



Letting Teachers Go— LEGALLY

Sometimes, despite a principal's best efforts, a teacher must be dismissed. Here are the basics for how to do so lawfully.

BY STEVE PERMUTH AND ROBERT EGLEY

There are times when an administrator comes to the conclusion that he or she needs to do something to improve his or her school that is painful and legally difficult: fire a teacher. Such a decision usually comes after training, personal counseling, extra supervision, and the like have failed to improve the teacher's performance or after realizing that the teacher is a detriment to the school. But the desire to dismiss a teacher and being able to do so are not the same thing. There are two essential parts of this issue that principals should be well-informed about: the rights of teachers and the expectations and actions incumbent on an administrator who tries to have a teacher removed.

In general, the legal standing of teachers comes from the overlapping and interdependent areas of (1) constitutional rights and (2) statutory and contract rights between the board and the teacher. Because many teacher dismissal cases involve both areas,

We needed to build a case and document the harm that she was doing to the school district...

The law calls for a process that when you are firing a person for incompetence and unprofessional behavior, you have to have a wealth of proof and substantiated documentation to prove that that's what is occurring.

—*Horwitz v. Board of Education of Avaco School District No. 37* (7th Circuit, No. 00-4271 [2001])

administrators should have knowledge of each area. Teachers will look to components of both of these areas—for example, union bargaining agreements, administrative regulations, and codes of ethics—to defend themselves.

Constitutional Rights

From an administrative perspective, perhaps the most important element to understand about the constitutional rights of teachers in public schools is the concept of due process. The Fifth and Fourteenth Amendments stipulate that “no person shall be deprived of life, liberty or property without due process of law.” The nature of due process (some suggest it should be called “process due”) is to provide a broad framework of justice and fairness to individuals in relationship to the government.

The separation of a teacher from employment in the public schools is a classic example of the government’s efforts to seek separation from an employee. A landmark

case of teacher rights, *Board of Regents of State Colleges v. Roth* (408 U.S. 564, 1974), directly focuses on several key elements of such separation and provides commentary about the rights of teachers and the responsibilities of administrators. Roth, a probationary teacher, brought suit against the University of Wisconsin–Oshkosh, claiming that he was not renewed for a second year of teaching and, on the basis of his due process rights, he should have been told why his employment was not renewed and should have had the opportunity to challenge the decision at a hearing. The Court stated clearly that a probationary teacher, if merely nonrenewed, does not have a constitutional claim to due process of law regarding the need for a reason or a hearing. The Court noted that:

The State, in declining to hire the respondent [Roth], did not make any charge against him that might seriously damage his standing and association in the community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, it would be a different case. For “where a person’s good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”

The Court’s decision substantiates the wisdom of probationary terms and annual contracts for new hires. If a teacher’s contract is not renewed after a probationary period, and no charges or statements are made against him or her as part of that decision, the teacher does not have the rights to constitutional due process. Implicit, however, is the assumption that if such charges are made or if the teacher is dismissed during the contact term, the teacher may be able to invoke the constitutional protection of due process.

The Court did not suggest that the board could not hold a hearing or give a statement of reasons, merely that there was no requirement to do so for declining to renew a probationary teacher’s employment. In contrast, the Court noted that once a teacher received continuing contract status through state law or contract, the liberty and property interests of the Constitution belonged to the teacher, whereas the nonrenewed teacher didn’t have those rights.

In *Roth*, the Court suggests that by providing employment under a continuing contact status (e.g., tenure or professional service contract), the employee is “entitled” to his or her position, which cannot be taken away without due process, both procedural and substantive. A court views tenure as a contractual and statutory commitment to the lifetime security of the teacher, disregarding resignation, death, or a reduction in force. It is clear that if an administrator tries to dismiss a tenured teacher, the burden is on school districts to adhere to the rigors of due process. It is important that administrators understand the legal protection a faculty member has after he or she is granted tenure.



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The elements of due process emanating from *Roth* and other cases suggest some essential steps needed to dismiss a tenured faculty member:

1. Timely and adequate notice that details the reasons for the proposed termination
2. The opportunity to be heard "at a meaningful time, in a meaningful manner"
3. The opportunity to confront and cross-examine witnesses
4. The opportunity to present oral arguments and evidence
5. The right to counsel
6. The right to an impartial decisionmaker
7. A statement from the decisionmaker of the reasons for dismissing the employee and the evidence relied upon to make that decision
8. A final decision resting solely on the legal rule of evidence adduced at the hearing.

It takes a significant amount of work to successfully dismiss continuing contract teachers, but this process is likely to have the support of the district, along with its legal resources and administrative support. If the teacher cannot be counseled to leave or merely nonrenewed, the ultimate determination will always weigh the cost of retaining a non-functional and perhaps detrimental teacher against the cost, in personnel and money, of the dismissal itself.

Statutory Rights

Once entitlement (e.g., tenure) is provided, the primary rationale for dismissing a teacher is in the state statutory law, which outlines what conduct fits the statutory rule for dismissal and whether a school board and its agents (e.g., the superintendent or the principal) have enough evidence to support their charges against a teacher. The constitutionality of state tenure statutes that define the grounds for possible termination of tenured teachers (or those in their contracts during probationary stages) has been well established. Although states differ in the specific terms, a tenured teacher might be dismissed for certain behavior. Grounds for such a dismissal are likely to include broad and expansive reasons, such as incompetence and insubordination (which are the two dominant arenas of dismissal), neglect of duty, immorality, moral turpitude, and other behavior covered under the broad umbrella of such terms as *just cause* or *good cause*.

