## CHAPTER 15

**Certification, Contracts, and Tenure**

*[I]t would be my aim again, to make better teachers, and especially better teachers for our common schools . . . teachers who would know more of the nature of children, of youthful development, more of the subjects to be taught, and more of the methods of teaching them. . . . In short, I was desirous of putting our schools in the hands of those who would make them places in which children could learn, not only to read and write and spell and cipher, but where they would have all their faculties trained in such harmony as would result in the highest formation of character.*

—Cyrus Pierce, 1851

###### CHAPTER OUTLINE

■ INTRODUCTION

■ TEACHER CERTIFICATION *Background Requirements*

■ TEACHER CONTRACTS

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■ GROUNDS FOR TERMINATION OF TENURED TEACHERS

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* Introduction

The employment conditions of public school teach- ers are governed by state statutory and regulatory policy. Because public education is exclusively a state function, the state may set the criteria for eli- gibility, qualification, and certification of teachers. In the exercise of its sovereign power to provide for an efficient system of public schools for the enhancement of the welfare of the people, the state can establish the conditions and requirements necessary to become a public school teacher:

A person has no constitutional right to be employed as a teacher in the public schools, as such employ- ment is not an uninhibited privilege and she (or he) has no right to serve except on such terms as the state prescribes.1

At its option, a state may have no certificate requirements, or it can establish complex condi- tions precedent to employment with regard to experience, education, test scores, or any num- ber of conditions that may be considered impor- tant to one’s ability to teach. The state may also prescribe the contractual relationship between the teacher and the school board and if it wishes, may create special contractual conditions per- taining to terms and conditions of employment. The actual contract between the teacher and school board may be for any period of time but is usually annual. Or, there may be a statutorily created long-term arrangement of indefinite length known as a *tenure* or *continuing contract*. However, the conditions for such contracts are prescribed by law, and teachers must agree to the legal conditions if they are to have and retain public school employment.

The courts may rely on common-law prec- edents pertaining to contracts when litigation arises regarding disputed statutory application or interpretation. Beyond specific statutory and regulatory provisions and relevant common-law applications, the courts may also be called upon to determine the lawfulness of state restrictions or restraints on employment that may adversely affect teachers’ constitutional rights. Thus, the law pertaining to teacher employment in public schools derives from state statutory and regula- tory prescriptions with a gloss of common-law precedents where there may be a lack of clarity. The employment relationship is also greatly af- fected by state and federal constitutional prohi- bitions that prevent government from arbitrarily

and unilaterally denying a teacher a basic and

fundamental constitutional right or interest.

This chapter is concerned with the eligibility and certification of teachers, their annual and tenure contractual relationships with school boards, and the conditions under which those relationships can be terminated. Further, this chapter deals with constitutional interests of teachers to the extent that they are affected by the obligation-of-contracts provision of the U.S. Constitution. Teachers’ rights, freedoms, and due process interests under the Bill of Rights and Fourteenth Amendment, as well as their rights under federal antidiscrimination statutory provisions, are discussed in subsequent chapters.

* Teacher Certification

All state legislatures have enacted laws relating to the certification of teachers, and when such laws are properly promulgated with no intent to discriminate, and are not arbitrary, they will be upheld by the courts. These laws run the gamut from great particularity to gross generality. Thus, it is necessary to consider the specific laws of each state individually to determine specific certification requirements.

The general rule is that if a teacher satisfies all of the requirements set forth in the statutes and regulations relative to the issuance of a cer- tificate, the certifying body may not arbitrarily refuse to issue the certificate. However, in most cases, the certificate-issuing body is vested with discretionary authority. Also, the issuing agency may, in many instances, prescribe higher stan- dards for certification than are contained in laws enacted by a state legislature.

###### BACKGROUND

Early U.S. schools were deficient for many rea- sons, most importantly, the lack of well-educated and well-trained professional teachers. Few teachers were well versed in subject matter, and still fewer knew the techniques of teaching. Early schools were usually staffed by itinerant teachers who were interviewed and hired by local school trustees, who themselves were often illiterate or only vaguely aware of the qualifications neces- sary to good teaching. Little serious thought was given to the education and training of teachers in America until the mid-nineteenth century. The late beginnings of teacher education in this

country tracked the general disinterest in public schools by parents who chose to send their chil- dren to private schools, where the teachers were equally poorly prepared, or who ignored formal education entirely, placing their children directly in the workforce at a very early age.

The Prussians had much earlier recognized the need for adequately trained teachers, and between 1750 and 1794, established dozens of seminaries for the special training of elementary school teachers. By 1808, the new French govern- ment under Napoleon had established the *École Normale Supérieure,* a higher-education normal school; between 1831 and 1833, France created 30 new normal schools for teacher training. It was not until 1839 that the first legislatively au- thorized normal school in America was estab- lished under the leadership of Horace Mann in Lexington, Massachusetts.2

Slowly, other states began to create normal schools in the realization that teachers should be trained in both subject matter and teaching meth- ods. Most knowledgeable persons agreed that the study of didactics by teachers was essential if the public school was to be efficient and effec- tive. Providing for well-trained personnel, how- ever, addressed only part of the problem. The local orientation and control of public schools had pro- duced the prevailing practice of lay certification through examination with little or no statewide coordination for quality control or continuity. It was said that even with the development of teacher training programs, many localities con- tinued to indulge in “schoolkeeping,” a system in which young, unmarried, and unqualified women taught while they were “anticipating marriage” or in which “traveling Ichabod Cranes *kept* school rather than professional teachers *teaching*” school.3 It was at this time proposed that the solu- tion to the quality problem lay in “establishing a well-organized state system of examinations” managed at the local level by professional edu- cators, superintendents, and professional teach- ers.4 It was reasoned that certification should be granted to teachers by professional educators “for the same reason that only lawyers can le- gally examine law students applying for admis- sion to the bar, that only physicians can legally examine medical students, and that only clergy- men pass on the fitness of theological students to enter the ministry.”5 The nature of public schools as governmental agencies, however,

prevented the implementation of such certifica- tion proposals. Eventually, a quasi-professional system was adopted whereby teacher-training colleges would train and recommend certifica- tion of teachers to a state educational agency, which would in turn issue teaching certificates. It was believed that this process was more effective than certification based upon lay examination or even statewide teacher tests for certification with little or no requisite education or training.

Partially because of the experiences of the past, the public today apparently believes that teachers should meet the rigors of certain pre- scribed academic attainment as evaluated by in- stitutions of higher education as well as teacher tests in order to acquire a license to teach. The license itself is a certificate issued by the state, rec- ognizing that a person is presumptively qualified to teach in the public schools. In this manner, the state extends some surety to the child and the taxpayer that the public schools are protected against “charlatans, ignoramuses, and hum- bugs”6 masquerading as teachers.

CERTIFICATE AS CAPACITY TO CONTRACT

*Possession of a teacher’s certificate is a necessary prerequisite to employment. Although a job appli- cant may be interviewed and hired on the strength of having completed all certification requirements, failure to actually obtain the actual certificate or license will prevent the formation of a contract enforceable at law. Certification constitutes capac- ity to contract.*

*—67B Am.Jur.2d* Schools *§ 163*

###### REQUIREMENTS

Most states specifically require by statute that an applicant for a teaching certificate be of good moral character. To remain eligible for either con- tinued certification or renewal of an existing certif- icate, the teacher must continue to evidence good moral character. Besides good moral character, state law generally requires that applicants have successfully completed a predetermined number of college credits in the subject that the individual plans to teach (e.g., English), and a required level on teacher test scores. All 50 states approve the content of teacher education programs conducted

by colleges and universities.7 States also generally require the individual to be a citizen of the United States of a specified age (usually 18 or older). Some states require the pledging of loyalty to the state and/or federal Constitution and, in recent years, have required the completion of an examination, such as the National Teacher Examination.

Teacher certification does not guarantee em- ployment. State legislatures have delegated the authority for employment of teachers to local school boards. Local boards have been given wide latitude and may place additional require- ments or restrictions on employment as long as these rules do not contradict or reduce the effect of state requirements. Neither can such rules violate one’s constitutional or statutory rights. Local boards cannot impose requirements that are arbitrary, capricious, or enacted in bad faith.

Some additional requirements that have been upheld include mandating greater academic credentials than those established by the state and requiring continuing education after em- ployment.8 School boards have been upheld in requiring teachers to establish residency within the boundaries of the school district,9 restricting outside employment, adopting reasonable health and physical requirements (within federal and state provisions for persons with disabilities), as- signing (within state statutes) teachers to teach- ing positions, and mandating the supervising of extracurricular activities.

*Statute Forbidding Certification to Persons Who Are Not Citizens and Have Manifested No Intent to Become Citizens Is Not Violative of Equal Protection*



**Ambach v. Norwick**

*Supreme Court of the United States, 1979.*

*441 U.S. 68, 99 S. Ct. 1589.*

Mr. Justice POWELL delivered the opinion of the Court.

This case presents the question whether a State, consistently with the Equal Protection Clause of the Fourteenth Amendment, may

refuse to employ as elementary and second- ary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization.

New York Education Law § 3001(3) forbids certification as a public school teacher of any person who is not a citizen of the United States, unless that person has manifested an intention to apply for citizenship. The Commissioner of Edu- cation is authorized to create exemptions from this prohibition, and has done so with respect to aliens who are not yet eligible for citizenship. Unless a teacher obtains certification, he may not work in a public elementary or secondary school in New York.

Appellee Norwick was born in Scotland and is a subject of Great Britain. She has resided in this country since 1965 and is married to a United States citizen. Appellee Dachinger is a Finnish subject who came to this country in 1966 and also is married to a United States citizen. Both Norwick and Dachinger currently meet all of the educational requirements New York has set for certification as a public school teacher, but they consistently have refused to seek citizenship in spite of their eligibility to do so. Norwick applied in 1973 for a teaching certificate covering nursery school through sixth grade, and Dachinger sought a certificate covering the same grades in 1975. Both applications were denied because of appel- lees’ failure to meet the requirements of § 3001(3). Norwick then filed this suit seeking to enjoin the enforcement of § 3001(3), and Dachinger obtained leave to intervene as a plaintiff. . . .

Applying the rational basis standard, we held last term that New York could exclude aliens from the ranks of its police force. Because the po- lice function fulfilled “a most fundamental ob- ligation of government to its constituency” and by necessity cloaked policemen with substan- tial discretionary powers, we viewed the police force as being one of those appropriately defined classes of positions for which a citizenship re- quirement could be imposed. Accordingly, the State was required to justify its classification only “by a showing of some rational relationship between the interest sought to be protected and the limiting classification.”

The rule for governmental functions, which is an exception to the general standard applica- ble to classifications based on alienage, rests on

important principles inherent in the Constitu- tion. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the dis- tinction no less than eleven times, . . . indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exer- cises the powers of governance. The form of this association is important: an oath of allegiance or similar ceremony cannot substitute for the un- equivocal legal bond citizenship represents. It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.

In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role. Each of these considerations supports the conclusion that public school teach- ers may be regarded as performing a task “that go[es] to the heart of representative government.” Public education, like the police function, “fulfills a most fundamental obligation of gov- ernment to its constituency.” The importance of public schools in the preparation of individuals for participation as citizens, and in the preser- vation of the values on which our society rests,

long has been recognized by our decisions:

Today, education is perhaps the most important function of state and local governments. Com- pulsory school attendance laws and the great ex- penditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even ser- vice in the armed forces. It is the very foundation of good citizenship. Today it is a principal instru- ment in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environ- ment. *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S. Ct. 686, 691 (1954).

. . . Other authorities have perceived pub- lic schools as an “assimilative force” by which

diverse and conflicting elements in our society are brought together on a broad but common ground. . . . These perceptions of the public schools as inculcating fundamental values neces- sary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. . . .

Within the public school system, teachers play a critical part in developing students’ attitude to- ward government and understanding the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students’ experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are respon- sible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the atti- tudes of students toward government, the politi- cal process, and a citizen’s social responsibilities. This influence is crucial to the continued good health of a democracy.

Furthermore, it is clear that all public school teachers, and not just those responsible for teach- ing the courses most directly related to govern- ment, history, and civic duties, should help fulfill the broader function of the public school system. Teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedicated to political and social subjects. More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Certainly a State also may take account of a teacher’s func- tion as an example for students, which exists in- dependently of particular classroom subjects. In light of the foregoing considerations, we think it clear that public school teachers come well within the “governmental function” principle

recognized in *Sugarman* and *Foley.* Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bears a rational relationship to a legiti- mate state interest. . . .

As the legitimacy of the State’s interest in fur- thering the educational goals outlined above is undoubted, it remains only to consider whether

§ 3001(3) bears a rational relationship to this inter- est. The restriction is carefully framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship. Appellees, and aliens similarly situated, in effect have chosen to classify themselves. They prefer to retain citizen- ship in a foreign country with the obligations it entails of primary duty and loyalty. They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualifica- tion for teaching the young of the State in the pub- lic schools, and § 3001(3) furthers that judgment.

Reversed.

*Employee Residency Requirements Are Constitutional*



#### Wardwell v. Board

**of Education of the City School District of the City of Cincinnati**

*United States Court of Appeals, Sixth Circuit, 1976.*

*529 F.2d 625.*

WILLIAM E. MILLER, Circuit Judge.

In December, 1972, plaintiff, Terry Wardwell, was hired to teach in the Cincinnati schools. As a condition of employment he agreed to move into the city school district pursuant to a rule announced by the school superintendent in November, 1972, that all newly employed teach- ers must establish residence within the district within thirty days after employment. In January,

1973, the Board adopted the following resolution, essentially ratifying the superintendent’s rule:

RESOLVED, That any employee hired by the Cin- cinnati Schools after November 13, 1972, must ei- ther reside within the Cincinnati School District, or agree, as a condition of employment, to establish residency within the district within ninety days of employment. Employees who live in the district must continue to reside therein as long as they are so employed. This policy does not affect in any way personnel hired before the above date.

Plaintiff Wardwell lived outside the district but within the State of Ohio. Despite the requirement he failed to change his residence. He filed the present action in July, 1973, under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, challenging the residency re- quirement on equal protection grounds and seek- ing injunctive relief and attorney’s fees. . . .

The district court denied the request for an in- junction and upheld the validity of the rule, relying heavily on the Fifth Circuit’s reasoning in *Wright v. City of Jackson,* 506 F.2d 900 (5th Cir. 1975).

Plaintiff argues that the Board’s residency requirement infringes his constitutionally pro- tected right to travel as defined in *Shapiro v. Thompson,* 394 U.S. 618, 89 S. Ct. 1322(1969), and

in *Dunn v. Blumstein,* 405 U.S. 330, 92 S. Ct. 995 (1972), extending the protection, as he contends, to both intrastate and interstate travel and em- bracing as a necessary corollary the right to re- main in one place.

We find no support for plaintiff’s theory that the right to intrastate travel has been afforded federal constitutional protection. An examina- tion of *Shapiro,* supra, *Dunn,* supra, and the Su- preme Court’s more recent opinion in *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 94 S. Ct. 1076 (1974), convinces us that the aspect of the right to travel with which the Court was con- cerned in those cases is not involved here. It is clear that the Court was dealing with the valid- ity of durational residency requirements which penalized recent interstate travel. Such dura- tional residency requirements or restrictions affecting the interstate aspect of travel will not pass constitutional muster “absent a compelling state interest.” . . .

. . . We conclude that the “compelling state interest” test is the applicable test in cases in- volving infringement of the right to interstate travel by *durational* residency requirements. On

the other hand, where, as in the present case, a continuing employee residency requirement af- fecting at most the right of intrastate travel is in- volved, the “rational basis” test is the touchstone to determine its validity.

some reasonable basis, it does not offend the constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’”

Affirmed.

We find a number of rational bases for the

residency requirement of the Cincinnati School Board. The Cincinnati school superintendent tes- tified that promulgation of the rule was based on the following conclusions: (1) such a require- ment aids in hiring teachers who are highly motivated and deeply committed to an urban educational system, (2) teachers who live in the district are more likely to vote for district taxes, less likely to engage in illegal strikes, and more likely to help obtain passage of school tax lev- ies, (3) teachers living in the district are more likely to be involved in school and community activities bringing them in contact with parents and community leaders and are more likely to be committed to the future of the district and its schools, (4) teachers who live in the district are more likely to gain sympathy and understanding for the racial, social, economic, and urban prob- lems of the children they teach and are thus less likely to be considered isolated from the commu- nities in which they teach, (5) the requirement is in keeping with the goal of encouraging integra- tion in society and in the schools. These conclu- sions appear to us clearly to establish rational bases for the residency requirement imposed by the Cincinnati Board. . . .

. . . [A]ppellant argues that the residency re- quirement is invalid because it requires newly hired teachers to move into and remain in the district and permits those already hired to remain or move outside the district. Appellee replies that distinguishing between new teach- ers and teachers with experience, who may have tenure and who did not know of the requirement when they accepted employment, is a reasonable distinction which the state is free to make. While we recognize that the limited applicability of the rule may be its most questionable feature, we do not believe that the residency requirement must fail because it does not apply to all teachers em- ployed by the Cincinnati schools. The Supreme Court has pointed out that there is no constitu- tional requirement that regulations must cover every class to which they might be applied. It has further stated that “if the classification has

###### CASE NOTE

Where a school board policy required that certi- fied personnel reside within the district or within a 10-mile driving distance of the limits of the school district and a teacher moved 17 miles out- side the district, her contract was not renewed. The court found that the policy had a rational basis, such as the necessity of community in- volvement. *McClelland v. Paris Public Schools,* 294 Ark. 292, 742 S.W.2d 907 (1988). *See also Mogle v. Sevier County School District,* 540 F.2d 478 (10th Cir. 1976); *Simien v. City of San Antonio,* 809 F.2d 255 (5th Cir. 1987).

*Teacher’s “Unethical” Conduct in Sending Threatening and Obscene Letters to His Supervisor Constituted “Immorality” Justifying Revocation of His Teaching Certificate*



#### Richardson v. North Carolina Department of Public Instruction Licensure Section

*Court of Appeals of North Carolina, 2009.*

*681 S.E.2d 479.*

BRYANT, Judge.

Petitioner Charlie L. Richardson appeals from an order entered in Mecklenburg County Su- perior Court affirming the decision of the State Board of Education to deny reinstatement of his teaching license. We affirm the order of the Su- perior Court.

Richardson was a teacher for twenty-two years and held a teaching license (license) issued by the North Carolina State Board of Educa- tion (SBOE). In 1994, Richardson brought suit in the United States District Court for the Western District of North Carolina against his employer,

the Cabarrus County Board of Education (the Board), alleging that the Board had unlawfully denied him promotion because of his race and had given him low evaluations and not pro- moted him because he had filed discrimination charges with the Equal Employment Opportu- nity Commission (EEOC).

A federal magistrate dismissed all of the claims except that which alleged discrimination by the Board in failing to promote Richardson to Assistant Principal. At trial, a jury was un- able to render a verdict, and the federal magis- trate declared a mistrial. A retrial was scheduled, but before it was held, the parties reached a settlement.

