive substantive rights, the teacher is probably not the appropriate party to carry the burden of proof either: the teacher should not be obliged to disprove someone else's accusations, particularly since he has been screened for competence\textsuperscript{32} and since relevant information may be in the control of his accusers.\textsuperscript{33}

Second, the statute does not specify whether the rules of evidence should apply at the tenured teacher's dismissal hearing. Some courts fear that a school board, untrained in law, would be unable to cope with the technical rules of evidence. However, even the foremost authority on administrative law, Professor Davis, does not argue that the technical rules of evidence should be strictly applied at an administrative hearing.\textsuperscript{34} However, the courts do require that the evidence presented be relevant and useful. Illinois courts have reversed dismissals when the only evidence supporting dismissal was unsubstantiated hearsay.\textsuperscript{35}

Third, the statute does not establish specific limits regarding the process of deliberation. Although the tenure act does not explicitly limit the decision to the

\textsuperscript{28} The fact that the school board is able to request a public hearing seems to indicate that it is interested in dismissal rather than an impartial finding of facts.

\textsuperscript{29} Subpoenas may be issued for the benefit of tenured teachers. The statute provides no method of discovery.

\textsuperscript{30} See K. Davis, Administrative Law Text, § 7:01 (1959).


\textsuperscript{32} A license to teach is prima facie evidence of competence. Neville v. School Directors, 36 Ill. 71 (1864).

\textsuperscript{33} Personnel reports and files are frequently kept by the administration on its teaching personnel.

\textsuperscript{34} Supra n.30, ch. 14.

facts in the record, it does imply that result.\textsuperscript{36} If the decision were made on the basis of facts outside the record, the entire purpose of the hearing could be negated. If the superintendent of schools, for example, were to influence the deliberations of the school board, the evidence taken at the hearing would be rendered ineffective. However, specific findings of fact by the school board, combined with the written record of the proceedings, might greatly expedite judicial review and might assure the courts that the decision has some basis in fact.

Regardless of all these unanswered questions regarding a tenured teacher's dismissal hearing before the school board, the Illinois courts have required that the hearing be conducted fairly.\textsuperscript{37} One Illinois court has written:

> The statute provides that a teacher may ask for a hearing on the question of whether he should or should not be dismissed and we believe that this is a fundamental right, not a mere formality. Not only is the teacher entitled to a hearing, but he is entitled to a fair hearing.\textsuperscript{38}

Although several questions exist regarding the statutory procedural rights of tenured teachers, the Illinois Tenure Act provides non-tenured teachers with only meagre protection. First-year non-tenured teachers are allowed only a notice of dismissal. Second-year non-tenured teachers are permitted only a notice of dismissal which lists the reasons for dismissal. Since the statute provides so little procedural protection for non-tenured teachers, the school boards are permitted to argue that non-tenured teachers may be dismissed for any reason\textsuperscript{39} and in almost any manner. The federal courts have generally responded to this argument by enforcing the procedural due process rights of teachers.

**Procedural Due Process of Law**

Unlike tenure legislation, procedural due process, the second source limiting the manner of dismissal, is constitutional in its scope. As such, procedural due process directly affects tenure legislation. The rationale of this second source of procedural rights seems to be the desire of the federal courts, in light of the substantive rights of teachers, to guarantee procedurally that a teacher not be dismissed in an arbitrary manner.\textsuperscript{40}

As one court explains, no legitimate interest of a school board is aided by arbitrariness:

> No interest of the university is directly served by a regime in which a decision not to retain a newcomer may be made upon a basis wholly


\textsuperscript{37} Perhaps no concrete definition of the term fairness is possible.


\textsuperscript{39} This argument is frequently inferred from a lesser procedural protection. See Part I (section of grounds for dismissal: the statute).

