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TEACHER CONTRACTS AND THE LAW: WHO IS PROTECTED?



The prevailing law in Catholic schools is contract law. A contract is an agreement between two parties who both incur detriments and derive benefits from the contract.

A teacher agrees to teach (a detriment in that one is unable to perform other employment during that time) and receives a benefit (salary, etc.). The school incurs a detriment (payment of salary) and a benefit (the students are being taught).

Breach of Contract

Breach of contract occurs when one party fails to perform. When a Catholic school is involved in litigation with personnel, the court will examine the provisions of the contract. *Weithoff v. St. Veronica School*, 210 N.W.2d 108 (Mich. 1973), an early but significant case, illustrates. The school terminated Ms. Weithoff's contract after her marriage to a priest who had not been laicized. She had signed a contract of employment that bound her to observe the "promulgated" policies of the sponsoring school. A policy requiring teachers to be practicing Catholics had been adopted by the governing body, but the policy was filed and never published to teachers. Therefore, Ms. Weithoff alleged that the school's dismissal of her was breach of contract. The court agreed and ordered the school to pay damages, since the remedy for breach of contract in the private sector is damages, not reinstatement.

Weithoff illustrates the importance of contract language. Had there been no clause requiring "promulgation," there is a strong possibility that the school would have won this case. The court might well have maintained that a person who teaches in a Catholic school should expect to be held to the requirements of church law.

Either party to the contract, the school or the teacher, can commit breach of contract. It is generally conceded, however, that it is futile for a Catholic school to bring breach of contract charges against a teacher who wants to terminate a contract because to compel a person to teach would be tantamount to involuntary servitude. Courts have stated that since replacements are readily available, a school sustains no injury. Without injury, there can be no lawsuit. As frustrating as this reality can be for principals (especially when a teacher phones over Labor Day weekend to inform the principal that the public school has offered a job and the teacher must report on Tuesday), it is simply a fact of life.

Some people suggest including liquidated damages clauses in contracts requiring a teacher who breaches a contract to pay a fee toward the cost of finding a replacement. The labor laws of most states do not permit withholding monies from salaries, so a school could be forced to pursue a small claims action, which might result in a teacher's paying an amount as low as \$1 a week. Thus, a school might be advised to forego the liquidated damages scenario.

Personnel Policies

Schools are responsible for developing policies that protect the contractual rights of personnel. A court can consider the faculty handbook as part of the contract. Contracts place certain obligations on the employer. It is important that the school's policies be in line with those of the diocese, especially in view of the fact that most teacher contracts bind the teacher to observe the policies and regulations of the diocese or other sponsoring organization.

Nonrenewal of Contract and Dismissal

Policies governing nonrenewal of contract and dismissal from employment should be in place in all schools. Nonrenewal of contract and dismissal from employment are not synonymous terms. Nonrenewal of contract does not carry the same connotations and stigma that dismissal from employment, or being fired, does.

Sometimes, the terms are used synonymously. Indeed, according to the way many contracts are written throughout the country, teachers in Catholic schools may face nonrenewal of contract every year because the contract contains a clause such as "This contract expires June 30 unless definitely renewed." In many of these situations, there is little real difference between nonrenewal of contract and dismissal. If a principal wants to dismiss a teacher, he or she simply does not renew the teacher's contract for the next year.

The situation is different if a school has a policy whereby a teacher can expect continuing employment after a given number of years. Even if no policy exists, *de facto* tenure (discussed later in this article) could be held to exist if an expectation of continuing employment is created.

Documentation: Creating a Paper Trail

The faculty handbook and/or the employment contract should state, at least in general terms, the reasons for which a teacher may be terminated. The most important factor to keep in mind in any termination or nonrenewal situation is documentation. The best protection against a lawsuit is a written record of the reasons and events leading to termination.

The principal should document all events that illustrate what makes an employee ineffective or undesirable. Administrators should keep in mind that teachers and other professional employees may do an adequate job in the classroom, but may behave outside the classroom in ways that are unacceptable. Examples are excessive absenteeism, tardiness, lack of cooperation, etc. Documentation should describe behaviors and avoid judgments. It would be better to record "Ms. Smith sent 20 students to the office for misconduct in a three-day period" than to state "Ms. Jones is having difficulty keeping order."

It is crucial that a principal have a paper trail indicating that the teacher was told of problems and given an opportunity to improve. One way to ensure appropriate communication and documentation is to follow a seven-point checklist when conferencing with problem teachers:

1. Enumerate precisely what is wrong and needs improvement.
2. State that the school wants the teacher to improve.
3. State what the school will do to help the teacher.
4. Set a deadline when all parties will sit down and review improvement or lack thereof.
5. Tell the employee that if there is no improvement within the time frame stated, disciplinary action will result.
6. Give the teacher a copy of the conference documentation stating the first five points and ask the teacher to comment on the document to ensure understanding.
7. Have the teacher sign the document and add any comments he or she wishes to include. If the teacher refuses to sign, have another person witness that fact.