A few weeks after the mistrial, Jessie Black- welder, Assistant Superintendent for the Cabar- rus County Schools and a designated witness for respondent, received an anonymous letter. The letter referred to Blackwelder’s “lies,” noted that it was time “to get [her] back,” and referred to “incriminating evidences” which would be re- vealed “to Mr. Richardson’s attorney . . . [and] to Judge Horn, too” unless Richardson received an administrative position “immediately.” The letter also “promise[d]” Blackwelder jail, fines, and “sudden retirement” if she did not cooper- ate with the demands made by the anonymous author.

Four months later, on 8 April 1997, Black- welder received a second anonymous letter refer- ring to the settlement agreement as a “cheap ass deal” that Richardson was too smart to sign. The tone and content of the letter was angrier and more threatening than the first and referred to Blackwelder by derogatory names. Blackwelder intercepted a third anonymous letter addressed to her husband that said among other things that she would learn not to mess with the writer.

. . . Richardson denied typing or sending any of the anonymous letters. However, there was evidence presented that the first letter was typed on the same typewriter used to type employment inquiries submitted and signed by Richardson. A federal magistrate concluded that Richard- son typed and mailed the three anonymous let- ters or caused them to be typed and mailed. The magistrate further concluded that Richardson’s conduct was intentional, egregious, and in bad faith and that the letters threatened Blackwelder; Richardson attempted to intimidate Blackwelder;

and Richardson’s actions “likely” violated fed- eral laws dealing with perjury and intimidating witnesses.

On 29 August 1997, having concluded that Richardson was the author of the anonymous let- ters, the magistrate granted the Board’s motion to dismiss and released the Board from the set- tlement agreement. Richardson was also barred from filing any claim based on the pending EEOC “right to sue” notice which had been incorpo- rated in the aborted settlement agreement. . . .

Richardson filed a Petition for Contested Case Hearing in the North Carolina Office of Admin- istrative Hearings (OAH), and a hearing was held on 5 November 1999 before Administra- tive Law Judge (ALJ) Robert C. Reilly. ALJ Reilly, in an order dated 11 April 2000, concluded that Richardson had engaged in conduct that was unethical. ALJ Reilly also found that Richardson’s conduct in sending the threatening and obscene letters had a “reasonable and adverse” relation- ship to his continuing ability to perform any of his professional functions in an effective manner and recommended to the SBOE that Richardson’s license be revoked. On 3 August 2000, the SBOE revoked Richardson’s license. Thereafter, Richardson pursued appeals of the final agency decision by the SBOE to the North Carolina Supe- rior Court, the North Carolina Court of Appeals, and the North Carolina Supreme Court; all courts upheld the license revocation.

. . . Richardson argues that the trial court erred when it affirmed the final agency decision of the SBOE denying his request for reinstatement of his license. Richardson contends that because the revocation of his license was based on “un- ethical” conduct and the denial of his request for reinstatement of his license was based on “im- moral” conduct, that such inconsistent bases constituted error. We disagree.

Under North Carolina Administrative Code, Title 16, Chapter 6, Subchapter 6C, Section 0312(a), the SBOE may revoke a teaching license based upon several grounds, including “any . . . unethical . . . conduct by a person, if there is a reasonable and adverse relationship between the underlying conduct and the continuing ability of the person to perform any of his/her professional functions in an effective manner[.]” 16 N.C.A.C. 6C.0312(a) (2007). Under 16 N.C.A.C. 6C.0312(f)

(1), the SBOE may not reinstate the license if the

action that resulted in revocation involved abuse of minors, moral turpitude, or grounds listed in N.C. Gen.Stat. 115C-325 (e)(1)(b). 16 N.C.A.C.

6C.0312 (f)(1) (2007). Under N.C.G.S. § 115C-

325(e)(1)(b), “immorality” is listed as a ground for dismissal.

Richardson’s license was initially revoked because he had engaged in unethical conduct by sending threatening and obscene letters to his supervisor which had a “reasonable and ad- verse” relationship to his continuing ability to perform any of his professional functions in an effective manner. Richardson then applied for reinstatement of his license and such application

. . . There is no evidence in the record that anything presented to or considered by the Eth- ics Committee panel or the Superintendent was improper, irrelevant, or tainted by the decision- making process. We hold that Richardson did not carry his burden to show that the trial court erred in finding that the denial of the request for reinstatement was not arbitrary, capricious, or an abuse of discretion. Accordingly, this assignment of error is overruled.

. . . Because Richardson has failed to show any error in the trial court’s decision, this assignment of error is overruled.

Affirmed.

was rejected. Richardson now argues that there

is a difference between immoral and unethical conduct. We disagree.

We do however agree with the reasoning of ALJ Gray that the original revocation based on “unethical” conduct can be fairly characterized as constituting “immorality,” which has been de- fined as “such conduct that by common judgment reflects upon a teacher’s fitness to teach[.]” . . . As the State Superintendent stated in her 12 June 2006 letter to Richardson:

The panel concluded that your license . . . was revoked due to moral turpitude and grounds listed in G.S. 115C-325(e)(1)b. (immorality). . . . As a result, the panel concluded that it could not recommend that your license be reinstated on the grounds that the action that resulted in revocation was based on moral turpitude and grounds listed in G.S. 115C-325(e)(1)b (immorality).

The conduct giving rise to the revocation of Richardson’s license is the same conduct upon which the agency based its refusal to reinstate his license, which conduct can be classified as both unethical and immoral. “Accordingly, a reasonable public school teacher of ‘ordinary in- telligence,’ and utilizing ‘common understand- ing,’ would know that [sending threatening and obscene letters to his supervisor would] . . . con- sequently plac[e] the teacher’s professional posi- tion in jeopardy.”

Upon review of the whole record, there is substantial evidence to support the superior court’s decision to uphold the SBOE’s final agency decision adopting ALJ Gray’s ruling that Richardson’s conduct constituted “immorality.” Therefore, this assignment of error is overruled.

###### CASE NOTES

1. One of the basic purposes of the certification laws is to provide a capable and competent instructor in every classroom. Consequently, not only is a teaching certificate a prerequi- site to employment and reemployment, but it is also necessary for schools to qualify for state aid. It is a common practice in several states to permit student teachers to assume complete control of a class in the absence of the regular teacher. This violates not only the spirit, but also the letter of the law of many states because a student teacher is not a quali- fied teacher, but is seeking to become a quali- fied teacher. If a teacher teaches without a certificate, she or he is considered to be a vol- unteer and is entitled to no compensation for services rendered. *See Floyd County Board of Education v. Slone,* 307 S.W.2d 912 (Ky. 1957).
2. A teacher who had no certificate when en- tering into an employment contract with a school board could not recover salary for ser- vices rendered, even though he or she had ob- tained the license prior to actually beginning work. *McCloskey v. School District,* 134 Mich. 235, 96 N.W. 18 (1903); *O’Conner v. Francis,* 42 A.D. 375, 59 N.Y.S. 28 (N.Y. App. Div. 1899); *Lee v. Mitchell,* 108 Ark. 1, 156 S.W. 450 (1913).
3. “Our contention and the legislative enact- ments support [the teacher’s] contention that the grant of a certificate from the State Board of Education inherently carries with it a pre- sumption of competence, interest and train- ing in the subjects designated.” *Bauer v. Board of Education, Unified School District No. 452,* 244 Kan. 6, 765 P.2d 1129 (1988).

NEXUS

*A showing of nexus, or reasonable relationship, be- tween the off-campus actions of a teacher and his or her fitness to teach, which has an adverse effect on or within the school community, is required be- fore disciplinary action of “immoral or unprofes- sional conduct” can be taken against the teacher based on such acts.*

—Winters v. Arizona Board of Education

*Nexus Existed Between a Teacher/Preacher’s “Holy Hugs and Kisses” with Minor Sufficient to Confirm Revocation of His Teaching Certificate*



#### *In re* Appeal of Timothy Morrill (New Hampshire

**State Board of Education)**

*Supreme Court of New Hampshire, 2001.*

*145 N.H. 692, 765 A.2d 699.*

BROCK, C.J.

The appellant, Timothy Morrill, seeks review of the revocation of his Experienced Educa- tor Certificate by the State Board of Education (board) for lack of good moral character. We affirm.

The record supports the following facts. From 1976 until his suspension in 1997, Morrill taught at Pelham High School. In 1993, he became a minister by completing the RHEMA Correspon- dence Bible School Course and subsequently formed a church, “Fellowship In His Love.” Morrill was pastor of the church which was located in his home in Sandown.

On December 26, 1995, a complaint was filed with the Sandown Police Department alleging that Morrill was behaving inappropriately with a thirteen-year-old girl (victim) who attended his services. A police investigation ensued, cul- minating in the issuance of an arrest warrant for Morrill for simple assault on a minor female.

On May 6, 1997, he pleaded *nolo contendere* and was found guilty. He was sentenced to twelve months in the house of correction, deferred for up to twenty-four months on the condition that he obtain a sex offender evaluation. Additionally, Morrill was prohibited from having unsuper- vised contact with minors under sixteen years of age in his home.

In June 1997, school officials received no- tice of the proceedings against Morrill. Mor- rill was suspended from his teaching position, *see* RSA 189:31 (1999), and the New Hampshire Department of Education (department) began an investigation into his activities. The depart- ment became aware of allegations made in 1989 against Morrill by a former foster daughter, who claimed that he had sexually abused her. In 1989, as a result of those allegations, the division for children, youth, and families (DCYF) denied a li- cense application by Morrill and his wife to pro- vide day care in their home.

The department sought to revoke Morrill’s teaching certificate pursuant to New Hamp- shire Code of Administrative Rules (Rules), Ed 200 and 510 because he had been found guilty of simple assault on a minor female. The depart- ment claimed that his actions violated a number of provisions of Rule Ed 511, the Code of Ethics for the New Hampshire Teaching Profession, which provides that a teacher shall protect the student from physical harm, refrain from using his position to take advantage of students, and respond to parents’ concerns.

After four days of hearings, the hearing of- ficer recommended the revocation of the certifi- cate. . . . The board sustained the findings and conclusions of the hearing officer and revoked the certificate. The board determined that Mor- rill “engaged in irresponsible and inappropriate conduct relating to [the victim] in the 1995 time- frame, said conduct reflecting that Timothy J. Morrill lacks good moral character to be a New Hampshire teacher.” The board denied Morrill’s motion for a rehearing. . . .

Morrill first argues that the board acted un- lawfully and unreasonably when it revoked his teaching certificate for misconduct which oc- curred outside of school with a non-student because no evidence demonstrated a nexus be- tween that conduct and his fitness and ability to teach. He contends that his activities outside of

the classroom should be only considered if there was a showing that his actions had a detrimen- tal effect on his ability to teach and that he acted with sexual intent. . . . A school board may ter- minate a teacher for conduct outside of school if there is a sufficient nexus between the conduct and “the board’s legitimate interest in protecting the school community from harm.”

We hold that the record contains sufficient evidence of a nexus between Morrill’s outside conduct and his fitness and ability to teach in the classroom. The evidence included the fol- lowing. In 1995, the victim began attending church services in Morrill’s home. Shortly there- after, Morrill initiated the practice that the vic- tim had to give him “holy kisses” on the mouth and “holy hugs” when she entered or left the house, and at other times, including during her tutoring. Morrill engaged in other inappropri- ate conduct with the victim. For example, while on a church retreat to Rhode Island, Morrill made her feel uncomfortable by putting his arm around her, placing his hand on her leg, and holding her hand.

Before the start of the 1995–1996 school year, the Morrills volunteered to tutor the victim at their home because she was having trouble learning in school. During the tutoring, Mor- rill continued to insist that the victim give him “holy hugs” and “holy kisses” on the mouth when she entered or exited his home, as well as during any study breaks. In November 1995, the victim complained to Morrill’s wife that she no longer wanted to be kissed by him and that his actions made her feel uncomfort- able. The victim repeated that statement to her mother. The victim’s mother told Morrill that he was no longer to give “holy kisses” to the victim, but he continued with “holy hugs” and began kissing the victim again after a couple of weeks. . . .

offender evaluation that, although his actions were not consistent with “classic pedophilia,” “[his] history . . . suggests a heightened risk for less than ideal judgment should an extended relationship be allowed to develop from within the confines of his personal domain.” Conduct leading to an assault against a minor female is a serious matter, especially in this context when Morrill was told to stop kissing her because it made her uncomfortable. We agree with the hearing officer that this conduct demonstrates “serious disregard for children under his super- vision and care.” Parents and school administra- tors would reasonably be concerned about the well-being and education of children in such an environment. *. . .* Such a loss of trust negatively affects Morrill’s fitness and ability to perform as a teacher. . . .

Morrill argues that the board impermissibly infringed on his sincerely held religious beliefs in violation of the Federal and State Constitu- tions because his teaching certificate was re- voked for purely religious conduct. Specifically, he contends that the Rules are discriminatorily applied and that similar non-religious conduct would not be questioned. We disagree. We ad- dress the State constitutional claim first. . . .

“The New Hampshire Constitution prohibits the State from revoking [Morrill’s] license for his religious views but does not prohibit revo- cation for acts that otherwise constitute unpro- fessional conduct, regardless of their religious character.” . . . The board specifically stated that it was seeking revocation because Morrill “was found guilty of assault on a minor age female and court ordered to undergo a sex offender evaluation,” not because of his religious views. Since the board revoked his certificate, not for his religious beliefs, but for his conduct with the victim, we reject this argument. . . .

Affirmed.

The evidence also demonstrates that Morrill’s

actions were related to his fitness and ability to teach. A teacher is entrusted by the board and the community to supervise and educate stu- dents. . . . A court order forbidding unsupervised contact in his home with minors under sixteen years of age raises concern about Morrill’s fit- ness to carry out those responsibilities. This con- cern could have only been intensified by other evidence, including a report from Morrill’s sex

###### CASE NOTE

*Character and Reputation.* The Oregon Supreme Court has pointed out that a teacher’s certifi- cate can be denied for lack of “good moral char- acter,” whether or not the person has a “good reputation.”A state licensure board can make a judgment with regard to “character” based on a person’s record of moral integrity. *Application of Bay*, 233 Or. 601 378 P.2d 558 (1963).

### Teacher Contracts

A teacher’s contract must satisfy the same re- quirements applicable to contracts in general. A school district is a legal entity, a corporate body with the power to sue and be sued; purchase, re- ceive, hold, and sell real and personal property; make contracts and be contracted with; and do all other things necessary to accomplish the pur- poses for which it is created.

###### THE STANDARD CONTRACT

Contracts of school districts must not only con- form to the requirements of general contract law, but also must satisfy other statutory and case law demands. A contract may be described as an agreement between two or more competent per- sons for a legal consideration on a legal subject matter in the form required by law. This defini- tion includes the five basic elements inherent in every valid contract, to wit: offer and acceptance, competent persons, consideration, legal subject matter, and proper form.

A CONTRACT

*A* ***contract*** *is a set of promises or agreement that the courts will enforce. Section 1 of the* Restate- ment of Contracts *defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”*

***Offer and Acceptance***

All contracts are agreements, but not all agree- ments are contracts. An agreement is an offer and an acceptance. Every valid contract contains an offer and acceptance. For example, a board of education offers a fifth-grade teaching position in a particular school to an individual. There is no agreement unless and until the individual ac- cepts the offer.

Several significant factors concerning agree- ments should be kept in mind. An offer can be accepted only by the individual or individuals to whom it is made. Unless otherwise stated, an offer must be accepted within a reasonable time after it is made, or it will be terminated automat- ically. Newspaper advertisements are usually considered to be invitations for offers and not

offers; that is, the board of education is solicit- ing offers. Also, an offer cannot be accepted un- less, at the time the individual performed the act necessary to accept the offer, he or she knew of the existence of the offer. By way of illustration, let us assume that vandals have broken into a school building, and that the board of education has offered a reward for information leading to the arrest and conviction of the vandals. The information is provided to the police by a man who is unaware of the reward offer. A majority of the states hold that the man is not entitled to the reward because he could not have accepted the offer, since he was unaware of its existence— there was no meeting of the minds.

***Competent Persons***

Each valid contract must be entered into between two or more competent persons—persons who have the legal capacity to contract. As already indicated, a board of education is considered a competent person under the law, with full ca- pacity to enter into contracts. However, there are certain classes of people who have limited ca- pacity to contract. These include minors, insane persons, inebriated persons, and corporations.

A minor has the right to disaffirm his or her contract until a reasonable time after reaching his or her majority (i.e., becoming an adult). If a board of education contracts with a minor, the minor has the prerogative of electing to void the contract within a reasonable time after he or she becomes an adult, and no penalties for a con- tractual breach will be imposed against the minor. A board of education would have no right or option to avoid its contract with the minor.

If an individual is so insane or inebriated at the time she or he enters into a contract that she or he does not know what she or he is doing, the person may have the contract set aside be- cause there was no meeting of the minds, which is always essential in every valid contractual situation.

At the common law, married women did not possess the legal capacity to contract. This law was premised on the age-old concept that when a man and woman married, the two become one and the man was that one. This contractual limi- tation has been removed by statutes in all states, and women now possess the power to enter into contracts on the same basis as men.

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Before entering into a contract with a corpora- tion, a board of education should ascertain that the corporation has the power, by statute or un- der its articles of incorporation, to perform the services agreed upon.

***Consideration***

Valid contracts must be supported by consideration—something of value. Consider- ation is divided into three types: good, valuable, and a promise for an act. Good consideration is love and affection. For example, a mother may convey property to a child for good consider- ation. This notion is seldom invoked by courts today. Valuable consideration is cash or its equiv- alent. Most deeds will recite that the property is being conveyed for good and valuable consid- eration. The third type of consideration is that found in a unilateral contract—a promise for an act. For example, a board of education prom- ises a reward of $500 for information leading to the arrest and conviction of vandals who dam- aged school property. An individual, knowing of the offer, provides the information that leads to the arrest and conviction of the vandals; she is entitled to the reward. Her consideration was the doing of the act requested.

***Legal Subject Matter***

All contracts, in order to be valid, must involve a legal subject matter. Most, if not all, states pro- hibit the holding of various types of assemblies, such as rooster fighting. If a board of education entered into a contract to lease school premises for the purposes of staging a rooster-fighting conclave, such a contract would involve an ille- gal subject matter and would be declared void.

***Proper Form***

In order to be enforceable, contracts must be in the form required by law. For example, all agree- ments with respect to the sale or lease of real es- tate must be in writing to be enforceable. An oral agreement to sell real property, even if made in the town square before 10,000 people, is unen- forceable in the courts. This is but one example of the requirement that contracts must be in the proper form to be enforceable. States require that teachers’ contracts be in writing.

Beyond the technical statutory and common- law requirements that govern the contractual

relationships between teachers and school boards, there are the even more pervasive requirements of the state and federal Constitutions, which sanctify the contract and protect the individual against arbitrary use of the contract by the state. This aspect of the contract is discussed later.

*Teacher Who Did Not Obtain Necessary Credit Hours During Specified Period Was Not Entitled to Contract Renewal*



**Feldhusen v. Beach Public School District No. 3**

*Supreme Court of North Dakota, 1988.*

*423 N.W.2d 155.*

VANDE WALLE, Justice.