\textsuperscript{40} See, e.g. Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966).
without support in fact or by a decision upon a wholly unreasoned basis. 41

Procedural arbitrariness may undermine the morale of other teachers42 and may interfere with the smooth operations of the school. Also, procedural arbitrariness may deprive the school board of the tools necessary to make an equitable decision regarding the substantive grounds for dismissal since only the teacher would have access to the information necessary to explain his actions.43

Enforcing a teacher’s procedural rights to due process insures the courts (1) that grounds for dismissal actually exist and (2) that the grounds for dismissal are reasonable. The existence of grounds for dismissal is insured when the school board is required to inform the teacher of the grounds for dismissal. The reasonableness of the grounds for dismissal is insured when the teacher may dispute those grounds. Thus procedural due process, with intent similar to that of tenure legislation, procedurally prevents dismissals caused by local politics, personal dislike, mistake, and other factors which interfere with quality education. To accomplish these results, the courts instinctively look to two criteria which are the essence of procedural due process: (1) the right to adequate notice and (2) the right to a hearing.

The Right to Adequate Notice

The decisions of the federal courts regarding teachers’ procedural due process rights to adequate notice suffer from many of the same problems which plague Illinois courts regarding tenure legislation. Three views are represented in the opinions of the federal courts. All three views differ regarding the meaning of the terms “adequate notice” and regarding when notice should be given.

Some federal courts have ruled that non-tenured teachers have no procedural due process rights beyond those accorded by state statute. When the statute is satisfied, these courts are unwilling to intervene even if the statute permits arbitrary dismissal.44 The issues in such opinions frequently are resolved on the defendant-school board’s motion to dismiss. These decisions now probably constitute only a minority position,45 but do represent the views of at least two federal circuits.46 Such courts fail to recognize the constitutional status of due

43 See, supra n.30 at 116.
45 See, Comment, 1970 Wis. L. Rev. 162; Frakt, Non-Tenured Teachers and the Constitution, 18 U. Kan. L. Rev. 27 (1969). Several cases cited in note 44 have strong dissents.
46 The tenth and eight circuits, and perhaps the sixth.
process of law, which does not depend either on contract law or tenure legisla-
tion.\textsuperscript{47}

A second group of cases, represented primarily by \textit{Drown v. Portsmouth School District},\textsuperscript{48} takes the position that teachers are entitled to notice of the “reasons” for dismissal.\textsuperscript{49} The court in \textit{Drown} explains:

This [failure to give reasons] effectively forecloses [the teacher] from attempting any self-improvement, from correcting any false rumors and explaining any false impressions, from exposing any retributive effort infringing on her academic freedom, and from minimizing or otherwise overcoming the reason in her discussions with a potential future employer.\textsuperscript{50}

The court continues:

From the point of view of the teacher, such notice [of the reasons] would give him the opportunity informally\textsuperscript{51}—to correct a decision made on the basis of mistaken or false facts.\textsuperscript{52}

The court further elaborates regarding other possible advantages to the teacher: (1) Notice of reasons could be of use in court to challenge the dismissal. (2) Notice of reasons would inform the teacher of his errors. (3) Notice of reasons might aid the search for further employment. Against these advantages to the teacher, the court in \textit{Drown} attempts to balance the disadvantages to the school board. However, the court finds that requiring the school board to provide the teacher with reasons for dismissal “would impose no significant administrative burden.”\textsuperscript{53} The court points out that providing reasons for dismissal is quite workable.

The requirement of notice of the reasons for dismissal, recommended by the court in \textit{Drown}, suffers from the same difficulties mentioned in regard to the notice provided the second-year non-tenured teacher in Illinois. If the school board has made its decision, even without hearing the teacher's explanation, whether reasons are given or not is insignificant in view of the fact that the teacher has lost his job.

