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Introduction

The primary distinction between teachers being "tenured" or "untenured" is statutory. Tenure statutes[1] basically require the teacher to be employed for a probationary period of specified length and, if the school wishes to continue the employment beyond this period, they will then develop a relationship that is permanent until the teacher either retires or resigns.[2] In order for a school board to dismiss the tenured teacher, there must be a showing of *cause—i.e.,* that dismissal is for good and sufficient reasons, as opposed to arbitrary or capricious ones. The problem for the non-tenured teacher is whether he has any rights and protections, or simply holds his position at the sufferance of his superiors.[3] The answer at present is uncertain.

Right or Privilege

The uncertainty stems in part from the theory applied to the teacher's status. It is rooted in the right-privilege dichotomy raised by Justice Holmes' epigram: "The petitioner may have a Constitutional right to talk politics, but he has no Constitutional right to be a policeman." [4] Holmes' meaning was that the petitioner, in this case a policeman, certainly had a constitutional right to exercise his free speech in a political context, but his continued public employment was not such a right and, therefore, was not subject to the protection of the Fourteenth Amendment's Due Process. Although not dead, this doctrine is at least no longer

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[1] Some typical examples of tenure statutes are: ALA. CODE tit. 52, § 356–57 (1958); HAWAII REV. LAWS § 38–53; ME. REV. STAT. ANN. tit. 20, § 161.5 (1964). *Also see:* M. L. LEAHY, A NEW TENURE ACT (Nov. 1966), which shows a proposed model tenure act from the American Federation of Teachers.

[2] Hence the expression of a teacher ending the final year of the probation period as being "up for tenure."

[3] By any future use of masculine pronouns, please understand such to be used in the sense of covering both masculine and feminine genders.

[4] 155 Mass. 216, 220; 29 N.E. 517 (1892).

considered to be fully relevant.[5] The Supreme Court has circumvented it on several occasions.

In *Cafeteria Workers* v. *McElroy,*[6] for example, a short-order cook, Rachel Brawner, was denied access to her place of employment, the M and M restaurant located on the premises of the Naval Gun Factory in Washington, D.C. Her identification badge was taken from her, in effect taking away her security clearance. No reason was given for this preemptory action and a hearing request was denied. The Supreme Court upheld this action, basing its decision on a comparison of the interests involved.[7] The Court did not enter into the specific question of whether this was a deprivation of a right or of a privilege, thus avoiding the theoretical jungle. Instead, speaking on the subject of a possible Due Process deprivation, it said, "This question cannot be answered by the assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action." [8]

Balancing of Interests

By proposing this balancing of interests test, the Supreme Court promulgated an approach that distinctly supplants the dichotomy. In other words, why view the distinction at all; instead, why not simply look to see what the relevant interests are.

The basis for federal court appeal by an untenured teacher when dismissed for unspecified reasons lies principally under section 1983 of the Civil Rights Act of 1871.[9] This statute has two primary requisites. The first is that the actor be found to be acting under color of state law. The immediate question could then become whether a local board of education, or a superintendent of schools, may be classed as a state actor. In *Bomar* v. *Keyes,*[10] where the issue was dismissal of a probationary teacher from a publicly-supported institution, the Court said, "That plaintiff's discharge was 'under color' of a state statute scarcely needs discussion." This issue seems rather well settled.

The second requisite of section 1983 is a finding of the deprival of a "right". Herein lies the real problem. In the case of the untenured teacher,

[5] *See generally,* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968). *More specifically in point see:* Davis, *The Requirement of a Trial-Type Hearing,* 70 HARV. L. REV. 193 (1956).

[6] 367 U.S. 886 (1960).

[7] *Id.* at 896.

[8] *Id.* at 894.

[9] 42 U.S.C. § 1983 (1964): Every person who, under color of any statute ... subjects ... any citizen of the United States ... to the deprivation of any rights, privileges or immunities secured by the Constitution shall be liable ...

[10] 162 F.2d 136, 139 (2d Cir. 1947), *cert. denied,* 332 U.S. 825 (1947).

is dismissal the deprivation of a right or of a privilege? In *Jones* v. *Hopper*,[11] a college professor was dismissed, with no reason given. He carried his case to the federal courts under section 1983. The defense raised by the college was that he had not stated a claim on which relief could be granted. The court pointed out the two elements of a section 1983 offense already noted and then, in finding against the plaintiff, asked what right he had been deprived of.