David Feldhusen appealed from a judgment dismissing his petition for a writ of mandamus. We affirm.

Feldhusen was employed by Beach Public School District No. 3 (Beach) as a teacher in the fall of 1981. His employment continued until his contract was nonrenewed in the spring of 1987.

Beach takes part in a voluntary “accreditation” program established by the State Department of Public Instruction. In order to be accredited a school district must establish and implement a policy for the professional growth of teachers. Beach implemented its policy through the fol- lowing provision in its professional-negotiations agreement with the teachers in the school district:

Summer school & extension course attendance shall be as follows to advance on the salary schedule:

* 1. All plus hours must be graduate hours.
  2. Teachers with degrees must acquire 8 semester or 12 quarter hours every five years.
  3. Teachers may substitute 16 hours of certified in- service training for 1 quarter hour. See attached policy on in-service hours.
  4. All credits must be earned from an accredited college or university.
  5. All teachers must provide written proof each year by the second Monday in September that

they meet above accreditation standards as required by North Dakota Department of Public Instruction. No salary increase will be granted the year accreditation standards are not met and no teacher contract will be offered the following year unless accreditation stan- dards are met. . . .\*

Beach established this policy in 1981. The 1985–1986 school year was the fifth year of the cycle for Feldhusen. At the end of that school year Feldhusen had completed only six of the requisite twelve quarter-hours.

In March of 1987 the Beach school board voted to contemplate nonrenewal of Feldhusen’s teaching contract. A letter was sent to Feldhusen informing him of the contemplated nonrenewal for the reason of “teacher qualifications” based upon Feldhusen’s failure to meet the accredita- tion standards. . . .

After the end of the 1986–1987 school year, Feldhusen performed coursework which would have given him the number of credits or quarter hours required by the Beach accreditation policy. This work was completed in June of 1987. In July of 1987 Beach hired another teacher to fill the position which Feldhusen had held. Subse- quently Feldhusen petitioned for a *writ of man- damus* requiring Beach to give him a contract. After a hearing was held, the trial court issued a judgment dismissing the petition. It is from that judgment that Feldhusen appeals.

The question before us is whether the trial court erred in dismissing Feldhusen’s petition for a *writ of mandamus*. . . .

Feldhusen . . . argues that he has a clear legal right to a contract from Beach because there was no statutory basis for the Beach school board’s nonrenewal decision. We disagree. The non- renewal of teacher contracts is governed by Section 15-47-38(5), N.D.C.C. A portion of that statute provides:

\*Schools are accredited and teachers are certified. Feld- husen was certified as a teacher. One of the standards required for accreditation of the school, a voluntary pro- cess, is that the school board establish and implement a policy of professional growth for each teacher and that it also locally establish the five-year period for each teacher who holds a life certificate. The language of the Beach policy requiring that teachers “meet . . . accreditation standards as required by North Dakota Department of Public Instruction” relates to the credits required of each teacher in order that the school meets the standards for accreditation.

The reasons given by the board for not renewing a teacher’s contract must be sufficient to justify the contemplated action of the board and may not be frivolous or arbitrary but must be related to the abil- ity, competence, or qualifications of the teacher as a teacher, or the necessities of the district such as lack of funds calling for a reduction in the teaching staff.

Thus teachers’ contracts can be nonrenewed for a lack of qualifications.

In this case Beach was voluntarily taking part in an accreditation program which required that it assure the professional growth of its teachers. In order to comply with the accreditation standards, Beach, in tandem with its teachers, created a pol- icy requiring its teachers to acquire a certain num- ber of college credits in a five-year period. That policy became a part of the professional negotia- tions agreement between the Beach school board and the teachers of Beach. It is readily apparent that one of the qualifications for a teacher in Beach was that the teacher abide by the contractual pro- vision designed to retain Beach’s accreditation. If a teacher failed to abide by the provision regarding the acquisition of college credits, the negotiated policy specified that no teacher contract would be offered the following year, thus justifying non- renewal under Section 15-47-38(5). Therefore, we cannot conclude that the trial court abused its dis- cretion in denying the petition for a *writ of man- damus* which was predicated upon a claim that nonrenewal could not be grounded in a teacher’s failure to abide by the Beach policy as formulated in the professional-negotiations agreement. . . .

The judgment is affirmed.

###### CASE NOTE

Teacher contracts with school districts take dif- ferent forms. Indiana statute, Indiana Code Chapter 20-6.1-4, provides a good example and definition of three such relationships:

1) A permanent teacher is one who serves under contract as a teacher in a public school for five or more successive years . . . and . . . at any time enters into a teacher’s contract for further service with that school corporation; 2) A semi-permanent teacher is one who serves under contract as a teacher in a pub- lic school corporation for two successive years . . . and . . . at any time thereafter into a teacher’s contract for further service with that school corporation; 3) A nonpermanent teacher is one employed for a term of less than defined as permanent or semi-permanent.

If a teacher is dismissed during a term of em- ployment, procedural due process is required. If a teacher is not rehired at the end of a non- permanent contract period, minimal due process is required only to the extent that a teacher be notified by a certain date for contract renewal or nonrenewal. Each contract entered into with a nonpermanent teacher continues in force un- less the school corporation notifies the teacher that the contract will not continue. In Indiana the notification of the teacher must be on or be- fore May 1, in writing, and delivered by regis- tered or certified mail or in person. Where an Indiana teacher was not notified on or before May 1, but instead was notified verbally on May 8, the Court held that the school corpora- tion had not properly complied with the statute, and the teacher was entitled to another year of employment. *Pike Township Educational Founda- tion, Inc. v. Rubenstein,* 831 N.E.2d 1239 (2005).

reemployment. The benefit of tenure is that it bestows on the teacher a right of continued employment in the school district, and dismissal cannot occur without a hearing and presentation of proof of sufficient cause to meet the statutory requirements for removal.

Many court cases have arisen concerning the transferring of a tenured teacher from a particu- lar class or school to another educational setting. Generally, a tenured teacher, like a teacher on a limited contract, may be assigned to any class or school in the district if she or he is qualified to teach in that position. However, the courts frown upon any attempt of a school board or admin- istrator to use “undesirable reassignment” as a means of retribution against a teacher who has achieved continuing contract status. If a teacher has committed an act for which her or his con- tract may be terminated, the proper legal pro- cedure should be followed to terminate the contract rather than using subterfuges of ques-

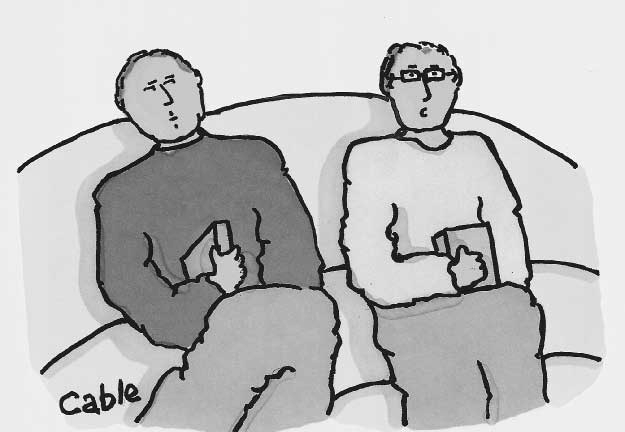
tionable legality.11

### Tenure

Tenure is a statutory right to hold office or em- ployment and receive the benefits and emolu- ments of the position. Tenure, in its general sense, is a mode of holding or occupying a po- sition or a job.10 A teacher, after meeting des- ignated academic and teaching requirements in a school district for a prescribed number of years, may acquire tenure if recommended for

### Grounds for Termination of Tenured Teachers

Tenure laws specify the grounds for and the man- ner by which a teacher’s employment may be ter- minated. These laws may apply to the dismissal of teachers during the period of an annual con- tract or to the termination of teachers who have



either continuing contracts or tenure. The most common grounds for dismissal are incompetency and insubordination.

Incompetency has been construed by the courts to mean any physical or mental condi- tion that tends to incapacitate a teacher so he or she cannot perform effectively. This rather broad definition generally concerns a fitness to teach that contains a range of factors and has been used by many boards as a catchall for teacher dismissal. Insubordination, on the other hand, is of narrower meaning and imports a willful dis- regard for express or implied directions of the employer or repeated refusal to obey reasonable regulations.12

Other grounds for dismissal include im- morality, misconduct, neglect of duty, and any other good or just cause. Every teacher is charged with the responsibility of setting a good example. Not only must teachers be of good moral character, but also their general reputa- tion must attest to this fact. Teachers not only must be moral persons, but also must conduct themselves in such a manner that others will know of their virtue. Although court opinions are not uniform on the subject, it may generally be concluded that *misconduct* is a broader term than *immorality* and that different standards of proof are required for each.

*Teacher Did Not Acquire Tenure Rights by Working Fourth Year Under Temporary Contract*



#### Scheer v. Independent School District No. I-26 of Ottawa County

*Supreme Court of Oklahoma, 1997.*

*948 P.2d 275 (1997).*

SUMMERS, Vice Chief Justice.

A young teacher, near the end of her third and final year as a “probationary teacher,” signed “a Temporary Certified Employee Contract” for her

fourth year. When the school district did not re- hire her after the fourth year she sued, claiming tenured or “career” status. This case gives us, for the first time, the chance to address the question of when does tenured (or career) status first take effect under Oklahoma’s statutes for teachers. The District Court granted summary judgment to the school district. . . .

Connie Scheer was first employed by the Afton School District for the 1990–1991 school year. She was thereafter employed for each of the next two years. Each year she was given evalu- ations, the results of which were that she was asked to improve in several different areas. More than once she was given a plan for improvement written by her administrator.

On April 1, 1993, before Scheer had com- pleted her third year of teaching, the school ad- ministration approached her and offered her a temporary contract for the following year. The school district was required by statute to make a decision as to her employment prior to April 10, or Scheer would have been entitled to continu- ing employment. . . . The school declined to offer her a permanent contract because of the many concerns about her teaching. Rather than ter- minating her, it offered the temporary contract as a “last chance” for improvement. After be- ing given an opportunity to review the contract, Scheer signed it.

The contract stated clearly that it was a “TEMPORARY CERTIFIED EMPLOYEE CONTRACT.” . . .

She worked as a teacher for the 1993–94 year under the temporary contract. When the School Board decided not to continue her employment beyond that year she brought suit in state court for breach of contract and loss of employment in violation of due process. The trial court granted summary judgment to the school district.

Essentially, Scheer urges that she was a ten- ured, or career, teacher. Recognizing that to be a tenured teacher she must have served as a teacher for three years, she claims tenure because she was employed under three one-year con- tracts, and the fourth contract—the temporary contract—was an invalid waiver of her rights to tenure. She finds it irrelevant that when she signed the temporary contract she had not yet completed her third year. In the alternative, she urges that by working the fourth year—albeit

under a temporary contract—she attained career or tenured status.

The School District urges that Scheer was not a tenured teacher, and therefore the School District was not bound by the requirements ac- corded to tenured teachers at the time it offered the alternative contract in lieu of termination. It claims that realizing Scheer would soon be ten- ured, the District offered her a temporary con- tract rather than dismiss her altogether. In so doing, it did not intend to offer her tenure, but instead attempted to give her another chance for improvement. The School District also urges that according to state law her employment under a temporary contract did not count toward giving her career or tenured status.

There are two principal issues before us. First, was Scheer tenured, either before or after her performance under the temporary contract? If we answer this in the affirmative, we must next address whether a tenured teacher may waive tenure rights in a contract in exchange for contin- ued employment for another year. We hold that under Oklahoma law she was not tenured either before or after the completion of the temporary contract. Because she had no tenure we need not address whether such rights may be waived by the teacher. . . .

. . . Clearly, she was not tenured at the time she signed the “temporary” teaching contact, because she had not completed her third con- secutive year. The School District was required by statute to inform her prior to April 10 as to whether her contract would be renewed. In fol- lowing its statutory obligation, the School Dis- trict notified her that the most she would be offered was a temporary contract. This occurred before April 10, and before the completion of her third consecutive year of teaching. At the time she signed the contract she had no rights to tenure.

A narrow interpretation of the definition of “career teacher” might lead to the conclusion that she became tenured after this third year regardless of the school district’s actions based on their dissatisfaction with her performance. But such an interpretation destroys the appar- ent intent of the statutory scheme created by the legislature. The legislature intended teachers to acquire tenure after their third year. At all times prior to completion of the third year a teacher’s

status is probationary, as is expressly stated in the definition of “probationary teacher.” 70 O.S. Supp. 1991 § 6-101.3(6). This permits a teacher to have three years to reach an acceptable level with regard to her or his teaching skills, and per- mits the school district three years to evaluate and perhaps seek improvement of a probation- ary teacher. . . .

If we were to follow Scheer’s narrow inter- pretation, both the probationary teacher and the school district lose a year within which to im- prove and evaluate. If a probationary teacher in fact gains some expectancy of tenure after sign- ing her third consecutive contract (which under statute must occur prior to April 10 of her second year), but before completing the performance re- quired under the contract, a school district will be forced to allow a probationary teacher only two years within which to meet a particular teaching standard before being forced to decide whether the teacher should be reemployed or terminated. In essence, this interpretation would create a third class of teachers not contemplated by the legislature: probationary teachers with two years of experience who have signed a con- tract for the third year. Though still probation- ary under the statute they would be protected as tenured if they can just finish out the third year.

We decline to adopt the interpretation argued by Scheer. . . . To receive tenure a teacher must have completed a third successful year. At the time she signed the Temporary Contact (prior to April 10 of her third year) she was a probation- ary teacher, and the school district had the right to consider her as such. The school district could have simply nonrenewed her contract prior to that April 10. The fact that she finished out the final month of school did not nullify or counteract the school’s decision.

There is no legally protectable interest in ten- ure after two years. Both the school district and the probationary teacher are given three years to evaluate and meet standards. This interpretation not only complies with our statutory scheme, but also furthers one of the purposes of tenure by im- proving the level of teacher qualification. . . .

The second argument urged is that Scheer gained tenure by working her fourth year un- der the temporary contract. Our statutes require that we hold she did not. Title 70 O.S. Supp. 1991, Section 6-101.23(A)(3) states that “teachers

who are employed on temporary contracts” are exempt from the tenure laws. Scheer’s employ- ment was extended to a fourth year only by a temporary contract. Specifically, if she did not have tenure before signing the temporary con- tract, she was exempted under Section 6-101.23. The legislature did not intend for teachers un- der temporary contracts to have the due process rights afforded to career teachers working under permanent contracts. Scheer did not gain tenure by working a fourth year under a temporary contract. . . .

. . . The judgment of the District Court of Ottawa County is affirmed.

###### CASE NOTES

1. In a case similar to *Scheer,* a Kentucky court in 2008 held that a teacher who had been terminated after her fourth year of teaching, and was not “currently employed” pursu- ant to statute that granted tenure to teachers currently employed and contracted for a fifth consecutive year, did not acquire the requisite fifth year when she was offered and taught part-time as a temporary substitute teacher. The superintendent’s notification to the teacher that her employment would not con- tinue a fifth year and ended her employment before she was hired as a substitute teacher was not a subterfuge to deny tenure. *Jones v. Board of Education of Laurel County,* 295 S.W.3d 120 (2008) discretionary review denied by Kentucky Supreme Court, 2009.
2. Tenure does not accrue until the statutory time has been completed. *Spiewak v. Board of Education,* 90 N.J. 63, 447 A.2d 140 (1982).
3. Tenure does not accrue until the anniversary date of first employment after a statutorily specified number of years. *Davis v. Harrison Community Schools Board of Education,* 126 Mich. App. 89, 342 N.W.2d 528 (1983).
4. A temporary contract does not apply toward time of employment for tenure purposes. The time of employment must be under a regular annual tenure-earning contract. *Cipu v. North Haven Board of Education,* 32 Conn. Supp. 264, 351 A.2d 76 (1974).
5. Tenure laws are enacted to provide job secu- rity for experienced teachers and to ensure that they are not discharged for insufficient and inadequate reasons. A system of tenure

has as its objective the maintenance of an able teaching force whose members have under- gone a period of probation, with the concomi- tant result that because of such protections, more talented personnel will be attracted to the teaching profession. *State v. Redman,* 491 P.2d 157 (Alaska 1971), *appeal after remand, Redman v. Department of Education,* 519 P.2d 760 (Alaska 1974).

1. The broad purpose of teacher tenure is to pro- tect worthy instructors from enforced yield- ing to political pressures and to guarantee employment, regardless of the vicissitudes of politics. *School District No. 8, Pinal County v. Superior Court of Pinal County,* 102 Ariz. 478, 433 P.2d 28 (1967).
2. A continuing contract has as one of its central purposes the elimination of uncertainty in the employment plans of both teacher and school district. *Peters v. South Kitsap School District No. 402,* 8 Wash. App. 809, 509 P.2d 67 (1973).
3. Tenure laws are not grants of power to school districts, but rather constitute limitations on the power of school districts to freely contract with teachers. *Carlson v. School District No. 6 of Maricopa County,* 12 Ariz. App. 179, 468 P.2d 944 (1970).

###### INCOMPETENCY

Incompetency has been given broad interpre- tation by the courts. It is generally defined as “want of physical, intellectual, or moral abil- ity; insufficiency; inadequacy; specific want of legal qualification or fitness.”13 Fitness to teach is essential and contains a broad range of factors. The courts have included in fitness to teach the lack of knowledge of subject matter, lack of dis- cipline, unreasonable discipline, unprofessional conduct, and willful neglect of duty. Usually, when incompetency is alleged, other charges are also presented. In one case, the dismissal notifi- cation listed 14 specific charges and included in- adequate maintenance of discipline during class, excessive and ineffective use of films, ineffec- tive classroom teaching, and failure to cooperate with school administrators. Here the school dis- trict presented a preponderance of evidence that children were disruptive, daydreamed in class, and left the room without permission. Incompe- tence was thereby proved, and the court upheld the dismissal.14

The manner of offering evidence in incom- petency cases is generally through testimony. Both the quantity and the quality of evidence are important. The courts have liberally allowed opinions of principals, curriculum supervisors, and other supervisory personnel to stand as ex- pert testimony. Other testimony by students and parents may be important, and actual observa- tions of what transpired in the classroom are significant.