The majority view regarding adequate notice is represented by those opinions which require the school board to inform the teacher of the charges which may result in his dismissal. The primary purpose of this requirement is to

\textsuperscript{47} Pred v. Board of Public Instruction of Dade County, 415 F.2d 851 (5th Cir. 1969); McLaughlin v. Tilendes, 398 F.2d 287 (7th Cir. 1968); Bomar v. Keyes, 62 F.2d 136 (2d Cir. 1947); Roberts v. Lake Central School Corporation, 317 F. Supp. 63 (N.D. Ind. 1970); Lucia v. Duggan, 303 F. Supp. 122 (D. Mass. 1969).

\textsuperscript{48} 435 F.2d 1182 (1st Cir. 1970).

\textsuperscript{49} In this context, supra Part II (section on tenure act).

\textsuperscript{50} 435 F.2d 1182, 1184 (1st Cir. 1970).

\textsuperscript{51} When a school board has made its decision without listening to the teacher's evidence, informal discussions are not likely to be successful.

\textsuperscript{52} 435 F.2d 1182, 1184-85 (1st Cir. 1970).

\textsuperscript{53} Id. at 1185.
permit the teacher to answer the charges prior to his loss of employment. This purpose seems to be quite important. A sample of a few opinions may adequately represent this view:

Fundamental fairness requires that a teacher be notified of the charges against him or her and that he or she be given an opportunity to respond and the knowledge of and right to demand a hearing before final action is taken in cases of dismissal.\(^5\)

Another court explains:

[T]he Board’s ultimate decision may not rest on a basis which the teacher was never notified, nor may it rest on a basis to which the teacher had no fair opportunity to respond.\(^5\)

Yet another court writes:

[H]arm to the university [as a grounds for dismissal] is to tell [the teacher] nothing which permits him to defend himself. It is difficult to conceive a more complete failure to accord the rudiments of due process of law.\(^5\)

Thus the federal courts have determined that procedural due process requires that the teacher be informed of the specific charges prior to dismissal.\(^5\)

Notice of the specific charges prior to the final decision to dismiss is best designed to assure the extensive substantive rights of teachers. This alternative does not involve any great administrative hardship. Certainly if notice of the reasons for dismissal does not involve any great hardship,\(^5\) notice of the charges will not cause much difficulty either. Additionally, notice of the charges may save the school district the embarrassment of being reversed in court when the teacher offers a viable explanation of his conduct.\(^5\) Also, the courts will be saved the trouble of hearing cases which could have been resolved amicably with a fair procedure at the local level.

Nonetheless, since the procedural rights of teachers is a developing area of law, many other questions regarding the procedural due process rights of teachers remain unanswered.

One of the unanswered questions regarding the procedural due process rights of teachers is what form the charges should take. Generally, procedural due process would be satisfied with any method of notice which adequately serves its purpose of adequately informing the teacher of the charges. However, because of the dangers inherent in oral notice, such as the possibility of disputes regarding the exact charges which may result from misunderstanding,

\(^{57}\) The time necessary to prepare to answer the charges may be quite extensive.
\(^{59}\) An arbitrary decision may exist when a decision is based upon mistake.
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forgetfulness, or perjury, written notice seems to be the best method of notification. At least one federal court has reversed a dismissal partly because the school board orally informed the teacher of the charges at a school board meeting.

Another unanswered question regarding the procedural due process rights of teachers is the degree of specificity of the charges. The courts apply the standard that the charges should be specific enough to permit the teacher to defend himself. However, this standard does not provide much guidance for the courts. Nonetheless, if a teacher is unable to defend himself because of the generality of the grounds, the purpose of adequate notice is undermined. At least one federal court has reversed a dismissal because the grounds were too general, and numerous other decisions seem to uphold the principle.

The question of the degree of specificity of the charges is related to yet another question: Is discovery to be allowed when charges are made? Since a school administration frequently makes reports regarding its personnel, it may have in its possession information which if known would nullify the charges raised against the teacher. However, since the school administration may be the party bringing the charges against the teacher, it may be reluctant to admit even the existence of such information. Nonetheless, without access to such information, the teacher may not be able to support his position. One federal court has written:

Access to reports would seem to be a logical consequence of any right to receive a statement of reasons. To the extent that they are consistent with and foreshadow the reasons for non-retention, they both corroborate and give some depth to those reasons. To the extent that, as in the instant case, prior reports do not foreshadow dissatisfaction on the part of the teacher's superiors, the right to access would tend to restrain a board from assigning capricious reasons for its present dissatisfaction.