Due Process: Fairness Considerations

In the public sector, due process demands that an accused person be given notice and a hearing before an impartial tribunal. Further, the accused has the right to question accusers, provide witnesses, have an attorney present, and appeal the decision. Recently many courts have required at least the first three elements (notice and a hearing before an impartial tribunal) as essential components of basic fairness in the nonpublic school. At a minimum, schools should develop policies requiring that a teacher facing suspension or dismissal be told of the charges and be given an opportunity to refute them. Some process for appeal should be in place. In most dioceses, the bishop is the “last court of appeal.”

The concept of *de facto* tenure (in fact, there is an expectation of continuing employment) merits mention here. If a Catholic school terminated a teacher who had worked in that school for 10 years, a court would look at the policies, procedures, and past practices of the school or diocese. If teachers are routinely retained after a certain number of years and rarely, if ever, face nonrenewal of contract, it is possible that *de facto* tenure exists. [Note: The concept of *de facto* tenure appears to be on again/off again in popularity. While no Catholic school to this author’s knowledge has ever had to reinstate a dismissed teacher or one whose contract has not been renewed, damages can be awarded, particularly if the judge accepts the *de facto* tenure argument. It is simply impossible to predict accurately the outcome of every hearing or trial or the basis for a particular judge’s decision.]

While Catholic schools are not bound by constitutional due process, they are bound by common law considerations of fundamental fairness. Further, the Gospel demands that those in authority treat others as Jesus would. Thus, some job protection should be available in Catholic schools. A teacher facing termination, for example, should be given a hearing if the teacher requests one.

Local school boards and dioceses should carefully develop and review policies on teacher discipline and dismissal. Reasons for dismissal should be listed. Generally, the following are recognized as legitimate grounds for dismissal: incompetence, insubordination, immorality, neglect of duty, incapacity, and unprofessional conduct.

Some argue that a teacher facing disciplinary measures should be allowed to have an attorney present at every stage of the process. There is no civil law requirement that this be done and, indeed, the presence of attorneys can often create an adversarial atmosphere; such a presence can lessen the possibility of attaining Christian reconciliation. Policy-makers may wish to allow a person facing dismissal or nonrenewal of contract the opportunity to bring a witness who is not allowed to speak.

Catholic school leaders must understand that the law is a parameter in which they must operate. It is appropriate to be concerned about the legal considerations affecting personnel issues in Catholic schools. Sometimes it is difficult to balance legal and Gospel considerations when developing and implementing personnel policies, but such is the challenge Catholic schools face.

New Development: Administrator Job Protection (or Lack Thereof)

A California appellate court in *Tollefson v. Roman Catholic Bishop of San Diego*, 268 Cal.Rptr. 550 (Cal.App.4 Dist. 1990), ruled that no cause of action existed in the case of a Catholic high school assistant principal whose administrative contract was not renewed, but who was offered a teaching contract in the school.

Ms. Tollefson had been employed at Marian High School as assistant principal for seven years. Separate one-year contracts ensured each year's employment. The contract specifically stated that there was no obligation to renew and that the administrator could be transferred to other positions at the school upon expiration of the contract.

Five years after Ms. Tollefson's initial appointment as assistant principal, a new principal was appointed. Two years later he informed Ms. Tollefson that he had decided on an administrative reorganization plan that would not include her. He expressed hope that she would remain on the staff as a teacher.

Ms. Tollefson alleged wrongful termination. The trial court granted summary judgment for the school. Ms. Tollefson appealed. The appellate court held that the express language of the contract limiting its duration to one year made any expectation of employment in that position beyond that time span impossible. The court held further that nothing in the record indicated that an agreement to continue to employ Ms. Tollefson as an administrator "absent good cause" existed.

The *Tollefson* case suggests that an employee whose administrative contract is not renewed will have no legal recourse if a nonadministrative position is offered. Demotion is not grounds for legal action.

[Note: Demotion remains a particularly sore topic in Catholic education. A new principal suddenly tells the assistant principal who has held the position for 15 years that he or she will have to return to teaching; the demoted individual believes the action is unfair and believes that there must be some recourse. But there is none. Demotion is not actionable; the only exception would be if the decision were made on discriminatory grounds, such as race, sex, etc. It is simply a fact of life that the chief administrator has the legal right to choose his or her own administrative team, regardless of whose feelings are hurt in the process or whose status or salary is affected by the decision.] 