A teacher who has been certified by the state is assumed to be competent, and it is the responsi- bility of the school board to prove incompetency. As long as school boards are not arbitrary or ca- pricious, the courts generally do not interfere. The Fifth Circuit Court of Appeals has said that “[f]or sound policy reasons, courts are loathe to intrude upon the internal affairs of local school authorities in such matters as teacher compe- tency.”15 This court said, “The court, in absence of proof of an abuse of discretion, cannot sub- stitute its opinion for the decision of the school board and of the district court where both of these tribunals were presented with substantial evidence upon which to base their decisions.”16

Unauthorized or excessive punishment of pupils may constitute incompetency. A New York court upheld the dismissal of a tenured teacher when the board gave evidence that the teacher administered excessive punishment on three separate occasions.17 Incompetency may be evidenced by poor classroom decorum. In a case where a school district dismissed a tenured teacher on grounds of incompetency because she was unable to maintain order in her classroom— the classroom was littered with sunflower seeds, paper, and “junk”; the furniture and walls were covered with graffiti; and the teacher had not planned her lessons or given students proper directions—the court upheld the dismissal.18 Moreover, of course, teacher ignorance may be a good and valid ground for dismissal. The dismissal of a tenured teacher who had been teach- ing for 25 years was upheld because the teacher used poor grammar and made spelling errors. The teacher also attempted to teach spelling before the children had mastered the alphabet.19

A teacher cannot be dismissed for incompe- tency for nebulous and nondefinitive evaluations of competency.20 Some state statutes require that teachers be given an opportunity to improve or

to remediate themselves. If a statute requires remediation, the school board must show that remediation has been attempted or that the situ- ation was irremediable.21

*School Board’s Termination of Teacher for Incompetence Stemming from Indiscreet*

*Classroom Discussion of Homosexuality Was Arbitrary and Invalid*



#### Collins v. Faith School District No. 46-2

*Supreme Court of South Dakota, 1998.*

*574 N.W.2d 889.*

AMUNDSON, Justice.

Richard Collins’ contract with Faith School District was terminated on the basis of incom- petency after he held a question and answer session with elementary school boys who had just seen a sex education video. In response to a question as to how two men could have sex, Collins described oral and anal sex to the boys. The school board’s decision to terminate Collins’ employment was upheld by the circuit court. We reverse and remand for reinstatement of Collins’ employment and a determination of appropriate back pay.

Richard Collins was employed by the Faith School District for twenty-nine years prior to his termination. During most of those years he was a fifth-grade teacher. Although he was being re- assigned to teach the fourth-grade class during the 1995–96 school year, Collins had a valid con- tract and was entitled to the protections of South Dakota’s continuing contract law (SDCL 13-43-

9.1 *et seq.*).

The Faith School Board (Board) had not es- tablished any formal sex education curriculum for its elementary school students. However, Board had made it a practice to contract with the community health nurse to provide sex educa- tion for elementary students for approximately fifteen years prior to 1995. The makeup of this program was basically set by the community

health nurse without any prescreening by Board or administration.

A video chosen by the community health nurse covering the topics of puberty, maturation, and reproduction was shown to fourth-, fifth-, and sixth-grade boys on April 24, 1995. This was the first time this particular video had been used by the nurse and this was the first time fourth- grade students were included in the program. At the end of the video, the nurse went through a worksheet with the boys, addressing such top- ics as circumcision, nocturnal emissions, and semen. An opportunity for the boys to ask the nurse questions was then provided, but none were asked. The school nurse attributed this to the fact she was a woman and the boys were not comfortable discussing the subject with her.

As in past years, following the sex education presentation, the boys then went to Collins’ class- room for a question and answer session. Before starting the session, Collins excused one student from the room because the student’s parents did not wish to have the child involved in the sex education program. Collins then proceeded to ask if the boys had any questions. Collins un- dertook this duty because he had been asked by a previous health nurse to solicit questions after sex education programs from the boys because the female nurse realized that the boys would be uncomfortable asking her questions. Collins was instructed to answer the boys’ questions as hon- estly as possible and he continued to carry out what had been an established practice for fifteen years. Questions were raised by the boys about circumcision, masturbation, nocturnal emissions and other topics from the film and worksheet. During the session, one of the boys also related that he had heard that two men could have sex and asked how this was possible. Collins pre- ceded his explanation with the disclaimers that this type of conduct is frowned upon, most peo- ple do not believe in it, and the boys would find it gross. Collins then described oral and anal sex- ual intercourse in explicit language.

On April 25, 1995, complaints from parents were received by the superintendent which were critical of what the grade school boys had heard from Collins during school the previous day. In essence, the complaining parents were concerned about the effect Collins’ answer to the question about homosexual intercourse would have on

the boys. An informal meeting was conducted, involving one boy’s parents, the superintendent, the principal, and Collins. At the conclusion of the meeting, Collins was advised by the super- intendent that the matter was not resolved. Later that day, the superintendent took the matter to Board. Board directed the superintendent to send notice to Collins that a termination hearing would be scheduled before Board to consider his dismissal.

A notice of hearing and charges was provided to Collins on April 28, 1995, which referenced the parental complaint as well as warnings by Collins’ evaluators in regard to lesson plans, in- struction, maintenance of records and personal hygiene since 1985 that could be relevant as to his competence. On May 17, 1995, the hearing was held before Board, at which time witnesses and evidence were presented. . . .

The high school principal testified that it was inappropriate and immoral for a teacher to dis- cuss homosexual activities with fourth- and fifth-grade boys. However, she indicated that she did not have any evidence that the children had been harmed in any way by the activity. She also testified that there had been no increased absenteeism or discipline problems of any kind. Nor were there any complaints from the children about feeling uncomfortable around Collins.

The superintendent testified without elabora- tion that the incident adversely affected Collins’ ability to perform his teaching duties. However, the superintendent also testified that there was no evidence of any adverse impact on the stu- dents. In fact, the superintendent had not even been in Collins’ classroom since the question and answer session to monitor for problems that may have developed because of the incident. Further- more, he acknowledged that he had no evidence whatsoever that the children had lost confidence in Collins as a teacher and agreed that they evi- dently had some level of trust in Collins or they would not have been comfortable in asking the questions of him in the first place. The super- intendent also indicated that he had no reason to question Collins’ character.

At the conclusion of the hearing, Board voted to terminate Collins’ contract on the basis of in- competency. . . .

Ignoring twenty-nine years of faithful service, the Board terminated Collins’ teaching contract

on the basis that he was incompetent. This deter- mination rested purely on his indiscreet answer with regard to homosexual activity—a subject which invariably invokes intense debate and un- doubtedly stirred emotions in this case.

It is undisputed that there is no evidence that the conduct of Collins complained of by Board violated any directive, regulation, rule, or order given to him by any administrator or Board. In fact, the evidence showed that the administra- tion had abdicated total control over the sex edu- cation program to the health nurse. Neither the superintendent nor the Board took any steps to personally plan the program or place any limits on it. It is also undisputed that Collins had been asked by the previous health nurse to answer questions after sex education videos in the past, and had done so for the past fifteen years with- out incident. Even so, the Board terminated Col- lins’ employment on the basis of incompetence for one moment of poor judgment.

“Incompetence” has been previously de- scribed by this court as “a relative term meaning lack of ability or fitness to discharge a required duty.” *Hartpence v. Youth Forestry Camp,* 325 N.W.2d 292, 296 (S.D. 1982) (quoting *Black’s Law Dictionary* 688 (5th ed. 1979)). Other courts have made it clear, however, that incompetence “does not invoke subjective analysis of standards of morality or professionalism which vary from individual to individual dependent on time, cir- cumstances or custom.” . . .

In *Hartpence,* we concluded that “the Commis- sion’s findings of fact address only the isolated instance of appellee’s fall. Since incompetency arises from habitual and on-going actions, this finding does not support the Commission’s con- clusion of incompetency.” 325 N.W.2d at 297. Similarly, the Faith School Board’s decision to terminate its contract with Collins on the basis of one ill-advised answer, honestly given, was not the type of habitual and ongoing action that

There has been no showing that Collins’ teaching ability has been or will be impaired, or that any children have been detrimentally affected. . . . Nor has there been a showing that Collins is likely to exercise poor judgment in a similar situ- ation in the future, since he has acknowledged that he used poor judgment in this case and regretted making the statement. . . .

. . . Collins’ inappropriate explicitness on a single occasion can hardly amount to incompetence. . . .

The question must then be asked: Where is the relationship between Collins’ ill-advised an- swer to the boys and the impairment of his ca- pacity as a teacher? . . . While the superintendent makes the bare claim that the incident adversely affected Collins’ ability to perform his teaching duties, he admits that he has not bothered to sit in on any of Collins’ classes to actually note any problems. There have been no allegations that the students’ education has suffered in any way. Absences have not increased. Discipline problems have not increased. Moreover, Board had the ability, pursuant to school policies, to suspend Collins prior to his termination. Instead, they chose to allow him to continue teaching from the April 24th incident to the May 17th board hearing, impliedly admitting they were not wor- ried about Collins’ ability to effectively teach his students after the incident. Furthermore, Board voted to extend Collins’ contract for another year on the very same night that they discussed Brown’s complaint that led to the hearing to de- termine if Collins should be dismissed. . . . The record contains no credible evidence that Col- lins’ teaching ability has been impaired or even that the incident in question has any connection with his continued effectiveness as a teacher.

Accordingly, the decision of the circuit court is reversed and the case is remanded for rein- statement of Collins’ teaching position and for a determination of the amount of back pay that Collins is entitled, less any offsets. . . .

would support Board’s conclusion that Collins

was incompetent. . . .

Nevertheless, there are times when only one incident may be of such magnitude or of such far reaching consequences that a teacher’s ability to perform his or her duties will be permanently impaired and a finding of “incompetence” would be proper. . . . However, there is no evi- dence that Collins’ conduct rose to such a level.

###### CASE NOTE

Numerous court decisions have found that in- competence cannot be concluded from a single incident, but rather must arise from a course of conduct or a series of incidents. *Tichenor v. Orleans Parish School Board,* 144 So.2d 603 (La. App. 1962). Yet, it is clear that incompetence hinges not on the number of incidents, but

rather on whether a single incident or a series of incidences was of such magnitude as to ren- der a determination of unfitness to perform the duties of the job. Courts have commented:

(a) Incompetency cannot be concluded from an isolated incident, but rather arises from habitual and ongoing actions, *Hartpence v. Youth Forestry Camp,* 325 N.W.2d 292 (S.D. 1982); (b) incompe- tency does not invoke a subjective analysis of standards of morality or professionalism, which vary from individual to individual dependent on time, circumstances, or custom, *Belcourt v. Fort Totten Public School District,* 454 N.W.2d 703 (N.D. 1990); (c) incompetency arises from habit- ual failure, *Collins v. Iowa Liquor Control Commis- sion,* 252 Iowa 1359, 110 N.W.2d 548, 550 (1961) (“A person who habitually fails to perform his work with the degree of skill or accuracy usually displayed by other persons regularly employed in such work is incompetent. And the same is true of one who usually performs substantially less than others regularly so employed.”); (d) a Wyoming court held that “a single honest failure in the performance of one’s duties does not with- out more amount to incompetency,” *McCoy v. Thompson,* 677 P.2d 839 (Wyo. 1984); (e) the Nebraska Supreme Court has held that “evi- dence that a particular duty was not competently performed on certain occasions, or evidence of occasional neglect of some duty of performance, in itself, does not ordinarily establish incompe- tency or neglect of duty sufficient to constitute just cause for termination,” *Sanders v. Board of Education,* 200 Neb. 282, 263 N.W.2d 461 (1978);

(f) a California court has concluded that allowing students to repeat vulgar language in papers pre- pared for class does not constitute incompetence of the teacher unless further evidence could be produced to show that the incident warranted a conclusion that the teacher was unfit to teach, *Oakland Unified School District of Alameda County v. Olicker,* 25 Cal. App. 3d 1098, 102 Cal. Rptr. 421 (1972); and (g) similarly, where a teacher of 20 years was arrested for three misdemeanors arising out of driving while intoxicated, the court found that the school district was unable to pro- duce evidence that rationally related the incident to the teacher’s competence or turpitude or the proper performance of his duties as a classroom teacher; thus, the court ruled that the termina- tion of the teacher’s employment was arbitrary

and capricious, *In the Matter of the Termination of Dwayne Kibbe v. Elida School District,* 996 P.2d 419 (N.M. 2000).

###### INSUBORDINATION

*Insubordination* is a defiance of authority,22 a dis- obedience to constituted authority; it is a refusal to obey some order that a superior officer is en- titled to give and have obeyed.23

Courts have defined insubordination as “a willful disregard of express or implied direc- tions of the employer and a refusal to obey reasonable orders.”24 Charges of insubordina- tion are not supportable if: (1) the alleged mis- conduct was not proved; (2) the existence of a pertinent school rule or a superior’s order was not proved; (3) the pertinent rule or order was not violated; (4) the teacher tried, although un- successfully, to comply with the rule or order;

(5) the teacher’s motive for violating the rule or order was admirable; (6) no harm resulted from the violation; (7) the rule or order was unreason- able; (8) the rule or order was invalid as beyond the authority of its maker; (9) the enforcement of the rule or order revealed possible bias or dis- crimination against the teacher; or (10) the en- forcement of the rule or order violated the First Amendment rights to free speech or academic freedom.25

Courts that require repetition and persistence of disobedience to establish insubordination26 attach much importance to “willfulness” in viola- tion of a reasonable rule. Evidence of willfulness and intent in refusing to obey a reasonable or- der is obviously established where the refusal is repeated.27

Some courts have held that a finding of insub- ordination does not necessarily hinge on whether it is a repeated refusal to obey reasonable rules or requirements. In some instances, refusal to obey school requirements is of such a nature that rep- etition is not necessary. Because the key to insub- ordination is willfulness, insubordination can be established by a single incident where there is evidence that a one-time occurrence clearly es- tablished that the teacher intended to break the school directive.28 For example, where a teacher refused to leave an old school building and teach in a new one, the court found that the teacher’s actions were willful and thus both insubordinate and neglectful of duty.29

In a case where a teacher was charged with insubordination for inappropriately punishing students and allowing card games to be played in study hall, the court ruled that there was no insubordination, even though the conduct was highly questionable, because the teacher ceased the activities after being admonished by the principal.30

In another insubordination case, a teacher was told not to use J. D. Salinger’s *Catcher in the Rye* in his classroom and had agreed not to use the novel. Afterward, he began to use the novel again and was requested to meet with the prin- cipal concerning the issue. The teacher walked out of the meeting after five minutes and was charged with two counts of insubordination:

1. breaking the previous agreement and
2. walking out of a conference. The school board upheld the charges and dismissed the teacher. Upon appeal, the court determined the dismissal was too severe. Although the courts do not gen- erally review administrative sanction, this court felt that the school board’s punishment of the teacher was disproportionate to the offense and unfair, since students were not harmed and there was no indication of lack of fitness to teach.31

The failure of school administrators or the local school board to follow teacher evaluation procedures, as prescribed by state education agency regulations or state statutes, will pro- hibit a local board from discharging, demoting, or transferring a teacher for reasons having to do with insubordination, misconduct, or incompe- tency. Every detail of the evaluation procedures must be followed. This general rule was fol- lowed by a West Virginia court, which held that a teacher could not be terminated for insubordina- tion if a school board (1) failed to comply with the specific requirements of the state board of educa- tion evaluation policy that provided for regular evaluation of teachers and (2) failed to deliberate concerning the teacher’s performance.32

The requirements necessary to validate a teacher’s dismissal for insubordination have been summarized by the *American Law Reports* as follows:

* 1. Insubordination imports a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders. (2) Insubordi- nation is defined as a disobedience of orders, in- fraction of rules, or a generally disaffected attitude

toward authority; it is generally synonymous with contumaciousness, which indicates persistent, will- ful or overt defiance of, or contempt for, authority.

(3) Insubordination is a constant or continuing in- tentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority.33

In jurisdictions expressly requiring “willful- ness” as an element to be proved to establish teacher insubordination, it has been held that the proof of willfulness required for insubordi- nation may be satisfied by a single intentional act. In summary, in cases where insubordina- tion was not upheld by the courts, one or more of the following were true in most instances:

(1) the teacher’s motive for violating the rule was not established; (2) no actual harm resulted from the violation; (3) the punishment was not proportional to the offense; (4) the rule or or- der that was broken was unreasonable; (5) the rule or order that was broken was beyond the authority of the maker; or (6) the rule or order that was broken violated a constitutional right of the teacher.34

*Insubordination Can Be a Single Incident of Willful or Intentional Disobedience*



#### Gaylord v. Board of Education, Unified District No. 218, Morton County

*Court of Appeals of Kansas, 1990. 14 Kan. App. 2d 462, 794 P.2d 307.*

JOHN W. WHITE, District Judge, Assigned:

Steve Gaylord appeals from the district court’s ruling affirming the termination of his teach- ing contract pursuant to K.S.A. 72-5436 *et seq.* by the Board of Education, Unified School District No. 218, Morton County, Kansas (Board). Gaylord argues that there was not substantial evidence to support the finding of insubordination and that the Board’s decision to terminate the contract was, therefore, arbitrary and capricious. We affirm.

In April 1987, the Board voted to renew Gay- lord’s teaching contract for the 1987–88 school year. Gaylord decided to explore employment opportunities elsewhere and scheduled a job inter- view in Bovina, Texas, for May 21, 1987. Gaylord requested personal leave for that day, which fell during the last week of the school year. Princi- pal Steve Barnes denied the request pursuant to the negotiated agreement, which forbade teacher absences the first or last week of any semester. Barnes told Gaylord that Superintendent Kenneth Fowler was the only one who could grant per- sonal leave during that time period. Fowler also denied Gaylord’s request.

Gaylord’s wife called Barnes on the morn- ing of May 21 and reported Gaylord was ill and would not be at work. Later that day, Fowler received a call from the high school principal in Bovina soliciting a recommendation for Gaylord. From that conversation, Fowler learned Gaylord had been in Bovina that morning.

The following day, Gaylord completed a sick leave form and attached a note from his physician. Fowler called Gaylord to his office, told him he knew about the Texas interview, requested his keys, and told him to leave school property. Gaylord was later notified of the Board’s intent to terminate his contract. The reasons given for the Board’s action were insubordination, failure to follow Board policy, and abusive treatment of students. . . .

The only issue to be considered for review by this court is the charge of insubordination. There is no contention that the Board acted outside the scope of its authority but only whether there was substantial evidence to support its finding. . . .

Insubordination is defined as “disobedience to constituted authority, refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a willful or in- tentional disregard of the lawful and reasonable instructions of the employer.” *Black’s Law Dic- tionary* 720 (5th ed. rev. 1979). . . .

Although Kansas has not addressed insub- ordination in the context of teacher termination cases, in other jurisdictions insubordination has been found where the teacher refused to accept a teaching or school assignment, refused to admit a student to class, or has been absent without authorization. . . .

Some courts have found insubordination in a single incident. . . . Other courts have concluded

insubordination can only occur when there is a constant or persistent course of conduct. . . .

In *Ware v. Morgan Cty. School D. No. RE-3,* 748 P.2d 1295, 1300 (Colo. 1988), the court stated that, by interpreting insubordination

to include the willful or intentional disobedience of a reasonable order on a particular occasion, we provide the school board with the necessary latitude to determine whether, in light of commu- nity standards and subject to judicial review, the teacher’s conduct on the occasion in question was sufficiently serious or aggravated to warrant an ul- timate finding of insubordination and the serious sanction of dismissal. . . .

. . . The facts show Gaylord attempted to take, and was twice denied, a personal day during a time specifically prohibited by the negotiated agreement. Failing to secure permission, he had his wife call and report his illness on the day in question. He then drove to Texas to interview for a job and, upon his return, filled out an absence sheet claiming illness as the reason for his ab- sence. Under the application of the community standards test articulated in *Ware,* substantial evidence exists to support the finding of insub- ordination warranting dismissal. . . .