In his allegations, plaintiff had listed the four reasons he believed were the grounds of his dismissal, all constitutionally protected activities—for example, writing articles in opposition to the conflict in Viet Nam.[12] The dissent pointed out that the allegation made by plaintiff is that he is being dismissed for exercise of constitutional rights and that this is the relevant question, not whether he had a right to his job. Indeed, the blatancy of the facts points up the weakness of placing the entire basis of jurisdiction under section 1983 on such an all or none proposition. This leaves a rather large number of persons in an *in terrorem* state as to their jobs, regardless of any degrees of constitutional protection normally afforded their activity. This would seem in conflict with the balancing of interests espoused in *Cafeteria Workers*. How can there be balancing of interests when the plaintiff must contend with a threshhold "yea" or "nay" situation, with no right to raise extenuating circumstances or have other approaches examined?[13] The narrow answer is that the language of the statute simply allows for no other interpretation.

This pattern of analysis has been gradually eroded. In *Wieman* v. *Updegraff*[14] an Oklahoma statute allowed enjoining of salaries of teachers who refused to sign the "loyalty oath." The Court disposes of the proposition of the sovereign's right to condition or dissolve public employment, saying, "to draw .... the facile generalization that there is constitutionally protected right to public employment is to obscure the issue." [15] Also, the Court said, "We need to pause to consider whether an abstact right to public employment exists. It is sufficient to say that the constitutional protection does extend to the public servant whose exclusion .... is patently arbitrary or discriminatory." [16] In other words, this point of erosion of the

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[11] 410 F.2d 1323 (10th Cir. 1969).

[12] *Id.* at 1326.

[13] Also, this case seems in opposition to Shelton v. Tucker, 364 U.S. 479 (1960). There was an Arkansas statute that required each teacher to list his affiliation in all groups. This was held unconstitutionally broad. In so doing the Court said at p. 488: "... even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

[14] 344 U.S. 183 (1952).

[15] *Id.* at 191.

[16] *Id.* at 192.

dichotomy restricts the dismissal to reasonable, lawful grounds, other than such as would be classed arbitrary, capricious or discriminatory.[17]

In *Keyishian* v. *Board of Regents,*[18] the Supreme Court further reiterated this proposition, rejecting the idea that, "... public employment, which may be denied altogether, may be subjected to any conditions, regardless of how unreasonable ...." [19] It is readily apparent that the recent graduate may be turned down upon application for a job. There can be no doubt of this right on the part of a board of education. This case, however, points out that the system cannot condition the employment, once granted, by onerous terms. The distinction lies in the lack of opprobrium attached to simply not being hired, as opposed to being dismissed.

The next year, in *Pickering* v. *Board of Education,*[20] the Supreme Court directed itself, again, to teachers' constitutional rights and their exercise, specifically the right of free speech. The Court in summing up says, " ... we hold that, in a case such as this, in the absence of proof of false statements knowingly ... made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis of his dismissal from public employment." [21] Here, the Court is directing itself to the core issue of not allowing the placing of constitutionally impermissive restraints on a substantive right, rather than to whether the due process safeguards should attach, or whether there is a "right" to the employment.

Another factor is raised by *Pickering.* Although it has been pointed out that government interests in achieving the dismissal of a teacher or any general encroachment on the privileges of the individual must be weighed against the individual's interest, this case seems to point up the existence of a possible third interest—the public. Public and government interests are not always coterminant. In *Pickering,* the facts show that the petitioner was dismissed for having written and published in a newspaper a letter criticizing the board's allocation of funds between educational and athletic programs. The letter was also critical of the methods of the superintendent in publishing information concerning spending. The essence of the point is that the specific disagreement was between the petitioner and the board of education, with the general public isolated from the discussion, yet involved to the extent that it is the audience for both sides. Thus, the Court says, " ... the question whether a school system requires additional funds is a matter of legitimate public concern ... " [22] and says, further, "Teachers,

[17] *See* Slochower v. Board of Higher Education, 350 U.S. 551, 555 (1966).

[18] 385 U.S. 589 (1967).

[19] *Id.* at 605. *Also see:* Sherbert v. Verner, 374 U.S. 398, 404 where the court said: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

[20] 391 U.S. 563 (1968).

[21] *Id.* at 574.

[22] *Id.* at 571.

as a class, are the members of a community most likely to have informed and definite opinions as to how funds alloted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely .... without fear of retaliatory dismissal." [23] At this point in the development, it should be noted that the Supreme Court is, in essence, using the idea that governments must act fairly, that they cannot act arbitrarily towards individuals.