If, as the majority view holds, adequate notice requires knowledge of the charges in order to permit the teacher to answer those charges, failing to permit teachers to search all the information in the control of the administration which might provide a legitimate defense might constitute a violation of due process of law. In light of the substantive rights of teachers, no significant hardship would be imposed upon the school board. Also, such a procedure

60 State tenure legislation would seem to support this result.
61 Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970).
62 Generality of grounds for dismissal may disguise constitutional violations.
65 Since the information is in the hands of the teacher's accuser, a danger of tampering with the evidence exists.
67 The alleged confidential nature of the reports seems to be no excuse for not disclosing such information relevant to the issues in question at the dismissal hearing.
would aid the courts to insure that the decision of the school board was not arbitrary.

The final unanswered question regarding the due process right to adequate notice is whether adequate notice requires the teacher to be warned, prior to the bringing of charges, that his present conduct may result in charges. The constitutional advantage of a warning is that the courts would be assured that the charges alleged as grounds for dismissal are not fictitious. In view of the extensive substantive rights of teachers and of the state’s interest in the smooth operation of the school, a warning would seem to be a logical way to insure quality education. If the teacher is able to remedy his conduct, his rights and his career, as well as the rights of his students to have quality education, are assured. However, if the teacher is unable to correct his conduct he has at least been allowed the opportunity to preserve his status. Several federal courts seem to suggest that a warning of impending charges is desirable.

The Right to a Hearing

An opportunity to answer charges is the major element of the procedural due process rights of public school teachers. The opportunity to answer the charges insures that the grounds for dismissal are reasonable. Nonetheless, many courts disagree regarding which method of providing an opportunity to answer the charges satisfies procedural due process of law. Does a teacher have a due process right to a hearing?

In addition to those courts which deny teachers’ due process rights, opposition to dismissal hearings for teachers is born of two fears. First, the courts fear that school boards may be unable to conduct formal dismissal hearings. Second, the courts fear that formal dismissal hearings may hinder teaching quality.

First, some courts fear that a local school board may be overwhelmed with requests for formal dismissal hearings. The fear of the possibility of numerous requests for hearings is compounded by the belief that school boards may be ill-equipped in time, money, and training to conduct such hearings. Thus, several courts have ruled that a hearing is unnecessary. One court explains:

It would be too much to ask the school board to hold a hearing every time it determines not to renew the contract of a probationary teacher.

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68 Arbitrary dismissal, a constitutional violation, may exist when charges have no basis in fact.
70 Assuming the problems are legitimate and do not infringe upon academic freedom.
71 See, e.g., Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969); Freeman v. Gould Special School Dist. of Lincoln County, 405 F.2d 1153 (8th Cir. 1969).
or even every time a terminated teacher requests a hearing without alleging unconstitutional action.\textsuperscript{73}

This first fear of dismissal hearings seems unjustified. Dismissal is an unusual occurrence; it is the exception rather than the rule of employment by the school board.\textsuperscript{74} Although tenured teachers usually constitute a majority of any teaching staff, those states with tenure acts which require formal hearings for tenured teachers have not suffered from any inability to conduct a dismissal hearing. The school boards in such states have not been inundated with requests for hearings. Certainly any agency which is able to supervise an extensive educational complex should be capable of conducting a dismissal hearing.