The Board acted within the scope of its author- ity, there was substantial evidence to support its findings, and there is no evidence that the Board acted fraudulently, arbitrarily, or capriciously. The decision of the district court is affirmed.

*Insubordination and Inefficiency in Teaching Are Grounds for Dismissal of Tenured Teacher*



#### *In re* Termination of James E. Johnson

*Court of Appeals of Minnesota, 1990.*

*451 N.W.2d 343.*

GARDEBRING, Judge.

The school board passed a resolution ter- minating the employment of James Johnson, a tenured teacher, based upon the independent

hearing examiner’s findings of inefficiency in teaching and insubordination. Johnson appeals, contesting the sufficiency of the evidence to ter- minate his employment and the propriety of the procedures followed by the school in conducting its investigation. We affirm.

Prior to his termination, relator James Johnson was a tenured mathematics teacher employed by respondent Independent School District No. 709 (Duluth) since 1967. He taught seventh and ninth grade math at several schools within the school district. Beginning in 1970, he received intermittent performance evaluations, both for- mal and informal, some negative and some rat- ing his teaching ability as satisfactory or better. In general, the evaluations noted four areas of concern: excessive failure rates, high volume of transfer requests, poor relationships with stu- dents and parents, and inappropriate teaching methods. In some instances, specific instructions were provided to Johnson as to required changes in classroom practice and teaching methodology. On September 17, 1987, Johnson received a letter from Richard Wallin, Director of Second- ary Education, outlining various directions Johnson must follow to improve his teaching

performance. . . .

On January 13, 1988, Johnson was charged with inefficiency in teaching, conduct unbecom- ing a teacher, and insubordination, and was suspended without pay, effective immediately. The charges outlined the following deficiencies:

(1) poor rapport with students; (2) insufficient communications with parents; (3) lack of student progress; (4) inappropriate use of class time; and

(5) failure to follow the school’s adopted mathe- matics curriculum. A hearing was conducted be- fore an independent hearing examiner, a retired district court judge. The hearing lasted 29 days over a seven-week period in September and October 1988. On May 11, 1989, the hearing exam- iner issued his findings and concluded that while there were insufficient grounds for terminating on the basis of conduct unbecoming a teacher, there was substantial evidence to recommend termination for insubordination and inefficiency in teaching. On May 31, 1989, the school board adopted the examiner’s recommendations and immediately terminated Johnson’s employment.

Is the school board’s decision to terminate Johnson supported by substantial evidence?

A school board’s decision to terminate a teacher will not be set aside on appeal unless the decision is fraudulent, arbitrary, unreasonable, not supported by substantial evidence on the re- cord, not within the school board’s jurisdiction or is based on an erroneous theory of law.

. . . This matter was extensively heard by the hearing examiner. Eighty-three witnesses were called and 157 exhibits were received in evi- dence. The transcript of the proceedings consists of 29 volumes containing 6455 pages. . . .

Inefficiency in teaching and insubordina- tion are two independent statutory grounds for termination. Minn. Stat. § 125.17, subd. 4(1),

(3) (1988). . . . We find that there is substantial evi- dence in the record to support the school board’s decision to terminate Johnson’s employment.

Evidence in the record demonstrates Johnson’s poor rapport with students and insufficient com- munication with parents. The administration received numerous complaints from students and parents wherein the students describe feelings of frustration and confusion regarding Johnson’s teaching methods and class assignments. Many of these complaints were accompanied by requests for transfer out of Johnson’s class. Administrators observing Johnson’s classes between 1977 and 1988 repeatedly noted the poor communication between Johnson and his students.

The record also contains evidence substantiat- ing the charge of lack of student progress. Even judged by his own techniques, the evidence sup- ports the finding that Johnson’s students were not progressing satisfactorily. Although the test scores of highly motivated students improved, the scores of the other students remained the same or worsened. Many students failed his ex- aminations. Testimony by the math teacher who took over Johnson’s class after his suspension reveals that Johnson’s students were behind in the curriculum. While evidence of requests by students and parents for transfer out of John- son’s classes are not indicative of poor teaching, it demonstrates a pattern of dissatisfaction with Johnson’s teaching methods which is a proper area of concern for the school board to address.

Furthermore, the district’s attention to John- son’s grading practices and failure rates was appropriate, and evidence on these issues sup- ports the finding of teaching inefficiency. While Johnson has argued that he should not be

evaluated on the attitudes of his students and their unwillingness to learn, evidence on grades, and in particular the large number of student failures, provides evidence of Johnson’s inability to teach the mandated curriculum.

Although the assignment of a grade may be entitled to first amendment protection, academic freedom is not absolute. . . . Johnson was respon- sible for transmitting basic information to sec- ondary school students. The district adopted a specific curriculum for achieving this objective. Johnson was terminated due to an inability to impart this basic knowledge, not because of the specific grades he assigned. We find no grounds to support Johnson’s claim that his right to aca- demic freedom was violated.

We note, however, that the school district’s September 1987 directive to Johnson that his grade distributions not deviate by more than two percent from distributions in other similar classes was inappropriate. Such a rigid, numeri- cal grading standard appears to us to potentially interfere with a teacher’s legitimate need for classroom flexibility. School districts are cau- tioned in this area.

In reviewing the entire record, we conclude there is substantial evidence supporting the find- ing that Johnson was inefficient in teaching.

Insubordination is a “constant or continuing intentional refusal to obey a direct or implied or- der, reasonable in nature, and given by and with proper authority.” . . . Johnson was specifically directed by Wallin and school principals to im- prove his relationship and rapport with students and parents. He was ordered to provide work- sheets containing the assigned problems instead of having the students copy the problems off the blackboard. He was also directed to furnish each student with copies of tests and any material used to supplement the textbook.

In light of the numerous complaints received by the administrators, these orders are reason- able. Although Johnson participated in several teaching workshops, he continually refused to change his instructional methods. The record contains substantial evidence to support the finding of insubordination. . . .

Based upon the entire record, we find there is substantial evidence to support the school board’s decision to terminate Johnson’s employment.

Affirmed.

###### IMMORALITY

Teachers must be of good moral character, and statutory requirements pertaining to the moral- ity of teachers are constitutional.35 *Immorality* has been interpreted to be such a “course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate.”36

Although the term *immorality* has been at- tacked as unconstitutionally vague,37 it has gen- erally been upheld by the courts, especially when it relates to fitness to teach and there is a rational nexus between the prohibited activity and the individual’s conduct and decorum as a teacher. Immorality may include both heterosexual and homosexual activities, but it does not pertain to exclusively sexual activities:

[W]e note that statutes from colonial days forward recognize the unique position of teachers as exam- ples to our youth and charge them to “exert their best endeavors to impress on the minds of children and youth committed to their care and instruction” the values basic to our society . . . , requiring school committees to have full and satisfactory evidence of a teacher’s moral character. This special role of teach- ers on impressionable and not fully tutored minds distinguished them from other public officials.38

###### IMMORAL CONDUCT

*Immoral conduct* is that which is “willful, fla- grant, or shameless and which shows a moral indifference to the opinions of the good and respectable members of the community.”39 Where a tenured teacher tampered with student test results, substantially raising the reported scores to exceed state test goals, the court agreed that such behavior constituted immoral conduct and affirmed the school board’s dismissal of the teacher.40 Similarly, altering school files to make school programs appear to comply with state and federal education laws constitutes pro- fessional misconduct, and warrants discharge and revocation of teaching certificate.41

Because of the exemplary nature of teaching and the high community expectations of teach- ers, the courts have left little question about the seriousness of sexual involvement with students. Courts will uphold school boards in dismissing teachers even without absolute proof of sexual contact with students. In a case where a teacher enjoyed a reputation as a good teacher, with

excellent rapport with students, but made sexual remarks and innuendos to female students as “good natured horseplay,” the court found that there existed a nexus attaching to the teacher’s classroom effectiveness and the questionable conduct, and the teacher was therefore unfit to teach.42

Sexual involvement with persons who are not students may have a logical nexus with the proper conduct of the school, and such activities may therefore be adjudged immoral. The courts, when dealing with cases of sexual activity of teachers with nonstudents, attempt to determine if there has been an impact on teachers’ fitness to teach and whether the activities were public or private. In a California case, a 48-year-old ele- mentary teacher had her life certificate revoked by the state board of education for immorality. The plaintiff was arrested at a private club by an undercover police officer after he watched her commit three separate acts of oral copulation, a violation of the penal code. After plea-bargaining, the charges were reduced to the misdemeanor of “outraging public decency.” The teacher and her husband had also appeared on television, in dis- guise, discussing unconventional sexual lifestyles. Even though the teacher introduced into evidence her classroom evaluations, which were satisfac- tory, and a contract from the local board offering to rehire her, the court held that the state board was correct in revoking her certificate. The evi- dence showed that the sex acts were witnessed by several strangers in a semipublic atmosphere and the “[p]laintiff’s performance certainly reflected a total lack of concern for privacy, decorum or preservation of her dignity and reputation.”43 The court said a teacher “in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by children coming under her care and protection.” Obviously, participation in sex orgies fell short of this standard.44

In order to dismiss a teacher who is homo- sexual for immorality, the school district must demonstrate a rational nexus between the ho- mosexual conduct of the teacher and fitness to teach. Factors such as adverse effect on students or fellow teachers, adversity anticipated within the school system, surrounding circumstances, and possible chilling effects on discipline may be used to establish unfitness.45

Tenured teachers can be dismissed for sexual conduct that is determined to be detrimental to the school, whether that conduct is of a hetero- sexual or a homosexual nature. However, the nexus between the activity and the decorum of the school and integrity of the teaching process must be shown. If, however, the sexual activity in public is proscribed by state statute, then the need to establish such a nexus is obviated by the violation of state law. Guilt of criminal conduct has been held to constitute immorality per se. In this regard, dismissals of tenured teachers for immorality, based upon the fact that the teach- ers were convicted of crimes, are valid. A “guilty verdict of criminal conduct will support a find- ing of immorality.”46

*Sexual Relationship with Student in Prior Teaching Employment Constitutes Immorality*



#### Toney v. Fairbanks North Star Borough School District

*Supreme Court of Alaska, 1994.*

*881 P.2d 1112.*

MOORE, Chief Justice.

In March 1992, David Toney was fired from his position as a tenured teacher with the Fair- banks North Star Borough School District (the “District”). The termination was based on evi- dence establishing that Toney had engaged in a sexual relationship in 1980 with a 15-year-old student while Toney was a teacher in Boise, Idaho. Toney appealed his termination to the su- perior court, which granted summary judgment in favor of the District. The court concluded that Toney’s failure to disclose the relationship consti- tuted a material misrepresentation and breach of the contractual covenant of good faith. The court also found that the relationship itself supported termination under AS 14.20.170(a). We affirm the superior court’s grant of summary judgment in favor of the District on the latter ground.

In 1980, Toney was employed as a teacher at Capitol High School in Boise, Idaho. In December

of that year, he entered into a sexual relationship with a 15-year-old student, Traci F. At that time, Toney was in his early thirties. Shortly there- after, Traci became pregnant with Toney’s child. She then transferred to a school for pregnant teenagers. In November 1981, Traci gave birth and, with the consent of all parties, the child was adopted.

In October 1981, just prior to the birth of the child, Toney and Traci’s father entered into a con- fidential written agreement concerning Traci’s medical expenses and other costs relating to the child’s birth. In the same document, Toney also agreed to “submit his resignation or take a leave of absence from the faculty of Capitol High School for the second semester of the 1981–82 school year and for the next school year in order to permit Traci to attend Capitol High School and to graduate therefrom.” Pursuant to this agreement, Toney resigned from teaching in the Boise School District before the beginning of the 1982 spring semester.

Meanwhile, in the spring of 1981, Toney com- pleted an application for employment with the Fairbanks North Star Borough School District. The application was dated February 3, 1981. However, it was not stamped as received by the District until April 28, 1981. Included in this ap- plication were Toney’s assertions that he had not been asked to resign for any reason from a teach- ing position and that he had not been convicted of any offense involving moral turpitude.

In August 1982, Toney was contacted by Bill Rogers, a principal with the District, regarding his application. Toney reaffirmed his interest in a position with the District. Rogers then contacted Don Johnson, the principal of Capitol High School in Boise, who gave Toney a positive rec- ommendation. Mr. Johnson did not reveal that Toney had resigned from Capitol High School at midyear during the 1981–82 school year.

Toney then came to Fairbanks to interview for a teaching position. During the interview, Toney did not disclose his relationship with Traci, nor did he disclose that he had not been employed as a teacher during the spring semester of the 1981– 82 school year. Following the interview, Toney was recommended to fill a position with the District. Following this recommendation, Toney was asked to complete an “affidavit of teaching

experience” and a “teacher’s personal record” for the District’s files. Toney incorrectly indi- cated on both documents that he held a fulltime teaching position with the Boise School District for the entire 1981–82 school year. A non-tenured contract was executed on September 17, 1982.

In 1992, after learning that Toney was teaching in Fairbanks, Traci contacted District personnel and informed them of her prior relationship with Toney. After investigating the allegations, the District terminated Toney by letter dated March 26, 1992. The letter stated that Toney’s firing was based on his failure to disclose to the District his relationship with Traci and his resignation pur- suant to the agreement with Traci’s father. In addition, the letter stated that Toney’s conduct supported termination under AS 14.20.170(a) (2)–(3), on the grounds that it constituted “im- morality and substantial noncompliance with the school laws of the state, the regulations or bylaws of the Department of Education, the by- laws of the District and the written rules of the superintendent.”

Toney appealed his termination to the Bor- ough’s Board of Education. The Board upheld the dismissal by a vote of six to one. Toney then appealed to the superior court. Both parties filed motions for summary judgment. The superior court granted the District’s motion in an Opin- ion and Order dated August 4, 1993. The court held that Toney’s failure to reveal the relationship and the circumstances surrounding his resigna- tion constituted misrepresentation and a breach of the contractual duty of good faith. The court further held that Toney’s actions supported termi- nation under AS 14.20.170(a)(2)–(3). Toney now appeals. . . .

Under AS 14.20.170(a)(2), a teacher, including a tenured teacher, may be dismissed for “immo- rality, which is defined as the commission of an act that, under the laws of the state, constitutes a crime involving moral turpitude.” A criminal conviction is not necessary to support a teacher’s dismissal under this provision. . . . In addition, it is well-established that there need not be a sepa- rate showing of a nexus between the act or acts of moral turpitude and the teacher’s fitness or capacity to perform his duties. . . . As the court in *Brown* stated, “[i]f a teacher cannot abide by these standards his or her fitness as a teacher is

necessarily called into question.” . . . Thus, in the present case, so long as the District had sufficient evidence to conclude that Toney committed an act or acts which constituted a crime of moral turpitude, the dismissal is valid, even in the ab- sence of a conviction. . . .

Toney acknowledges that he engaged in a sexual relationship with Traci when she was 15 years old and a student of his. This conduct satisfies the elements of the crimes of sexual abuse of a minor in the second and third degree under Alaska law as presently enacted. . . . Toney’s con- duct also constitutes a crime under Alaska law as it existed in 1981, under present Idaho law, and under Idaho law as it existed in 1981.

such a limited interpretation is appropriate. In addition, as the superior court noted, such a con- struction would conflict with public policy, since it would immunize from dismissal a teacher who had engaged in illegal and immoral con- duct prior to hiring, but who had successfully concealed such conduct. We therefore affirm the superior court’s conclusion that Toney’s actions were sufficient to support his dismissal under AS 14.20.170(a)(2).

Toney’s criminal sexual relationship with a minor student is adequate grounds for his dis- missal under AS 14.20.170(a)(2). The superior court’s opinion and order upholding Toney’s dismissal is therefore AFFIRMED.

Toney does not dispute that his conduct with

Traci was criminal, nor does he deny that his actions constituted crimes of moral turpitude. Instead, he argues that the statute authorizing dismissal for such acts does not reach conduct engaged in before a teacher is hired by a school district.

In addressing this argument, the superior court noted that the language of AS 14.20.170(a)

(2) “does not explicitly or implicitly limit the statute’s application to . . . acts that occur only while a teacher is under contract with an Alaska school district.” The court further found that the legislative history of the statute offered no sup- port for Toney’s argument. Finally, the court rec- ognized that Toney’s contention is contrary to sound public policy:

As the Borough points out, the effect of such an in- terpretation would be contrary to public policy as it would allow an individual who commits an act of moral turpitude, and who successfully conceals his/her behavior from a school board, to be im- mune from dismissal upon subsequent discovery of the conduct.

Thus, the court concluded that Toney’s conduct “establish[ed] immorality under AS

14.20.170 (a)(2) and [was] sufficient grounds for his dismissal.” . . .

Toney’s sole argument is that AS 14.20.170 (a)

1. does not provide for the dismissal of a ten- ured teacher on the grounds of conduct occur- ring prior to the teacher’s hiring. This argument is nonsensical. Nothing in the language of the statute or its legislative history suggests that

###### CASE NOTES

1. *Moral Turpitude.* Moral turpitude is “[a]n act of baseness, vileness, or depravity in the private and social duties which a man owes to his fel- low men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” *Black’s Law Dic- tionary,* 7th ed. (St. Paul, Minn.: West, 1999),

p. 1160. Moral turpitude is difficult to clearly define because it is premised on the moral standards of the community.

The courts generally separate moral tur- pitude into two categories: sexual miscon- duct and conduct involving deceit or fraud. Beyond these categories there appears to be little order or consistent rationale. *See* John Trebilcock, *Off Campus; School Board Control over Teacher Conduct,* 35 Tulsa L. J. 445 (2000); *Morrison v. State Board of Education*, 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P.2d 375, 379–87

(Cal. 1969). For example, the dismissal of a teacher for a romantic relationship with a student has been upheld as moral turpitude. *Ballard v. Independent School District No. 4 of Bryan County*, 320 F.3d 1119 (10th Cir. 2003) (appeal stayed pending resolution of a ques- tion of state law). *See also Ballard v. Indepen- dent School District No. 4 of Bryan County,* 77 P.3d 1084 (Okla. 2003). Dismissal for moral turpitude was held to be appropriate where a teacher made numerous false changes to student transcripts. *Hill v. Independent School District No. 25,* 57 P.3d 882. (Okla. Ct.

App. 2002).

Moral turpitude has also been defined as:

Any conduct contrary to justice, honesty, and good morals. [It] implies something immoral in itself regardless of whether it is punishable by law. The doing of the act itself, and not its prohibition by statute determines the moral turpitude. The ele- ments of intent and knowledge are regarded as im- portant, and if the wrong is unintentional or if the act is made improper by statute without regard to the mental element, it is not moral turpitude.

The Oklahoma Supreme Court has said that moral turpitude is a high standard to meet. In *Kelley,* for example, the court held that “an isolated conviction of public drunk- enness” was not a crime of moral turpitude because it was not “the kind of offense which signifies an inherent quality of baseness, vileness and depravity denoting moral turpi- tude.” *Kelley v. City of Tulsa*, 569 P.2d 455, 457 (Okla. 1977); *see also Andrews v. Independent School District No. 57,* 12 P.3d 491, 495 (Okla.