In this light, consideration might also be given the possibility of a denial of equal protection under the Fourteenth Amendment.[24] Basically, this means that the board of education or superintendent could be thought to be denying such equal protection by dismissing one teacher from among several situated in the same position.[25] If this were found to be the case, then the protections of procedural due process would inevitably follow.[26]

One other point is the issue of class or status distinctions in the law. In *Cafeteria Workers,* the Supreme Court set up a balancing of interests as the best method of obtaining the correct result. However, in so doing it subtly made a class distinction for Rachel Brawner. "(She) remained entirely free to obtain employment as a short-order cook or get any other job ... " [27] This inference, albeit weak, is somewhat buttressed by the case of *Greene* v. *McElroy.*[28] Petitioner there was an aeronautical engineer and general manager of a private corporation doing considerable manufacturing and development of military secrets for the Armed Forces. He was denied his security clearance pursuant to Defense Department regulations enacted without explicit authority from either Congress or the President. As a result, the company dismissed him. He was given a hearing on charges of Communist sympathies, but there was no cross-examination of witnesses or full release even of their testimony. The Supreme Court held the Department could not deprive him of this clearance without proper safeguards. But the Court said, "We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our ... notions of fair procedure." [29] Then, speaking of the harm possible to the petitioner, the Court said, " ... petitioner's work opportunities have been severely limited ... ".[30]

A further distinction of this sort is made by the Court as to parties with the status acquired by licensure. In the case of *Schware* v. *Board of Bar*

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[23] *Id.* at 572.

[24] U.S. CONST. amend. XIV, § 1.

[25] *Infra* note 5: Van Alstyne at 1454.

[26] Indeed, Prof. Van Alstyne lists this as one of the six means utilized to circumvent the right-privilege dichotomy, pp. 1445–1458.

[27] *Infra* note 6, at 896.

[28] 360 U.S. 474 (1958).

[29] *Id.* at 506.

[30] *Id.* at 508.

Examiners,[31] the petitioner had been denied his application to practice law in New Mexico on the grounds of undesirable moral character. He had made a showing of good moral character in contradiction, and the Court said, "... it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace." [32] Does this distinction, if based on licensure, also reflect on teachers, who also, as a class, have a state licensure requirement? Does this decision not help the teachers as a class to be raised to the status of being in pursuit of their professions and, therefore, entitled to due process protection procedures?

This analysis breaks down rapidly at one level, since the dismissal of a teacher carries no penalty pertinent to the license as does dismissal from the Bar. The teacher still has his license and can "get another job" in the sense of *Cafeteria Workers.* However, one asks whether there is still not a very harmful effect on the teacher himself. Having spent a great deal of time and money achieving a license to teach, dismissal or non-continuance without stated reason will create a cloud when he begins to look for another job. Another employer will want to know the reason for the dismissal; if not satisfactorily answered, the board, composed of local citizens and parents, will be hesistant to take a questionable person into the classroom. If the teacher is not given a statement of reasons for his dismissal, it is even conceivable that his dismissal for use of extraordinary techniques in a conservative district will not come to the attention of a board that is looking specifically for such a person.[33] Also, as we have seen from *Pickering* and other cases, the teacher will be under the handicap of carrying his own burden of proof when he alleges dismissal for constitutionally impermissible reasons.

When a teacher is dismissed for no obvious reason and with no statement of reason nor hearing on the issue, he will most likely find it difficult to prove allegations of denial of First Amendment rights or other constitutional guarantees. It is as if the teacher were arguing in a vacuum. For example, the teacher might allege his dismissal was based on his union activities—a deprival of the right of association. The school board, having made no position statement, can simply deny the allegation and state a disagreement with techniques, incompetence, or any other reason. How is the teacher to prove his allegation without the help of the defendant?

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[31] 353 U.S. 232 (1957).

[32] *Id.* at 239, note 5. *Also see:* Meredith v. Allen County Hospital Commission, 397 F.2d 33 (6th Cir. 1968); Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) for the point of physicians and licensure. *Also see:* Lucia v. Duggan, 303 F. Supp. 112 (1969), a public school teacher.

[33] Drown v. Portsmouth School District, 435 F.2d 1182, 1185 (1st Cir. 1970), *cert. denied,* 402 U.S. 972 (1971).