Second, some courts fear that formal dismissal hearings may result in a lower quality of education. The court in\textit{Drown v. Portsmouth School District}\textsuperscript{75} exemplifies this fear. It argues that a formal dismissal hearing for teachers would not only "be an added, expensive and unfamiliar obligation for the school district,"\textsuperscript{76} but that such a procedure might encourage administrators "to tolerate incompetent teachers"\textsuperscript{77} and might result in "over caution in . . . hiring practices"\textsuperscript{78} with the effect that "the schools would be left with a teaching force of homogenized mediocrities."\textsuperscript{79}

This second fear also seems unjustified. Although the interests of the state and of the school board in quality education must be balanced against the rights and interests of teachers, no valid interest of the schools is served by a decision which does not consider all the available relevant evidence.\textsuperscript{80} If the administration is able to support its charges with facts, nothing prohibits the teacher from being dismissed. However, if it is unable to support the charges, then a teacher's rights and career, the product of years of work, merit consideration. Fictitious charges are insufficient to justify dismissal.\textsuperscript{81} A school board which may use arbitrary methods and which has a "prerogative to be short-sighted and narrow-minded"\textsuperscript{82} can hardly be credited with not encouraging "a teaching force of homogenized mediocrities."\textsuperscript{83}

In contrast to those courts which deny a teacher the right to a hearing, some courts suggest that a hearing may be necessary but only in certain cir-

\textsuperscript{73} Thaw v. Board of Public Instruction of Dade County, 432 F.2d 98, 100 (5th Cir. 1969). This case involved a great number of dismissals for administrative reasons.
\textsuperscript{74} Frakt, Non-tenured Teachers and the Constitution, 18 U. Kan. L. Rev. 27 (1969).
\textsuperscript{75} 435 F.2d 1182 (1st Cir. 1970).
\textsuperscript{76} Id. at 1186.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} How can a school board possibly make a good faith decision without permitting the teacher to answer the charges, particularly when the teacher is the only one able to explain his conduct?
\textsuperscript{81} Such charges would result in an arbitrary dismissal.
\textsuperscript{82} Drown v. Portsmouth School District, 435 F.2d 1182, 1186 (1st Cir. 1970).
\textsuperscript{83} Id.
cumstances. According to these courts, a hearing is required if the teacher (1) has tenure, (2) has an expectancy of further employment, or (3) has suffered a violation of his constitutional rights.\(^8\) One court explains:

A hearing was mandatory, if desired by [the teacher]. But where the only matter in issue is a difference of view over a school board's exercise of judgment and discretion concerning matters non-constitutional in nature, the board is not required to conduct a hearing. . . . There are in-between situations which are somewhat more difficult. If the board asserts a non-constitutional reason and the teacher claims it is a sham and that the real reason is one impinging on his constitutional rights, he must be afforded a hearing. Also, even in the area of non-constitutional reasons, the board's decision must not be wholly unsupported by evidence else it would be so arbitrary as to be a constitutional violation.\(^8\)

Although this line of authority seems to approach the essential questions, the distinction between constitutional and non-constitutional grounds for dismissal seems obscure. Does the distinction depend solely on what the teacher alleges to the school board? The court in *Drown* arguing against this approach reasons that two constitutional hearings, one at the school board level and another at the federal district court level, are unnecessary.\(^8\) Although a hearing seems necessary, a distinction between constitutional and non-constitutional grounds for dismissal, which school boards must apply, is unnecessarily technical. Considerations of federal question jurisdiction, although certainly relevant to the jurisdiction of the federal courts, do not appear initially relevant to whether a school board should provide a teacher with a dismissal hearing: other considerations, although also of constitutional stature, are applicable.

Despite the wide disparity of views regarding dismissal hearings, a formal dismissal hearing which includes most of the trappings of a trial\(^8\) is desirable for all teachers. Since less formal methods of providing an opportunity to answer charges do not provide an opportunity to present and to cross-examine witnesses, such methods are insufficient. Even oral argument alone does not present a sufficient opportunity to answer the charges: such an argument could only indicate the differences of opinion regarding the merits of the dismissal; it could provide no means to resolve that difference of opinion.