Ct. App. 2000).

Revocation of the teaching certificates of two teachers for growing 52 marijuana plants in a greenhouse has been upheld by a Florida court because their actions violated the moral standards of the community. The court con- cluded that since teachers are in a leadership capacity and are obligated to maintain a high moral standard in the community, the pos- session of marijuana plants, and the ensuing publicity, seriously impaired their abilities to be effective teachers. *Adams v. State Professional Practices Council,* 406 So.2d 1170 (Fla. Dist. Ct. App. 1981), *petition denied,* 412 So.2d 463 (Fla. 1982). In an earlier California decision, a teacher was found not to be guilty of moral turpitude where he was found to be cultivat- ing only one marijuana plant out of curiosity. *Board of Trustees v. Judge,* 50 Cal. App. 3d 920, 123 Cal. Rptr. 830 (1975).

Conviction for mail fraud constitutes moral turpitude justifying revocation of a teaching certificate. *Startzel v. Pennsylvania Department of Education,* 128 Pa. Commw. 110, 562 A.2d

1005 (1989).

1. *Neglect of Duty.* A school board may validly dismiss for neglect of duty a teacher who while serving as cheerleader sponsor drank beer with the cheerleaders in violation of a school rule prohibiting the drinking of alcoholic

beverages. The dismissal of the teacher in this case was upheld by the court even though the hearing officer ’s recommendation to the board was that the teacher be retained. The court said, in relating “immorality” to “neglect of duty,” that “neglect of duty is directly related to the teacher’s fitness to teach”; “neglect of duty occurs when a teacher fails to carry out his or her obligations and responsi- bilities in connection with classroom or other school-sponsored activities.” *Blaine v. Moffat County School District Region No. 1,* 748 P.2d 1280 (Colo. 1988).

Willful neglect of duty may be interpreted broadly to include a teacher’s repeated fail- ure to follow directions of the school princi- pal. Where a teacher repeatedly sent students to the principal’s office without escorts, the court upheld the tenured teacher’s dismissal, saying it would “neither substitute its judg- ment for the judgment of the school board nor interfere with the board’s *bona fide* exercise of discretion.” *Wise v. Bossier Parish School Board,* 851 So.2d 1090 (La. 2003).

Willful neglect of duty imposes a relatively high standard upon a school board to suc- cessfully effectuate a dismissal. Where a ten- ured teacher reported that a loaded gun was stolen from his wife’s car while it was parked outside of his classroom and the school board charged him with willful neglect of duty and dismissed him, the Louisiana Supreme Court overturned the dismissal and ordered the teacher to be reinstated with back pay. According to the court, the board did not have a rational basis supported by substantial evi- dence to document “willful neglect.” *Howard v. West Baton Rouge Parish School Board,* 865 So.2d 708 (2004).

The duties required of a teacher by a board, when evaluating neglect of duty, were out- lined in an Oregon case. The court said that the essential features are: (1) the duty of a teacher to serve as a role model for students and com- munity of good citizenship and law-abiding behavior; (2) the duty to maintain effective relationships with students, parents, and other staff of school; and (3) the duty to teach the approved school curriculum. *Jefferson County School District No. 509-J v. FDAB,* 311 Or. 389, 812 P.2d 1384 (1991).

*Tenure Contract May Be Terminated for Off-Campus Immoral Conduct*



#### Board of Education of Hopkins County v. Wood

*Supreme Court of Kentucky, 1986.*

*717 S.W.2d 837.*

WINTERSHEIMER, Justice. . . .

The issue is whether the contracts of tenured teachers may be terminated for immoral conduct or conduct unbecoming a teacher for off-campus activities involving students when no written re- cords of such conduct are in the personnel file.

In 1983, a Hopkins County grand jury while investigating a murder received testimony from two 15-year-old girls that two days prior to the murder they had purchased 10 marijuana ciga- rettes and had taken the marijuana to the apart- ment of the Wood brothers where the girls and the Woods and others smoked some of the mari- juana. The grand jury suggested that the matter be investigated further by the county attorney and subsequently the Woods were arrested in a misdemeanor charge of contributing to the delin- quency of a minor. In district court, on Septem- ber 20, 1983, the Woods both signed a statement pleading guilty to unlawful transaction with a mi- nor in violation of KRS 530.070, a misdemeanor.

Officials of the Board of Education took the statements of the two girls on September 1, 1983, and on the basis of these statements, the Wood brothers were suspended from their teaching po- sitions on September 6 for immoral character and conduct unbecoming a teacher. A hearing was conducted on September 28. At the hearing the Board presented the guilty plea filed in district court and the two girls as witnesses. The Woods denied smoking marijuana and three other wit- nesses testified that they did not see any mari- juana smoking. Character witnesses also testified on behalf of the Woods. At the conclusion of the hearing the Board voted unanimously to termi- nate the Wood brothers. . . .

The Wood brothers argue that the Board has no right to terminate their teaching contracts by reason of acts committed during off-duty hours, during the summer months before the school year began and in the privacy of their own apartment.

. . . The evidence indicates that there was serious misconduct of an immoral and crimi- nal nature and a direct connection between the misconduct and the teachers’ work. The Wood brothers pled guilty in district court to an unlaw- ful transaction with a minor after having enter- tained two 15-year-old female students in their home at a marijuana-smoking party. . . .

The purpose of teacher tenure laws is to pro- mote good order in the school system by pre- venting the arbitrary removal of capable and experienced teachers by political or personal whim. It is not to protect those who violate the criminal law. A teacher is held to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students. The school teacher has traditionally been re- garded as a moral example for the students. . . .

Conduct unbecoming a teacher or immoral conduct, unless limited to behavior occurring on the school premises during school hours, could not possibly be documented by a record of school supervisory personnel in a manner that is probative or appropriate as contemplated by the statute. Such records relate to in-school pro- fessional performance, not off-school activities. Therefore to give the statute an absolutely literal interpretation leads to a patently absurd result. We must construe statutes of this nature in ac- cordance with their purpose, which means mak- ing an exception to the literal language in the present statute to avoid an absurd and unwork- able result. . . .

Great care must be taken to ensure that proof of conduct of an immoral nature or conduct un- becoming a teacher which is sufficient to merit discharge of a tenured teacher should be of the same quality as required by other subsections of the statute, that is, written documentation from impartial sources to substantiate the charges, as in the present case, or its substantial equivalent. In addition, the conduct, when it occurs in a context other than professional competency in the class- room, should have some nexus to the teacher’s

occupation, as was true in this case which in- volves smoking marijuana with two students. . . . It was not the intention of the legislature to subject every teacher to discipline or dismissal for private shortcomings that might come to the attention of the Board of Education but have no relation to the teacher’s involvement or exam- ple to the school community. The power of the Board to discipline teachers is not based on per- sonal moral judgments by Board members. It ex- ists only because of the legitimate interests of the government in protecting the school community

and the students from harm. . . .

It is the holding of this Court that the con- tracts of tenured teachers may be terminated for conduct unbecoming a teacher or immoral con- duct involving off-campus activities involving students notwithstanding written records indi- cating a satisfactory teacher performance.

The decision of the Court of Appeals is reversed and the judgment of the circuit court is reinstated.

All concur.

###### CASE NOTES

1. *Off-Campus Sex.* Consensual sexual conduct between a teacher and an adult of the oppo- site sex, committed off-campus, cannot with- out other extenuating circumstance constitute “good cause” for a school board’s rejection of a superintendent’s nomination of the teacher for reemployment. *Sherbourne v. School Board of Suwannee County,* 455 So.2d 1057 (Fla. Dist. Ct. App. 1984).
2. *Commission of a Crime.* Statutes in a number of states provide that teachers may be dis- missed for “a felony or crime of moral tur- pitude.” A felony is “[a] crime of a graver or more atrocious nature than those designated as misdemeanors . . . , [g]enerally an offense punishable by death or imprisonment in the penitentiary.” *Black’s Law Dictionary,* 4th ed. (St. Paul, Minn.: West), p. 744.

Where a teacher was charged with theft, assault and battery, and fleeing a police offi- cer, the court upheld his dismissal and stated, “[I]t cannot be said that a teacher’s conduct outside the classroom bears no reasonable relation to his qualifications for employment.” *Gary Teachers Union, Local 4, American Federa- tion of Teachers v. School City of Gary,* 165 Ind. App. 314, 332 N.E.2d 256 (1975).

Dismissal for unfitness is not necessarily de- pendent on criminal conviction. A school board may dismiss a teacher for an arrest for a felony, even though the trial does not result in convic- tion. In a case where a teacher was charged with a criminal act of engaging in oral copu- lation with another man and was acquitted of criminal charges, the school board dismissed the teacher for immorality and unfitness. The state code provided for school boards to dis- miss teachers for sex offenses. The court held for the board and said that it was the respon- sibility of the board to determine the fitness of the employee even if acquitted of criminal charges. *Board of Education v. Calderon,* 35 Cal. App. 3d 490, 110 Cal. Rptr. 916 (1973), *cert.*

*denied,* 414 U.S. 807, 95 S. Ct. 19 (1974).

1. *Misdemeanor.* Included in the area of criminal convictions is the dismissal of a teacher for a misdemeanor. Misdemeanors are “[o]ffenses lower than felonies and generally those pun- ishable by a fine, penalty, forfeiture, or impris- onment otherwise than in [a] penitentiary.” *Black’s Law Dictionary,* 7th ed. (St. Paul, Minn.: West, 1999), p. 1150.

In a case where a tenured teacher was ar- rested and charged with “disturbing the peace by being under the influence of intoxicants, attempting to fight, and display of a gun,” his dismissal was upheld for good and just cause, and the board’s action was held not to be ar- bitrary, irrational, or unreasonable. *Williams v. School District No. 40 of Gila County,* 4 Ariz. App. 5, 417 P.2d 376 (1966).

1. *Drugs and Immorality.* Teachers, in recent years, have been dismissed for possession and use of controlled substances. Since state statutes usually do not specify dismissal for drugs, teachers who have been involved with drugs have been dismissed under statutory provisions regarding fitness to teach, moral turpitude, immorality, and misdemeanor and felony convictions, plus other good and suf- ficient cause.

Such an example was found in Georgia, where a tenured teacher was arrested for pos- session of cocaine, glutethimide, and mari- juana and pleaded guilty to violating that state’s Controlled Substances Act. Since it was a first offense, the teacher was placed on probation. Because of the publicity, she was

transferred to two other teaching positions during the remainder of the year. Finally, the board dismissed her for “immorality” and “other good and sufficient cause” based on her guilty plea. The court said, “[T]he proven fact of the teacher’s possession of three dan- gerous drugs is evidence from which ‘immo- rality’ may be inferred, even in the absence of criminal purpose or intent.” *Dominy v. Mays,* 150 Ga. App. 187, 257 S.E.2d 317 (1979). A

similar result was reached in *Chicago Board of Education v. Payne,* 102 Ill. App. 3d 741, 58 Ill. Dec. 368, 430 N.E.2d 310 (1981).

*A Teacher Who Had Sexual Relationship with a Student of Another School Is Unfit to Teach*



#### Elvin v. City of Waterville

*Supreme Judicial Court of Maine, 1990.*

*573 A.2d 381.*

McKUSICK, Chief Justice.

In January 1989 the City of Waterville dis- charged plaintiff Kathleen Elvin from her job as a fourth grade teacher on the findings of the Waterville Board of Education, pursuant to 20-A

M.R.S.A. § 13202 (1983), that she had proven “unfit” to teach and that her continued services were “unprofitable” to the school system. On her appeal, we find no reversible error in the Board of Education’s findings and so affirm, as did the Superior Court (Kennebec County, *Alexander, J.*).

Elvin, a divorcee, lives in Winslow with her two children. In the spring of 1987, Elvin en- gaged in sexual intercourse several times with a fifteen-year-old neighbor who occasionally babysat for her children and did errands for her. The boy, a public high school sophomore, turned sixteen in June some weeks after the first act of intercourse, and Elvin continued to maintain a sexual relationship with him for several months thereafter.

As a result of these acts, Elvin was indicted on two counts of sexual abuse of a minor on

May 4, 1988. The sexual abuse charges were dropped in exchange for Elvin’s *nolo contendere* plea to one count of assault stemming from the sexual contact. Shortly after being indicted, Elvin was suspended with pay from her teaching posi- tion. Pursuant to 20-A M.R.S.A. § 13202, the Board held a hearing in January 1989 and voted to dis- miss Elvin from her fourth grade teaching job. . . .

The employment of public school teachers in Maine is controlled by statute. “A school board, after investigation, due notice of hearing and hearing thereon, shall dismiss any teacher . . . who proves unfit to teach or whose services the board deems unprofitable to the school.” 20-A

M.R.S.A. § 13202. The Board concluded that Elvin was unfit to teach and that her services were unprofitable to the school. . . . Based upon the evidence before the Board, we cannot say that its decision to dismiss Elvin was irrational or arbitrary.

The Board found as a fact that Elvin’s “rela- tionship [with the boy] was her own choice, fully consensual, and of long duration.” It based its ultimate finding that Elvin had proven unfit to teach upon, *inter alia,* her poor judgment, her lack of concern for the emotional welfare of a public school student, and her impaired ability to deal with other sexually exploited students due to public awareness of her course of con- duct. Each of these findings is supported by sub- stantial evidence in the record. Elvin admitted that she exercised poor judgment. In the Rule 11 hearing at which Elvin pleaded *nolo contendere* to the assault charge, she agreed to pay part of the victim’s cost of psychological counseling for the reason that, as her counsel acknowledged, she was partly responsible for his current psycho- logical problems. Elvin also admitted that she lied about her conduct when initially questioned by authorities and that she was aware of the boy’s psychological problems prior to their sex- ual relationship. According to the Board, Elvin’s actions “put more pressure on the victim” and “aggravated” the situation. Two school admin- istrators testified that in their professional opin- ions, returning Elvin to the classroom “would be very detrimental to the schooling system,” would adversely affect the system’s credibility in dealing with sex abuse cases, would damage the school’s reputation, and would cause the public to “los[e] respect and trust.” Upon these findings

the Board rationally concluded that Elvin was unfit to teach.

The Board further determined that continu- ation of Elvin’s services would be unprofitable to the school system. In support of this conclu- sion, the Board found that “the publicity as- sociated with this case certainly has made the public aware of the charges and the sexual rela- tions that [Elvin] had with a young boy from a neighboring school” and that public awareness of her conduct will “undermine her ability and her reputation in dealing with . . . students and parents.” The Board also found that her contin- ued employment “will undermine the admin- istration’s program dealing with sexual abuse and exploitation of children.” These findings are supported by substantial evidence in the record. Elvin’s relationship with the boy attracted sub- stantial media attention, and school administra- tors testified that at least one parent reported having a child who knew about the incident. The school administrators also testified about the deleterious consequences of returning Elvin to the classroom. Upon these findings, the Board rationally concluded that Elvin’s continued em- ployment would be unprofitable to the school system. . . .

The entry is: Judgment affirmed. All concurring.

###### CASE NOTES

1. *Immorality and Nexus.* The Supreme Court of Delaware, 2008, held that the term “im- morality” refers to such immorality as may reasonably be found to impair the teacher’s effectiveness to teach. In this decision the court expanded on the “nexus requirement,” saying that the nexus test strikes “a focus on how the conduct may affect the teacher’s ability to teach.” The court found both “im- morality” and the requisite “nexus” in justify- ing the dismissal of a male elementary school teacher who had a sexual relationship with his 17-year-old former student who frequently came to the elementary school to pick up her younger sibling. The girl did not attend a high school within the elementary school district. Public controversy had followed when the teacher was arrested and the relationship was disclosed to the public. The affair became public when the 17-year-old girl told a friend

about the relationship and the friend told her parent, who informed the state police. The teacher was arrested and charged for fourth- degree rape based on the student’s age. The charge, however, was later dismissed. In spite of the dismissal of the criminal charge, how- ever, the school board terminated the teacher for immorality. The teacher claimed that,

* 1. the student did not attend school in the district, (2) he had not engaged in criminal ac- tivity, and (3) the affair had no impact on his professional responsibilities. The Delaware court cited the “nexus” rationale of the New Hampshire court in *In Re Appeal of Morrill*, “the holy kisses” case cited above, and upheld the school board’s decision to dismiss the teacher. The court said that the school board’s decision could be sustained merely on its determina- tion that the relationship itself negatively af- fected the teacher’s “important function as serving as a role model to the students in his school.” Furthermore, the court observed that the teacher’s conduct undermined the confi- dence of all parents in the community regard- ing both the teacher and the school district. *Lehto v. Board of Education of the Caesar Rodney School District*, 962 A.2d 222, (2008).

1. Lying is considered to be immoral. Where a tenured teacher was denied permission to attend a conference and she went anyway, and then upon her return she submitted a re- quest for excused absences because of illness, the board dismissed her based on immoral- ity. The court upheld the board and said: “[Q]uestions of morality are not limited to sexual conduct, but may include lying.” *Bethel Park School District v. Krall,* 67 Pa. Commw. 143, 445 A.2d 1377 (1982).
2. Some school boards have overreached the intent and meaning of the term *immorality* in tenure laws in their zeal to find legal grounds for suspension or dismissal of teachers. Such was the case in a Pennsylvania school district where two teachers were suspended for en- gaging in a water fight with students in which one of the students suffered minor skin irri- tation when a cleaning fluid was sprayed on the students by the teachers. The court said that such “horseplay” may have been outra- geous and uncalled for, but it did not rise to the level of immorality. *Everett Area School*

*District v. Ault,* 120 Pa. Commw. 514, 548 A.2d

1341 (1988).

1. Being pregnant and unmarried does not con- stitute immorality. In a case where an un- married pregnant teacher was dismissed for immorality, the school district argued that “unwed parenthood is *per se* proof of immoral- ity and . . . a parent of an illegitimate child is unfit role model,” yet the school district could offer no support for such an assertion. The court said, “Therefore, we hold that [the teach- er’s] discharge was in violation of her rights under the equal protection clause of the Four- teenth Amendment.” *Avery v. Homewood City Board of Education,* 674 F.2d 337 (5th Cir. 1982).