In *Mitchell* v. *Alma School District*[34] the plaintiff had been a teacher for a period of ten years and was not rehired. His claim was based on his union activities, but the board held it was because of his failing to follow disciplinary procedures at the school—he was administering corporal punishment without prior approval and requisite witnesses. Plaintiff was given a hearing at which there was no discussion of his union activities. The court in this case held there was no abuse of discretion.[35] In *Simcox* v. *Board of Education of Lockport*,[36] an untenured teacher was not rehired, and he alleged dismissal was based on his heavy involvement in union activities. The court found no such evidence, but did find a decided lack of cooperation with his superiors. The appellant had refused to help with management of extra-curricular activities without being paid extra, feeling it was outside the bounds of his contract. The court talked in terms of his diametric opposition to the views of the administration[37] and said, "There is no evidence in this record to support the contention that the Board did not act in good faith. To the contrary, the record amply supports the conclusion that the Board made a *bona fide* value judgment . . . ".[38] Here is the opposite side of the coin. If the teacher has a problem of carrying his burden of proof, what of the problem the school has where the teacher's claim is specious? The school is put to the burden of defending the action, when its intentions were purely altruistic as to the school, not to mention encountering the opprobrium attaching to the school for mistreating its teachers.

The burden of the school can be expensive in more than one sense of the word.[39] It would seem reasonable to assume that the school or university places more than a passing value on autonomous conduct of its affairs. If it is then forced to answer for its judgment to the courts, it will lose a degree of this autonomy. While this statement is true, it is also plain that the days of absolute sovereign rule are ended, and there are, in fact, certain limitations on the freedom of activity of school systems.[40]

What is the resultant effect on the freedom of the school to conduct its hiring policies? In *Fluker* v. *Alabama State Board of Education*,[41] the petitioners were two untenured college professors who were not given re-

[34] 332 F. Supp. 473 (1971).

[35] *Also see:* Armstead v. Starkville Schools, 331 F. Supp. 567 (1971), where the black principal was held to bear the burden of proof for dismissal for alleged civil rights violation.

[36] 443 F.2d 40 (1971).

[37] *Id.* at 44.

[38] *Id.* at 45.

[39] *See:* Comment, *Due Process Restrictions on the Employment Power and the Teaching Profession*, 50 NEB. L. R. 655 (1971).

[40] Pettigrew, *Constitutional Tenure: Toward a Realization of Academic Freedom*, 22 CASE WEST L. R. 475, 484 (1971). *Also see* Keyishian, *infra* note 18.

[41] 441 F.2d 201 (1971).

appointments to positions in the departments of history and art. At a hearing ordered by the court, the school pleaded a desire to upgrade the staff as the reason for dismissal of the petitioners. The defendant showed that the College Association accrediting the institution had a requirement of twenty-five percent Ph.D.'s in a department. These two petitioners were the only ones in their respective departments without tenure or doctorates, hence they were let go in order to hire someone of that status. In discussing the facts of this case, the court said, "(Petitioner's) allegations are either unsupported by the facts or contradicted by the testimony of other witnesses." [42] In this case, the college was forced into two appellate level confrontations with the dismissed teachers (one of which could have been avoided by granting the hearing *ab initio*) and was forced to pursue its hiring policies in public.

What will be the burden placed on a large metropolitan school district or a huge university when it is forced to meet this process upon dismissal of each teacher, however specious his claim? Part of the answer lies in the status of present law, giving the petitioner the burden of proof. But this still leaves the defendant school also in court. If the school takes the initial procedural steps of granting a hearing, this also works a hardship on the system, especially when the number of hearings mounts. At the very least, it affects the efficiency of the operation, as must every added process in direct proportion to its complexity.

Associated with this problem is the question of possible damages. If it is found that the defendant school system has harmed the plaintiff, how is his measure of damages to be arrived at? In *Hegler* v. *Board of Education of Bearden*,[43] Mrs. Eve Hegler was not rehired by the Bearden School Board. The lower court, on the section 1983 action based on racial discrimination, ordered the school to offer the appellant a teaching position comparable to that held previously, which it did. However, the appellant appealed that part of the decision denying her damages and attorney fees. In quoting *Smith* v. *Board of Education of Morrilton School District*,[44] the court said, "The period for which damages may be shown is the period between the completion of the teacher's services (at her school) and filing date of this opinion, or the effective date of re-employment (at the school) . . . ". Further, the court holds, "Of course the normal rules of mitigation shall apply to these damage determinations." [45] As this case shows, where the wrong-doer school wishes to show such mitigation of damages, the burden of any such proof lies with the wrongdoer.[46] In this

[42] *Id.* at 212.
[43] 447 F.2d 1078 (1971).
[44] 365 F.2d 770, 784 (8th Cir. 1966).
[45] 447 F.2d at 1080.
[46] *Id.* at 1081.

particular situation, the appellee showed only that Mrs. Hegler could have taken another job in a different state during the period in question. The court then found that this was not adequate, since her husband was employed in Bearden and she did not wish to leave him or her home. It found that such a desire was not unreasonable.