If a formal dismissal hearing were not provided, the school board would not have access to the best evidence available, the testimony of the teacher himself. Who knows better than the teacher himself why he acted in a particular manner? Professor Davis, the foremost authority of administrative law, explains when a formal hearing is required:

\(^8\) *Thaw v. Board of Education*, 432 F.2d 98 (5th Cir. 1969).
\(^8\) *Lucas v. Chapman*, 430 F.2d 945, 948 (5th Cir. 1970).
\(^8\) *Drown v. Board of Public Instruction of Dade County*, 435 F.2d 1182 (1st Cir. 1970).
\(^8\) Davis calls a formal hearing a "trial-type hearing." See, supra n.30 at 113.
Facts pertaining to the parties and their business and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts.88

Davis further explains that the determining criterion regarding the necessity of a hearing is the nature of the party’s interest or right:

The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance when some other interest, such as national security, justifies an overriding of the interest in fair hearing.89

A formal dismissal hearing not only insures the courts that the school board has considered all the relevant evidence before it made its decision, but a hearing permits school boards to avoid the embarrassment and expense of being presented with a valid explanation of a teacher’s behavior in a court of law. Even the court in Drown recognizes this fact:

[T]he chief beneficiaries [of a hearing before the school board] are the school board itself, which can only profit from reviewing a decision before being subject to possible liability, and the courts, which do not seek unnecessary litigation.90

Although due process provides teachers with a right to adequate notice of the charges, such knowledge would be inconsequential if the teacher had no opportunity to present the evidence which would exonerate him.

Thus, while the due process clause requires that the school board make reasonable decisions on the basis of all the relevant information presented at a dismissal hearing, this requirement only reinforces the belief that the school board is the best forum for the resolution of local educational problems. The requirement only reaffirms the responsibility of school boards to insure quality education. However, a dismissal hearing before the school board tends to suffer from various problems which if unresolved may result in a lack of impartiality.

One of the problems affecting dismissal hearings before school boards is the uncertainty regarding who has the burden of proof. Some courts, although perhaps addressing themselves to the burden of proof in civil rights actions

88 Supra n.30 at 116.
89 Id. at 115.
before the courts, require the teacher to assume the burden of proof at a dismissal hearing. This determination depends upon the scope of a school board's discretion.

Although the teacher may be the appropriate party to assume the burden of persuasion on appeal in the courts, he is not the appropriate party to assume either the burden of ultimate persuasion or the burden of going forward with the evidence at a dismissal hearing before the school board: a teacher's rights and interests are too extensive. The teacher has been screened by the state for competence; his license is prima facie evidence of his competence. Even the school board recognized the teacher's competence when it hired him from among all its applicants. The Illinois tenure statute itself indicates that tenured teachers have a right to continued employment. Also, since relevant information generally is in the control of the administration, a teacher may not even have access, in the absence of discovery, to the information which could disprove the charges raised against him. Requiring a teacher to disprove the charges raised against him is somehow inappropriate in a free society.

Since the grounds for dismissal should be related to the teacher's performance and since the administration, as the agent of the school board, has the primary responsibility for insuring quality education, the administrator who directly supervises the teacher (perhaps with the assistance of legal counsel employed for the purpose) is probably best able to bring the charges and sustain the burden of proof. Only the teacher's supervisor has the detailed information necessary to support his charges; he has been closely aware of the teacher's performance probably for the duration of the teacher's employment. Such a procedure gives the courts additional assurance that the dismissal is warranted. This procedure requires that the person who supervises the teacher's performance be satisfied that grounds for dismissal actually exist and that the supervisor be able to support his charges.