Incompetence

Perhaps the most common ground for the dismissal of tenured teachers lies in the area of incompetence. *Black's Law Dictionary* defines *incompetence* as the "lack of ability, legal qualifications, or fitness to discharge the required duty" (Garner, 1996). This broad term speaks to the mental and physical capability of the tenured teacher to carry out his or her duties. As William Valente (1997) notes in *Law in the Schools*, cases that involve the dismissal of tenured teachers on incompetence grounds have focused on conditions that include physical or mental capacity; lack of knowledge or ability to impart knowledge; failure to adapt to new

teaching methods; physical mistreatment of students; violation of school rules; lack of cooperation with supervisors or coworkers; persistent negligence; failure to maintain discipline; and personal misconduct, in or out of school.

Any statutorily defined parameter can lead to dismissal, but the severity of the problem must be significant and the evidence provided to a hearing agency or the court must be strong and compelling. In *American Public School Law*, Kern Alexander and David Alexander (2001) note that:

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

Granting tenure to the faculty member provides presumption to the court of the teacher's competence. It becomes the burden of the school board to show that such competence can no longer be presumed.

Insubordination

Insubordination is the willful disregard by a teacher of the explicit or implicit directions of an administrator, assuming that the administrator has the right and the responsibility to provide those directions. This disregard can manifest itself as ongoing refusal to listen to the administrator and unwillingness to perform reasonable duties or as a single occurrence that is of such a magnitude that the school has cause to seek the teacher's termination. For example, a Minnesota teacher was dismissed on grounds of failing to improve communication with parents, failing to adopt the school's curriculum, and using school time inappropriately. Noteworthy is the volume of material that was needed to dismiss the teacher.

In general, courts look primarily at acts that are willful and show continual and persistent disregard for authority or at an incident that establishes clear and convincing proof that the teacher knew and intentionally violated school directives. Courts will, however, always examine whether the problem was a result of a simple mistake of communication or unwillful response to the authority. Issues of insubordination gain support from the court if it can be shown that:

- The teacher violated a rule or directive that is clearly written, witnessed, or part of school precedent
- The rule is reasonable and known
- The rule is nondiscriminatory and does not infringe on constitutional rights
- Harm resulted from the violation
- The teacher's motive for insubordination was harmful to the health, safety, or welfare of the school
- The misconduct is proven
- Treatment of the incident is consistent with other actions of the administrators in similar circumstances

Recommendations for Principals

- Don't fear the work a dismissal might take if, in your judgment, a teacher is not performing or is detrimental to the operation of your school.
- Separate your personal feelings from the situation, but remember that seeking a person's dismissal affects you as well as that individual.
- Do everything possible to prevent a court case: counseling, reassignment, and professional development are less-costly options. Do not view dismissal as an option if you simply don't get along with a tenured teacher.
- Know the basic constitutional rights, statutes, and local contract issues that are relevant to dismissing contracted teachers as well as not renewing teachers' contracts. These matters will differ from state to state and contract to contract.

Know how your district's legal defense team

money or materials, and growing or smoking marijuana.

Although teachers can be dismissed for immorality, because of due process protection a teacher's controversial actions do not necessarily provide sufficient grounds for dismissal. Courts will likely examine whether the teacher's conduct would or could affect performance in class and whether the behavior would make the teacher unable to perform appropriately in the school and the community. Again, the school administrators have the burden of complying with school district, statutory, and constitutional regulations when moving toward possible dismissal. The damage done to the reputation of a teacher who is accused of immorality and then is found innocent by a court of law has consequences for both the school and the teacher—who may not be able to continue teaching at that school, regardless of the court's findings.

Moral Turpitude

Moral turpitude, a base, vile, or depraved act, has a clear overlap with immorality as a grounds for dismissal. In many cases of moral turpitude, there is associated criminal activity, such as fraud, drug use and dealing or growing marijuana,

Thus, the concept of good or just cause is purposely broad and has been upheld as long as the reasons for dismissal are not arbitrary or capricious, irrational, or unreasonable, and show commitment to the health, safety, and welfare of children. Schools have dismissed tenured teachers for such causes as misrepresenting reasons for absence from school, refusing to stop proselytizing to students, and failing to seek professional counseling. As in the other areas, there is purposeful overlap to ensure that schools can lawfully dismiss tenured teachers who are detrimental to schools.

An analysis of cases strongly suggests that courts tend to look favorably on school districts that can provide a preponderance of specific evidence, inclusive of time to remedy behavior, if possible. A court will also look to the nature of the actions leading to dismissal, as well as how well the school followed the procedural protocols of due process.

As noted in Horowitz at the beginning of the article, it takes careful and dedicated hard work and documentation to remove a teacher who is detrimental to the well-being of the school. Dismissing a tenured teacher should never be taken lightly because it tarnishes the reputation of the teacher and the administrator responsible for building the case. The cost of dismissing a teacher is high and, at times, may not be the best use of a school's time or energy. However, the failure to act in the face of teacher incompetence

has its own consequences—including compromising the morale of the school, its operation, and the education of the students. **PL**

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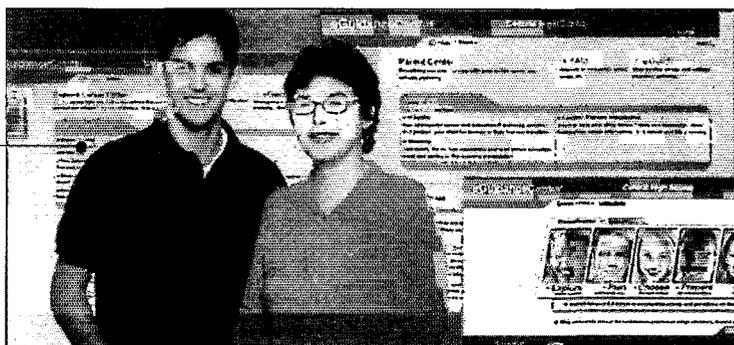
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