###### CAUSE OR GOOD CAUSE

Both common law and statute usually pro- vide for the dismissal of teachers for “cause” or “good cause.” Where tenure statutes specify the causes for dismissal, a teacher cannot be dis- missed for causes beyond those specified.47 If, however, no causes are specified and the statute merely provides for dismissal for cause, then that which constitutes cause is subject to broader interpretation.48

The substance of “just cause” may be found in other aspects of inappropriate activity of a teacher. A Pennsylvania court has found that lying and/or making false statements is immo- rality constituting just cause for dismissal.49 A teacher’s misrepresentations regarding his or her unexcused absences may be within the context of persistent and willful misconduct and may, thereby, be the substantive grounds for dismissal for good or just cause.50

Cause may, at times, be rather nebulous, vest- ing the school board with substantial and broad authority. A Kansas court interpreted that state’s tenure law to permit termination or nonrenewal of a tenured teacher for good cause, including “any ground which is put forward by the school board in good faith and which is not arbitrary, ir- rational, unreasonable, or irrelevant to the school board’s task of building up and maintaining an efficient school system.”51

Just cause may emanate from factors other than those of the teacher’s making. For exam- ple, financial problems of a school district may constitute “just cause” for dismissal. In an Iowa case, just cause was given as the justification for

release of a tenured teacher with 17 years of ex- perience. The reasons given for just cause were budgetary considerations, declining enrollments, and the need to make more efficient use of staff. The district had 757 pupils in 1975, 506 in 1985, and 440 to 461 projected by 1989. The decline in enrollment had caused a loss of state revenues. Evidence was also submitted to the court show- ing that the district was overstaffed. The poor financial condition therefore led the court to up- hold the dismissal based on just cause.52

“Good cause” must be determined based on the facts of each case.53 For example, “good cause” has been established to support dismissal where a tenured teacher: (1) cohabitated with a teacher of the opposite sex; (2) used a human fetus in the classroom when discussing abortion;

1. talked about abortion; and (4) spoke to classes about personal living arrangements.54

Violation of school policy may constitute cause. Dismissal of a tenured teacher was up- held for violating a school policy that stated that “the board of education does not encourage cor- poral punishment.” Over a four-year period, the teacher had kicked a student, struck another in the face, knocked a person to the floor, and com- mitted other similar acts.55 Needless to say, the court upheld the dismissal for cause.

Failure to abide by school rules may be either “good cause” or insubordination. In a case where a tenured teacher was warned numerous times to stop religious activities such as writing “God is truth and truth is God,” on the blackboard, the board dismissed him for cause. The teacher did not deny the allegations and said he would not stop because “he was a Christian and that part of his mission was a sense of evangelism.” His actions and refusal to abide by the board’s order constituted good cause grounds for dismissal.56

Cause for dismissal may also be supported for violation of a policy prohibiting corporal punishment. In a case where a teacher grabbed a child and kneed him in the back, causing him to cry, and shoved another child to the floor, the court found sufficient cause.57

Thus, cause, good cause, or just cause may encompass a host of teacher misbehaviors that could probably be otherwise justified as incom- petency, insubordination, neglect of duty, or some other more specific charge. As noted ear- lier, however, such other specifications may not

be necessary if the school board is vested by the tenure law with the more general catchall term of *cause*.58

*Teacher’s Dismissal for Just Cause Is Appropriate Where Shoplifting Was Determined to Harm Her Effectiveness and Competence*



#### Board of Directors

**of Lawton-Bronson v. Davies**

*Supreme Court of Iowa, 1992.*

*489 N.W.2d 19.*

SNELL, Justice.

This is a school teacher termination case under section 279.27 of the Iowa Code (1989). The appellant, Lawton-Bronson Community School District, made findings of just cause to discharge appellee, Kathleen Davies, during the contract year. . . .

Kathleen Davies was employed by the Lawton- Bronson Community School District as an elemen- tary teacher. On November 17, 1989, Davies was arrested for shoplifting at a Younker’s Depart- ment Store in Sioux City, Iowa. A formal charge of third-degree theft was filed against her on December 20, 1989.

On January 22, 1990, the district’s superin- tendent of schools issued to Davies a notice and recommendation to terminate her employment contract pursuant to Iowa Code section 279.27 (1989). . . .

Davies claims that her compulsion to engage in shoplifting activity is the result of a mental illness/disability and, therefore, such conduct does not rise to the level of just cause for termi- nation of her employment. The board of direc- tors of the school district maintains that the acts of shoplifting and other incidents at the school are undisputed and have detrimentally affected her ability to be a role model to the students. . . .

The school superintendent also provided testimony by several teachers and one parent as to other incidences of Davies’ behavior as a teacher. These incidences were: (a) statements to

her fifth grade class that she carries a handgun,

(b) statements to a student that she understood his pain related to headaches and would like to fly out of a window, (c) students dictating the substance of classes, (d) laying her head on her desk due to headaches on several occasions,

1. taking several pills in front of students, and
2. making an improper reference to “Jesus Christ” during class. . . .

Several parents expressed concern to the su- perintendent and other teachers about her ability to be an effective teacher. Five of Davies’ col- leagues, two of her principals, and the superin- tendent all testified that the shoplifting incident adversely impacted upon her ability to be an effective role model for fourth and fifth graders and would prevent her from being an effective teacher in the future.

On the issue of Davies being an appropriate role model, the board found that Davies was not a good role model prior to November 17 and, therefore, the knowledge by the district’s pa- trons and students that she was involved in sev- eral cases of theft caused an irreversible situation whereby Davies could no longer be an effective teacher or role model. The board further found that fifth grade students would be negatively impacted by the knowledge of the thefts regard- less of Davies’ ability to be acquitted as a result of any diminished responsibility defense. . . .

. . . In our review, we give weight to the find- ings of fact made by the board of directors of the school district but are not bound by them. Iowa Code § 279.18. We examine the evidence to de- termine if the decision of the board of directors of the school district has support in a preponder- ance of the evidence in the record as a whole. . . . The statute under which this case proceeded provides: “a teacher may be discharged at any time during the contract year for just cause.” Iowa Code § 279.27 (1991). The term “just cause” includes legitimate reasons relating to teacher fault. In *Briggs v. Board of Directors,* 282 N.W. 2d

740, 743 (Iowa 1979), we stated:

Probably no inflexible “just cause” definition we could devise would be adequate to measure the myriad of situations which may surface in future litigation. It is sufficient here to hold that in the context of teacher fault a “just cause” is one which directly or indirectly significantly and ad- versely affects what must be the ultimate goal of

every school system: high quality education for the district’s students. It relates to job performance including leadership and role model effectiveness.

In applying the “just cause” criteria to this case, the adjudicator and the district court de- termined that our case of *Smith,* 293 N.W.2d at 221, required that the board be reversed. We thus have an issue both of interpretation and applica- tion of our case law, primarily as formulated by the *Smith* case.

In *Smith,* we reviewed the termination of a teacher employed as a counselor who was hav- ing difficulties fulfilling his official duties due to a preoccupation with personal problems. Smith was given an extended leave of absence and sought professional psychiatric help. After di- agnosis and treatment for a paranoid condition, Smith’s doctor testified he no longer suffered from the condition. The doctor further stated that he could not determine when Smith would be fully capable of returning to work but did say that he could try returning to his duties.

We recognized in *Smith* that just cause for ter- mination of a teaching contract may be found as a result of mental or physical disability. . . . Among the appropriate factors to be considered are “the nature and the extent of the duties re- quired by the contract, the character and dura- tion of the illness, the needs of the employer and the extent to which the duties can be performed by another.” . . .

Davies argues, on the law, that *Smith* makes no distinction among a teacher’s effectiveness, com- petence, and role modeling and therefore applies to this case. Role modeling comprises a part of a teacher’s effectiveness and competence. . . .

It is extremely difficult in this case to com- partmentalize those characteristics of Davies that may properly be considered in judging her role as a teacher. To consider the shoplifting incident as the crux of the matter and look for an explana- tion to Davies’ adverse reaction to medication is an oversimplification of the problem facing the school board. Such an approach virtually ignores Davies’ prior history of inappropriate conduct in the classroom, which bears not on her teaching skills but on the perception of her by students as someone to emulate.

There is much precedent for requiring a teacher to be a good role model. The United States Supreme Court in *Ambach v. Norwick,*

441 U.S. 68, 78–79, 99 S. Ct. 1589, 1595, 60 L. Ed.

2d 49, 57–58 (1978), stated:

Within the public school system, teachers play a criti- cal part in developing students’ attitude toward gov- ernment and understanding of the role of citizens in our society. . . . Further, a teacher serves as a role model for his students exerting a subtle but impor- tant influence over their perception and values. . . .

. . . The particular issue of shoplifting has arisen in other jurisdictions. In *Leslie v. Oxford Area School District,* 54 Pa. Commw. 120, 420 A.2d 764 (1980), the teacher asserted that her act of shoplifting was a result of temporary mental instability brought on by physical and emotional stresses. The Penn- sylvania court found that the act of shoplifting is immoral and affects the teacher’s ability to pro- vide effective instruction. Regarding the teacher’s claim of temporary mental instability, the court said: “The circumstances described are mitigating but they cannot ‘eradicate the result or change the complexion of her acts.’ ” . . .

In its review of Davies’ record as a teacher, the board specifically found that she was not a good role model for the students even prior to the shoplifting incident of November 17. It re- ferred to her startling comments and bizarre con- duct in the classroom, referenced in this opinion. This finding was followed by a finding that the knowledge by the district’s patrons and students of her several cases of theft caused an irrevers- ible situation whereby she could no longer be an effective teacher or role model. . . .

The need for a teacher to be a good example to the students is not denied by Davies in her ar- gument. Rather, she views role modeling as part of a teacher’s effectiveness and competence. On this, the board agrees and so do we. As it is arti- ficial to separate these components of a teacher’s abilities in making a factual determination of “just cause,” so it is strained to interpret the legal requirements in that manner. . . .

. . . The findings by the board are extremely detailed. They lead to a conclusion that Davies’ status as a role model was permanently impaired in her employment at the school with no hope of reconstruction due to the small size of the school district and the widespread knowledge of her status. Although not specifically mentioned, we find that the matters required by *Smith* to be con- sidered were substantially included by the board

in its determination. Davies was given a fair hearing by the board that met the legal require- ments for the protection of her rights.

Our review convinces us that there is sub- stantial evidence to support the board’s conclu- sion. The board has established “just cause” for termination of Davies’ employment under sec- tion 279.27 by a preponderance of the competent evidence. . . .

REVERSED AND REMANDED.

###### CASE NOTES

1. *Cause.* Good and just cause includes “any cause bearing a reasonable relationship to a teacher’s fitness to discharge [his or her] du- ties” or “conduct which materially and sub- stantially affects performance.” *Fredrickson v. Denver Public School District No. 1*, 819 P.2d 1068 (Colo. 1991).

Statutory grounds of “just cause” for ter- mination of employment of a tenured teacher may be interpreted by a school board as en- compassing insubordination. Where a teacher routinely took a confrontational approach to her supervisors, responded negatively to per- formance evaluations, disagreed with various instructional decisions, and refused supervi- sory oversight of her curriculum and class- room methods, the South Dakota Supreme Court agreed with the school board determi- nation that such constituted insubordination and was just cause for dismissal of the teacher. *Barner v. Spearfish School District No. 40-2,* 725 N.W.2d 226 (2006).

In a rather bizarre case where a teacher shouldered his way into a fourth-grade child’s life and then pursued a battle against the child’s parent to wrest legal custody from her, the court upheld the teacher’s dismissal for good and just cause. *Kerin v. Board of Education, Lamar School District,* 860 P.2d 574 (Colo. Ct. App. 1993).

In a case where a hearing was conducted after a parent complained about a female teacher sending “dirty e-mail jokes” to a former female student, the teacher was dismissed for “good and just cause.” The court upheld the dismissal finding the offense to be a “fairly serious mat- ter” constituting unprofessional conduct that was disruptive of school decorum. *Oleske v. Hilliard City School District Board of Education,* 764 N.E.2d 1110 (Ohio Ct. App. 2001).

1. *Unfitness.* In *Weissman v. Board of Education,* 190 Colo. 414, 547 P.2d 1267 (1976), the court held that in determining whether a teacher’s conduct indicates unfitness to teach, certain matters may properly be considered, including the age and maturity of the teacher’s students, the likelihood that his or her conduct may have adversely affected students and other teach- ers, the degree of such adversity, the proxim- ity or remoteness in time of the conduct, the extenuating or aggravating circumstances sur- rounding the conduct, the likelihood that the conduct may be repeated, the motives under- lying it, and the extent to which discipline may have a chilling effect upon the rights of either the teacher involved or other teachers.
2. *Unprofessional Conduct.* Some tenure laws provide for the dismissal of teachers for un- professional conduct. *Black’s Law Dictionary* contains the following definition:

*UNPROFESSIONAL CONDUCT.* That which is by general opinion considered to be grossly unpro- fessional, immoral or dishonorable; *State Board of Dental Examiners v. Savell,* 90 Colo. 177, 8 P.2d 693, 697, that which violates ethical code of profession or such conduct which is unbecoming member of profession in good standing. *People v. Gorman,* 346 Ill. 432, 178 N.E. 880, 885. It involves breach of duty which professional ethics enjoin. *People v. Johnson,* 344 Ill. 132, 176 N.E. 278, 282.

See also the authorities annotated under the title “Unprofessional Conduct,” 43A Words and Phrases 83. In 68 Am.Jur.2d *Schools* § 161 is found the following:

Unprofessional Conduct Definition: “Unprofessional Conduct” refers to conduct that violates the rules or the ethical code of a profession in good standing, or which indicates a teacher’s unfitness to teach. So construed, a statutory provision authorizing dis- missal of a permanent employee for unprofessional conduct is not rendered void for vagueness.

The phrase “unprofessional conduct” is to be construed according to its common and ap- proved usage, having regard to the context in which it is used. *Board of Education of City of Los Angeles v. Swan,* 41 Cal. 2d. 546, 261 (1953). Unprofessional conduct means conduct indicating an unfitness to teach. *Morrison v. State Board of Education,* 1 Cal. 3rd 214, 82 Cal.

Rptr. 175, 461 P.2d 375 (1969).

In a case where a male teacher admitted to homosexual intimacy with a student, the court upheld the teacher’s dismissal for unprofes- sional conduct. In what could be classified as an Olympian understatement, the court said: “A teacher who invites or permits a student or students to sleep with him and engage in intimate activity compromises his ability to teach.” Such activity by definition would, of course, have a detrimental effect on the school and classroom. *Morris v. Clarksville-Montgomery County Consolidated Board of Education,* 867 S.W.2d 324 (Tenn. Ct. App. 1993).

###### REDUCTION IN FORCE

Some school districts have been faced with declin- ing student enrollments, and as a result, there has been a necessary, corresponding reduction in the number of professional employees. Reductions in force may be brought about through enrollment declines, financial exigencies, reorganization, or the elimination of programs. Therefore, even a tenured teacher may be removed from the work- force if justification is substantiated.

Local school boards may, within their discre- tion, establish a reduction-in-force policy, absent contractual obligations created by statutory or collective-bargaining agreements. Such a policy should consider: (1) the necessity of a reduction in force; (2) the positions eliminated; (3) the bad- faith actions of school boards; and (4) seniority.59

*Reduction in Force Must Be in Good Faith and for Constitutional Reason*



#### Zoll v. Eastern Allamakee Community School District

*United States Court of Appeals, Eighth Circuit, 1978.*

*588 F.2d 246.*

Action was brought by former school teacher for reinstatement and back pay following non- renewal of her contract. The United States Dis- trict Court for the Northern District of Iowa . . .

entered judgment in favor of teacher against superintendent and elementary principal, and superintendent and principal appealed and teacher cross-appealed. The Court of Appeals . . . held that: (1) there was sufficient evidence of illicit motive for nonrenewal of teacher’s contract to support jury verdict of liability; (2) no revers- ible error was committed in charging jury on elements of teacher’s case, but (3) district court failed to comply with requisite guidelines for at- torney fee awards and decided back pay claims against school district without benefit of the Supreme Court’s recent *Monell* decision, which foreclosed absolute immunity for local govern- ing bodies.

Mrs. Zoll holds a Master’s Degree in Elemen- tary Administration and is certified by the State of Iowa as both a teacher and an administrator. Prior to the nonrenewal of her contract, she had been employed as a first-grade teacher in Alla- makee County for twenty-nine years. The last fifteen years of her teaching career were with the Eastern Allamakee Community School District which was organized after she began teaching. She was promoted to elementary school princi- pal in the Eastern Allamakee Community School District but resigned after two years to devote her full time to teaching.

In September 1973, Mr. Harold Pronga suc- ceeded Mrs. Zoll as the elementary school prin- cipal. In June and July 1974, Mrs. Zoll wrote two letters to the editor of a local newspaper sharply criticizing Mr. Pronga, School Superintendent Duane Fuhrman, and school board members Lawrence Protsman, Hugh Conway, James Met- tille and Roy Renk for a decline in administra- tive concern with academic excellence.

Mrs. Zoll complained that athletics were stressed over academics in the high school and that the quality of the elementary school was also in jeopardy. Her fears were based in part upon Mr. Pronga’s refusal to authorize her requisi- tion for work books and his suggestion that Mrs. Zoll teach her students to play “Fish” and “Concentration.”

In August, 1974, on her second day at school following the summer vacation, Mrs. Zoll was summoned to Mr. Pronga’s office to discuss the letters. Mr. Pronga had informed Superintendent Fuhrman of the planned meeting. At the outset of their discussion, Mr. Pronga read to Mrs. Zoll

from his prepared notes: “I am very concerned and equally puzzled by your letters to the edi- tor.” Mr. Pronga accused Mrs. Zoll of misrep- resenting facts and chastised her for failing to express her feelings through proper channels.

In December 1974, the school board followed the suggestion of the Iowa Department of Public Instruction in adopting a contingency plan for staff reduction in the event of a decline in enroll- ment. The plan included rules for determining the pool of teachers from which layoffs would be made. Selection from the pool would be by a 100-point system. A maximum of 40 points could be awarded for experience and training. The principal, superintendent and school board could award up to 20 points each, based on their subjective evaluations.

At the February 1975 school board meet- ing, the board was informed of a projected en- rollment decline of first-grade students for the 1975–76 school year which would warrant a staff reduction. The board treated as a pool from which a lay-off would be made the three first- grade teachers: Mrs. Zoll, Mrs. Rebecca Oker- lund and Mrs. Jane Meyer. The official decision of which teacher to terminate was postponed until the March board meeting. Mrs. Zoll was advised by a colleague of the school board presi- dent that the decision to terminate her was actu- ally made at the closed executive session of the February board meeting.

Out of the potential 100 points, Mrs. Zoll re- ceived 57, Mrs. Okerlund 62½, and Mrs. Meyer

72. Mrs. Zoll was erroneously awarded 17 points for experience, although she was entitled to 20 points under the objective scale. Thus, she was actually awarded 54 points, although entitled to 57 points. Mrs. Zoll received the highest point totals on the objective evaluation of experi- ence and training. Out of a possible 40 points, Mrs. Zoll received 40, Mrs. Okerlund 4½, and Mrs. Meyer 16. Mrs. Zoll received the lowest point totals on the subjective evaluations by Mr. Pronga, Mr. Fuhrman and the school board. Out of a possible 60 points, Mrs. Zoll received 17, Mrs. Okerlund 58, and Mrs. Meyer 56.

On April 8, 1975, the school board notified Mrs. Zoll that her contract would not be renewed for the 1975–76 school year. A public hearing was convened by the school board at Mrs. Zoll’s request on June 9, 1975, pursuant to Iowa Code

§ 279.13 (1975). At the conclusion of the hearing, the board voted four to one not to renew her contract.

On December 15, 1975, Mrs. Zoll filed suit against Mr. Pronga, Mr. Fuhrman, and the four board members who voted not to renew her con- tract, alleging that they had refused to renew her teaching contract in retaliation for her exercise of First Amendment rights, in violation of 42 U.S.C.

§ 1983 (1970). . . .