Some petitioners have argued that the superintendent of schools should have the burden of proving the charges. However, the courts have not sustained such a position. Two serious obstacles justify these courts' decisions. First,

92 See Part I.
93 A teaching certificate is required for teaching in Illinois public schools.
94 Neville v. School Directors, 36 Ill. 71 (1864).
95 Non-tenured teachers also seem to have such a statutory right to be retained unless they have received formal notice of non-retention.
96 See Part I.
97 Also teachers.
98 Counsel would lend legitimacy to the proceedings and avoid personality conflict between employees of the school board.
99 A danger exists that witnesses who are employed by the school board but who lack protection from arbitrary dismissal may be pressured to perjure themselves in order to protect their jobs.
100 An effect on the teacher's performance is required, see Part I.
since the superintendent of schools generally has extensive rapport with the school board, if he were to bring charges or to attempt to prove such charges, his influence might affect the outcome. Second, if the superintendent were to bring charges or to be assigned the burden of proof, the identity of the teacher's real accuser might be obscured.\textsuperscript{102}

An additional problem concerning dismissal hearings, which if uncorrected could result in a lack of impartiality, is the difficulty of separating the task of bringing charges from the task of finding facts, a problem not uncommon with administrative agencies.\textsuperscript{103} When the school board itself is the party which brings the charges against a teacher\textsuperscript{104} and yet is permitted to determine the validity of those charges,\textsuperscript{105} its ability to reach a just result is questionable. The school board's accusatorial function may adversely influence its judgment: its ability to weigh the evidence equitably is lacking.

A final problem which may affect the impartiality of a dismissal hearing before the school board is the nature of the deliberations. The deliberations of administrative agencies are subject to numerous weaknesses. One writer notes:

The weaknesses of the institutional decision lie in its anonymity, in its reliance on extra-record advice, in frustration of parties' desire to reach the men who influence the decision behind the scenes, and in the separation of the deciding function from the writing of the opinion or report.\textsuperscript{106}

Since a school board is a group rather than a person, fixing the responsibility for a school board's decision is much more difficult than for a judge's decision.

The major problem from which school boards suffer when considering dismissals is the possibility of interference from parties not appropriately part of the decision making process. One extreme case serves to exemplify this point. In \textit{McDonough v. Kelly},\textsuperscript{107} a member of the school board who was not present at the dismissal hearing was required to cast the deciding vote. While members of the administration talked with the absent member prior to his decision, the absent member did not talk with the teacher. Although the court indicated that such discussions prior to making the decision were a denial of due process, the court emphasized another factor:

It does not require any extended citation of authority to rule that it is a fundamental denial of one's constitutional right to due process of law to allow one who has not been present at the hearing to cast the deciding vote on the very issue which is the subject matter of the hear-

\textsuperscript{102} Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970) seems to indicate that the teacher has a right to know the identity of the person(s) bringing charges against him.

\textsuperscript{103} Supra n.30.

\textsuperscript{104} Illinois is probably such a state.

\textsuperscript{105} The school board as an administrative agency is the finder of facts.

\textsuperscript{106} Supra n.30 at 187.

\textsuperscript{107} 329 F. Supp. 144 (D.N.H. 1971).
ing. To rule otherwise would make a hearing requirement meaningless.108

Thus, the record of a dismissal hearing is the only legitimate basis for making a decision to dismiss a teacher.109 Specific findings of fact may assure the courts that the school board’s decision is reasonable.

In addition to these problems affecting the impartiality of a dismissal hearing, some petitioners argue that only a public hearing can guarantee impartiality. These petitioners fear that a hearing behind closed doors may hide an arbitrary decision. After all, if a school board has not acted arbitrarily, it has little to fear from granting a public hearing at the request of the teacher. Indeed, a fair public hearing may benefit the school board by easing public concern and improving the morale of other teachers. As the Illinois Supreme Court has explained: “A board would not readily dismiss when its reasons therefor will be submitted to the bar of public opinion.”110

However, the presence of the public at a dismissal hearing may be a two-edged sword. The United States Supreme Court explains:

Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty.111

If a dismissal hearing is conducted fairly, whether the public is invited to attend seems unrelated to the issues to be decided. Although the deliberations regarding a dismissal hearing should be held behind closed doors, the public does have an interest in knowing how their elected officials conduct themselves. In the absence of countervailing interests and particularly if the teacher so requests, a dismissal hearing should probably be open to the public. However, the failure to permit a public dismissal hearing, in the absence of other unfairness may constitute only harmless error.

IV. A Prototype for Dismissal Procedure

The substantive rights of teachers are quite extensive. Indeed the nature of these rights when viewed with the nature of employment as a teacher may come to be recognized as a federally protected constitutional interest. Any procedure which is adopted must sufficiently protect the substance of this interest.

Although the federal courts frequently resolve disputes by balancing the constitutional interests of one party against those of the opposing party, such a balancing process requires two adverse constitutional interests. However, the interests of teachers do not seem adverse to the educational interests of the

108 Id. at 150.
109 Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970).
school board or the state. Indeed the substantive and procedural rights of teachers complement the interests of the state and school board in quality education. The purpose of tenure legislation, recognizing that quality education cannot flourish where teachers may be dismissed for any reason and in any manner, exemplifies this unity of interests.

However, tenure legislation seems too narrow in scope to protect quality education adequately. The minimal procedural protection for non-tenured teachers permits the very abuses which resulted in the enactment of tenure legislation initially. The rationale for a distinction among those who perform the same work seems questionable.\textsuperscript{1} When teachers have been screened by the state and licensed as competent to teach only after serving an internship, what valid interest may be served by permitting the school boards to dismiss non-tenured teachers differently from all other teachers, particularly in view of the in terrorem effect of dismissal upon the teacher's professional career? School boards do not have an interest in being arbitrary especially in view of academic freedom. On the other hand, teachers, whether tenured or non-tenured, have no right to be retained if they have not substantially performed their duties.

The following suggested dismissal procedure, applicable to all teachers, may clarify some of the confusion surrounding the rights of teachers regarding dismissals.

1. The substantive rights which procedural rights protect must be clearly understood before any procedure can be effective. Therefore, the grounds of dismissal previously recommended may be useful.\textsuperscript{112} If the grounds for dismissal are clearly established by a group other than the school board in accord with the constitutional and professional rights of teachers, difficulties regarding grounds for dismissal would be minimized. Academic freedom requires that teachers be given the benefit of the doubt regarding the techniques they utilize.

2. Written school rules available to all teachers are a prerequisite of adequate notice. The participation of teachers in the preparation of such rules is desirable in order to avoid unnecessary controversy.

3. A written warning of dissatisfaction is necessary in order to minimize conflict and permit the teacher to preserve his interests.

4. Adequate notice of the specific charges which may result in dismissal is necessary.

5. Access to all files and information relevant to the charges is desirable and necessary to permit the teacher to answer the charges.

6. A formal hearing before the school board is required to permit the teacher to answer the charges and to permit the school board to hear all the evidence

\textsuperscript{112} See Part I. (section on grounds for dismissal: the statute, and n.41)
\textsuperscript{113} See Part I. (section on grounds for dismissal: a possible solution)
relevant to the charges. The rights of the accused, including the right to cross-examination, to counsel, and to confrontation, should be protected.

(7) Many of the difficulties of a dismissal hearing may be minimized by the presence of a hearing officer who is not a member of the school board. The presence of a hearing officer to conduct the hearing would assure the courts that the hearing was conducted fairly and that the school board appropriately limited its decision to the adjudicative facts.

(8) The burden of proof at the hearing, in view of the substantive rights of teachers, is appropriately borne by the party raising the charges. Generally, since the charges should be related to the teacher's performance, the teacher's immediate supervisor, perhaps with the assistance of legal counsel, should have the burden of proof.

(9) The school board's decision should be based solely upon the evidence presented. Precautions should be taken to avoid the interference of parties not appropriately part of the decision-making process. Specific findings of fact would help assure the courts of this result.

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