There is sufficient evidence of a retaliatory mo- tive for the nonrenewal of Mrs. Zoll’s contract to support the jury verdict. Mrs. Zoll’s letters to the editor criticizing the school administration were published in the summer of 1974. On the second day of the 1974–75 school year, Mr. Pronga called Mrs. Zoll to his office to express his displeasure with the letters. Mr. Fuhrman had foreknowl- edge of the meeting. There was testimony that the decision to terminate Mrs. Zoll was made be- fore the statistical evaluation. Mrs. Zoll’s expert witness testified to inconsistencies between the points assigned Mrs. Zoll and the notes and tes- timony of Mr. Pronga and Mr. Fuhrman.

Under the staff reduction policy which the board had adopted in December 1974, teach- ers laid off pursuant to the policy were granted certain “recall rights” for a three-year period: “Any staff member laid off due to reduction of staff policy may be recalled if a vacancy exists within three years.” Three vacancies arose dur- ing the year following Mrs. Zoll’s termination. The vacancies were at the first grade, sixth grade and seventh-eighth grade levels. Mrs. Zoll ap- plied for but was not offered any of these posi- tions. Instead, two new teachers were hired and one teacher was transferred to fill the vacancies. The jury could reasonably have believed that the subjective rating of Mrs. Zoll by Mr. Pronga and Mr. Fuhrman was a pretext for discharging her for exercising her First Amendment rights. See *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). . . .

Accordingly, we affirm the entry of judgment of liability on the jury verdict, vacate the attor- ney’s fee award and remand to the district court for reconsideration of the post-trial back pay issue and the attorney’s fee award and for fur- ther proceedings consistent with this opinion.

Affirmed in part, vacated and remanded in part.

###### CASE NOTES

1. Reduction-in-force litigation can reach in- depth considerations of a teacher’s endorse- ment to teach a certain subject. Where wording of a collective bargaining agreement lacks pre- cision regarding credentials, courts may step in to settle the matter regarding seniority in a particular teaching area. A good example is the South Dakota Supreme Court’s distin- guishing a “computer science” endorsement from that of “educational technology.” The court disallowed “bumping” rights of a se- nior teacher who was certified in the former but not the latter because the “educational technology” endorsement required a math and science certification and the “computer science” endorsement did not. *Hansen v. Vermillion School District No. 13-1*, 727 N.W.2d 459 (2007).
2. A law that permits dismissal of a tenured teacher for “good cause” is sufficient to support a reduction-in-force (RIF), terminat- ing employment of a tenured teacher. The Montana Supreme Court has ruled that a school district’s decrease in general fund revenue constituted good cause to justify a RIF. The court also determined that a school board policy that provided for bumping rights to be determined by four criteria: se- niority, evaluations, multiple certifications to enhance teacher versatility, and the num- ber of students taught to meet accreditation standards, was rational and objective, justify- ing the termination of a more senior teacher. *Scobey School District v. Radaovich,* 332 Mont. 9, 135 P.3d 778 (2006).
3. A tenured teacher may have “bumping” rights in time of fiscal stress. A Montana court has held that a high school principal with tenure had the right to bump an untenured teacher in a subject matter area in which he was certified to teach. *Holmes v. Board of Trust- ees of School District Nos. 4, 47 and 2,* 243 Mont. 263, 792 P.2d 10 (1990).
4. In abiding by the intent of tenure laws, school boards must follow a protocol that gives pri- ority to tenured teachers in retaining employ- ment. An Oklahoma court has explained:

When declining enrollment requires a reduction- in-force, a school board must balance a district’s

needs against available resources and take ap- propriate action to curtain personnel. Although a school board may exercise wide latitude and autonomy in choosing a method for reducing the teaching force, its RIF policy must nonetheless conform to the commands of tenure law. Tenured faculty has a claim to preferential status over non- tenured faculty in implementation of a reduction- in-force plan. To hold otherwise would emasculate the statutory tenure policy and let school boards do indirectly what they cannot do directly. Tenure rights must be protected and school boards af- forded the necessary discretion to so shape qual- ity education programs as to make them meet the available financial resources. In sum, a school board is always free to adjust its teachers’ roll to meet economic necessity, but it cannot invoke unsanctioned grounds to subvert the statutorily mandated security-from-termination protection for tenured teachers.

*Babb v. Independent School District No. I-5 of Rogers County,* 829 P.2d 973 (Okla. 1992); *see also Barton v. Independent School District No. I99,* 914 P.2d 1041 (Okla. 1996).

1. The term *just cause*, justifying termination of the employment of a tenured teacher, may be defined as including not only incompetence, turpitude or performance of duties, but also encompasses exigent fiscal conditions that justify a reduction in force (RIF). *Aguilera v. Board of Education of the Hatch Valley Schools,* 139 N.M. 330, 132 P.3d 587 (2006).

### Constitutional Protection of Contracts

Both state60 and federal61 constitutions contain protections against the unilateral alteration of contracts by the state to disadvantage individu- als in their relationships with the government. Basically, these provisions ensure the citizens that the state will not modify or abolish a con- tract to which it is a party.

However, an inherent conflict exists between the guaranteed sanctity of contracts and the police power of the state in subsequent legis- latures to make and change laws in the inter- est of the common good. A legislature cannot be completely bound and restricted by agree- ments made by earlier legislatures. Thus, the constraints placed on legislatures by the contract provisions of the state and federal constitutions

must necessarily be hedged to allow the govern- ment to function freely. The U.S. Supreme Court has declared:

it is settled that neither the “contract” clause nor the “due process” clause has the effect of overrid- ing the power of the State to establish all regula- tions that are reasonably necessary to secure the health, safety, good order, comfort, or general wel- fare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and all contract and prop- erty rights are held subject to its fair exercise.62

Whether the individual’s right to a contract prevails over the state’s interest in modifying the agreement is dependent on at least three conditions. First, an agreement between an in- dividual and the state must clearly be a “con- tract” before it invokes the obligation of contract protection. It cannot be simply a privilege be- stowed by the state, or some other relationship defined as something other than a contract. Second, the rights under a contract are deter- mined by the laws existing at the time that the contract was made.63 Third, where, on balance, the interests of the state in modifying or abrogat- ing the contract are sufficiently weighty and com- pelling, the interest of the individual must give way to the common and general interest of all the people.

The burden of proof is on the individual to show that a particular relationship with the state is, in fact, a contract. The U.S. Supreme Court in *Dodge v. Board of Education* defined the condi- tions necessary for a statute to be regarded as a contract:

In determining whether a law tenders a contract to a citizen it is of first importance to examine the lan- guage of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear. . . . On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at will by the legislature. This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption.64

The most important precedent rendered by the Supreme Court defining the extent of gov- ernmental prerogative with regard to contracts was the famous *Dartmouth College* case,65 which gave form and substance to Article I, § 10, the obligation of contracts provision of the U.S. Con- stitution. That article states: “No State Shall . . . pass any law . . . impairing the Obligation of Contracts. . . .”

In *Dartmouth College,* the English crown had granted a charter to the college, which had been established in the colony of New Hampshire as a private institution.66 The college was governed by a self-perpetuating board of 12 members. A conflict that had political ramifications devel- oped between the college president and the board members. Reacting to this controversy, the New Hampshire legislature enacted legisla- tion in 1816 that materially altered the charter, making the college a state institution. The col- lege trustees brought an action and claimed, in part, that the act of the legislature was uncon- stitutional and impaired the obligation of their contract, the original charter. The opinion of the Court, delivered by Justice Marshall, made two constitutionally important points: (1) a charter is a contract, and (2) a contract between an indi- vidual and the state is protected by the U.S. Con- stitution, Article I, § 10, “No State Shall Pass Any Law Impairing the ‘Obligation of Contracts’.”

Later, in an Indiana case, *Indiana ex rel. Anderson v. Brand,*67 Article I, § 10, of the U.S. Constitution was directly applied as a limitation on state legislative actions pertaining to public educa- tion. The Indiana legislature passed an act that repealed a 1927 law granting tenure to teachers, and a teacher thereafter sought a *writ of manda- mus* to compel her continued employment. She claimed the original act had granted her a con- tinuing contract that could not be impaired nor breached by subsequent legislation. The original act provided, “It is further agreed by the con- tracting parties that all of the Teachers’ Tenure Law, approved March 8, 1927, shall be in full force and effect in this contract.”68

The Indiana Supreme Court ruled in favor of the defendant board of education, and the teacher appealed. The U.S. Supreme Court reversed the Indiana court.69

Both of these decisions illustrate the con- stitutional requirements within which a state

legislature must operate when dealing with contracts. Particular application may be noted where legislation such as tenure and retirement statutes may create a contract between the state and an individual. There is a fine line between the constitutional rights of one individual and the rights of the people as exercised through the elected authority of the legislature to provide for the welfare of the state. This is demonstrated by the dissent of Justice Black in the *Anderson v. Brand* case, when he said that the Supreme Court should not interfere with the determination of educational policy by the Indiana legislature be- cause the legislature of a state cannot make and be held to a contract “with a few citizens, that would take from all the citizens, the continuing power to alter the educational policy for the best interests of Indiana school children. . . .”70

*Constitutional Prohibition Against Impairment of Contracts Is Not Violated by Additional Test Requirement for Retention of Teaching Certificate*



**State v. Project Principle, Inc.**

*Supreme Court of Texas, 1987.*

*724 S.W.2d 387.*

CAMPBELL, Justice.

This is a direct appeal from a temporary in- junction prohibiting enforcement of Tex. Educ. Code § 13.047 (Vernon Supp. 1987) on the ground that the statute is unconstitutional. Section 13.047 provides that public school educators, to retain their teaching certificates, must successfully com- plete an examination known as the Texas Exami- nation for Current Administrators and Teachers, or TECAT. We hold the statute is constitutional and we reverse the judgment of the trial court and dissolve that court’s injunction. . . .

On July 3, 1984, the state legislature passed into law House Bill 72. The bill contained numerous educational reforms, including additional school funding, school finance reform, teacher salary increases, and teacher competency testing. . . .

Section 13.047 provides for a testing pro- gram by the State Board of Education for con- tinued certification of all educators who have not taken the test required by section 13.032(e) of the Code. However, the section 13.032(e) test was first administered on May 24, 1986; thus, all previously certified teachers, including all members of Project Principle, were required to take the TECAT. . . .

The state argues that the trial court’s injunc- tion is in error because section 13.047 impairs no contract rights. Project Principle contends that teaching certificates are contracts with which the legislature may not interfere. We hold that a teaching certificate is not a contract within the meaning of article I, section 16. Rather, the cer- tificate is a license, and like all licenses, is subject to such future restrictions as the state may rea- sonably impose.

The United States Supreme Court spoke to the impairment of contracts argument more than forty years ago in *Dodge v. Board of Educa- tion,* 302 U.S. 74, 79, 58 S. Ct. 98, 100, 82 L. Ed. 57

(1937). In *Dodge,* retired teachers challenged an act of the Illinois legislature which decreased the amounts of annuity payments to retired teachers of Chicago public schools. The teachers claimed that the Act impaired the obligation of contracts in contravention of article I, § 10 of the United States Constitution. The Supreme Court of Illinois held that in passing the statute providing for the annuities the state legislature evinced no intent to create a binding contract with teachers. The United States Supreme Court affirmed, stat- ing “the presumption is that [a tenure] law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.”

As early as 1925 it was recognized in Texas that a teaching certificate is a license. In *Marrs v. Mat- thews,* 270 S.W. 586 (Tex. Civ. App.—Texarkana 1925, writ ref’d), a teacher claimed that the state superintendent could not cancel his “permanent teacher’s certificate” because the language used in describing the offenses for which a certificate may be cancelled was void for vagueness. The teacher also claimed that the statute giving the superintendent the authority to cancel the certif- icate of any “unworthy” teacher was an attempt to confer judicial powers upon an executive de- partment of the state government. In dissolving

the trial court writ enjoining cancellation of the teaching certificate, the court stated that a teach- ing certificate “is merely a license granted by the state, and is revocable by the state.” The court noted that the teacher had “voluntarily sought and secured a statutory privilege to be enjoyed

must be judged by a rational basis standard. We hold that competency testing bears a rational rela- tion to the legitimate state objective of maintain- ing competent teachers in the public schools. . . .

We reverse the judgment of the trial court and dissolve that court’s injunction.

subject to statutory conditions.”

Because we hold a teaching certificate is not a contract, the constitutional prohibition against impairment of contracts is not violated when the legislature imposes new conditions for the reten- tion of the certificate. Further, because the cer- tificate is a license and confers no vested rights, the constitutional prohibition against retroactive laws is not violated. It is only when vested rights are impaired that a retroactive law is invalid. . . . The state contends the trial court’s injunc- tion is in error because section 13.047 does not violate due process guarantees. Project Princi- ple contends the statute violates federal and state guarantees of due process. . . . Project Principle argues that after the enactment of section 13.047, educators’ certificates are subject to cancellation without a hearing or avenue for appeal upon fail- ure to take the TECAT or to perform satisfactorily

on the TECAT.

First, it must be noted that decertification is not automatic upon failure of the examination. Section 13.047 provides that “each teacher must be given more than one opportunity to perform satisfactorily” on the TECAT.

Second, provisions for appeal of “proceedings concerning the suspension, revocation, or cancel- lation of a [teaching] certificate” are contained in 19 Tex. Admin. Code § 157.1(b)(4) (1985). . . .This review provides procedural due process to any teacher who fails to perform satisfactorily on a competency examination. . . .

. . . Project Principle argues that the classifica- tion of teachers into a class composed of those who pass the test and a class composed of those who fail the test is subject to strict scrutiny under equal protection analysis. Strict scrutiny is appli- cable, Project Principle argues, because the clas- sification impinges upon a fundamental right, the right to practice a profession.

. . . Likewise, we hold a person’s interest in teaching is not a fundamental right.

The right to teach not being fundamental, a classification which impinges on that right is not subject to strict scrutiny. . . . Rather, the TECAT

###### CASE NOTE

The elimination of tenure for principals in Chicago did not violate the federal Constitution. Tenure was found not to be a contract; therefore, Article I,

§ 10, the Obligation of Contracts provision of the

U.S. Constitution, was not violated. *Pittman v. Chicago Board of Education,* 860 F. Supp. 495 (E.D. Ill. 1994).

### Summation of Case Law

*Certification*

1. The distinction between citizens and aliens is fundamental to the definition and gov- ernment of a state, and thus governmental entities, when exercising the functions of gov- ernment, have wide latitude in limiting the participation of noncitizens.
2. Because public schoolteachers may be regarded as performing a task that goes to the heart of representative government, and since all pub- lic schoolteachers, regardless of courses taught, should help fulfill the broader function of the public school system, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bear a rational relationship to a legitimate state interest.
3. A school board’s residency requirement for teachers is not invalid on equal protection grounds because it required newly hired teachers to move into and remain in district and yet permitted those already hired to re- main or move outside district.
4. A school board may terminate a teacher for conduct outside of school if there is sufficient nexus between the conduct and the board’s legitimate interest in protecting the school community from harm.

*Contracts*

1. Nonrenewal of teacher ’s contract can be based on the teacher’s failure to obtain the re- quired hours of summer school and extension courses required by contract of all teachers.

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1. A teaching certificate may be structured as a license rather than a contract and as such is subject to any future restrictions as the State may reasonably impose.

*Tenure*

1. A probationary teacher does not become a “career teacher” with expectancy of tenure after signing a third consecutive one-year contract but before completing performance required under such contract. At all times prior to completion of third year, a teacher’s status is probationary.
2. A probationary teacher who had completed three years of service does not acquire tenure rights by working a fourth year under tempo- rary contract.
3. A single incident may be of such magnitude or of such far-reaching consequences that a teacher’s ability to perform his or her duties will be permanently impaired, and a finding of “incompetence” would be proper.
4. For purposes of terminating a teacher, insub- ordination can be a single incident of will- ful or intentional disobedience which, when viewed in light of community standards and subject to judicial review, shows that the teacher’s conduct was sufficiently serious to warrant the sanction of dismissal.
5. A school board’s decision to terminate a teacher will not be set aside on appeal un- less the decision is fraudulent, arbitrary, and unreasonable; not supported by substantial evidence on the record; not within school board’s jurisdiction; or is based on an errone- ous theory of law.
6. A criminal conviction is not necessary to support a teacher’s dismissal on grounds of immorality.
7. Proof of immoral or unbecoming conduct suf- ficient to merit discharge of a tenured teacher must be supported by documentation from impartial sources, or substantial equivalent.
8. Immoral or unbecoming conduct sufficient to merit discharge of a tenured teacher, when it occurs in context other than professional com- petency in classroom, must have some nexus to the teacher’s occupation. Mere private shortcomings which come to the attention of the school board but have no relation to the teacher’s involvement in or example to school community are not sufficient.
9. Contracts of tenured teachers may be termi- nated for conduct unbecoming a teacher or immoral conduct in regard to off-campus ac- tivities involving students, notwithstanding written records indicating satisfactory teacher performance.

### Research Aids

Research citations below are abbreviated as: *American Law Reports* (A.L.R.), *American Jurispru- dence* (Am.Jur.), *Corpus Juris Secundum* (C.J.S.), and *McQuillen Municipal Corporations* (McQuil- len Mun.Corp.). Explanations for each of these sources of law are found in Chapter 1 of this text. Also, see Appendix B of this book.

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16B Am.Jur.2d Constitutional Law § 655, Fundamental Rights and Privileges: Freedom to Travel.

67B Am.Jur.2d Schools § 154, Teachers and Other Employees: License or Certification.

97 A.L.R.2d 827, Revocation of Teacher’s Cer- tificate for Moral Unfitness.

66 Am.Jur. Proof of Facts 3d, 541, Proof That a Teacher’s License Was Improperly Revoked: Teacher ’s Damages and Emotional Distress Award.

22 A.L.R.3d 1047, Elements and Measure of Damages in Action by Schoolteacher from Wrongful Discharge.

78 C.J.S. Schools and School Districts 434, Teachers, Principals, Superintendents, and Simi- lar Personnel: Measure of Damages.

67B Am.Jur.2d Schools § 235, Teachers and Other Employees: Dismissal for Immoral Conduct.

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78 C.J.S. Schools and School Districts § 385, Retention, Change, Interruption of Employment Status, Reemployment or Renewal.

52 Am.Jur.2d Mandamus § 242, Schools and Colleges: Teachers, Employees, and Administra- tors; Reinstatement.

67B Am.Jur.2d Schools § 205, Teachers and Other Employees: Tenure Statutes.

127 A.L.R. 1298, Teacher Tenure Statutes.

67B Am.Jur.2d Schools § 225, Incompetence and Neglect of Duty.

4 A.L.R.3d 1090, what Constitutes “Incom- petency” or “Inefficiency” as a Ground for Dis- missal or Demotion of a Public School Teacher.

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78 A.L.R.3d 19, Sexual Conduct as Grounds for Dismissal of Teacher or Denial or Revocation of Teaching Certificate.

96 A.L.R. 5th, 391, Federal and State Constitu- tional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct.

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  3. R. Freeman Butts and Lawrence A. Cremin, *A History of Education in American Culture* (New York: Henry Holt, 1953), p. 399.
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