There is a clear distinction on the issue of burden of proof here, since the malefactor has been found opposed at the allegation stage. As to the actual amount of damages, it would seem that the applicable measure would be the salary lost from the dismissal. Any question of possible consequential damages appears something less than realistic. Whether this is correct would depend on the facts, but one could conceive of a situation in which mental suffering and damage to reputation could also become relevant.

Permissible Grounds for Dismissal

If dismissal for union activities, racial discrimination and other constitutional violations are not to be allowed, what then can be a basis for dismissal of an untenured teacher and how does it differ from dismissal of the tenured teacher? In the *Fluker* case,[47] one acceptable ground for dismissal was pursued—the need to upgrade the faculty in order to comply with association standards. One can hardly fault this if it is all that prompts the action.

Apparently another readily acceptable reason is the desire to increase harmony in the faculty. In *Shirck* v. *Thomas*[48] there was a summary judgment at the trial level on the section 1983 action in favor of the defendant school district which had not rehired the plaintiff at the end of her probationary period. The reason given was the teacher's failure to coordinate her teaching with the other German teacher so that students who needed to transfer from one to the other at the end of a semester would not be handicapped. Although the court of appeals reversed and remanded this case because of the need to provide the appellant with notice and a hearing, it denied the plaintiff's request to go beyond this point and hold that the school could not rely on its stated reason to dismiss her unless, "... the defendants could also show that they had defined in advance the standard of conduct to be followed and informed plaintiff of it."[49] Instead the court said, "(It) is important that in deciding whether to retain (a teacher) the (school) should enjoy the widest possible latitude consistent with protection against arbitrariness... It is not necessary to require

[47] *Infra* note 41.
[48] 447 F.2d 1025 (1971).
[49] *Id.* at 1027.

that the (school) enumerate in advance a code of conduct...".[50] Also, it said, "We think, however, that a teacher may be assumed to be competent in matters of classroom performance, and the school... (may dismiss)... a probationary teacher who does not meet imprecise, though nonetheless valid, standards of competence." [51]

This court is saying that there remains with school boards a broad level of discretion about the performance of their teachers. The immediate question is how this discretion is to be channelled to prevent abuse and a circumvention of the requirements against dismissal for impermissible grounds. Correct usage of this precept cannot be assumed in all cases.[52] When combined with the general legal principle that the teacher-plaintiff bears the burden of proof in his allegations of dismissal on improper grounds under section 1983,[53] the dismissed teacher is left to prove that his dismissal was based on impermissable grounds. This is difficult without overt actions that cast doubts on the defendant's action.[54] This is a rather large problem for the plaintiff, but if it is met, the defendant can still counter with a showing of other reasons for the dismissal, or with a simple denial. As in the *Fluker* case the courts hold that the burden of proof is on the plaintff to show impermissible grounds, and this burden is not shifted to the defendant by a showing of a *possibility* of improper grounds, *i.e.*, a mere allegation.[55]

It is difficult for hard and fast rules to be drawn, since the interests on each side are both desirous and compelling. If the teacher risks being labelled a troublemaker and boat-rocker for pursuing his action, it is also clear that the school has need to pursue its goals and maintain internal discipline, even to the possible detriment of constitutional rights.[56]

It is interesting to note how this situation compares with that of tenured teachers. The one difference that is most obvious and also most compel-

[50] *Id.*, quoting from Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971), at the district court opinion, 310 F. Supp. 972, 983.

[51] *Id.*

[52] Pettigrew, *infra* note 40, quoting JAMES MADISON from THE FEDERALIST No. 51 at 337: "If men were angels, no government would be necessary." To extend this to meet our specific situation; if school boards were composed of angels, no judicial review would be necessary.

[53] *See, e.g.*, Fluker v. Alabama State Board of Education, 441 F.2d 201, 205 (1971). *See also,* Sinderman v. Perry, 430 F.2d 939, at 940 (5th Cir. 1970): "[Petitioner] must bear the burden... of proving that a wrong has been done by the collegiate action in not rehiring him."

[54] *See:* Cornist v. Richland Parrish School Board, 448 F.2d 594 (1971), where a black teacher had ordered a phonograph record and other materials entitled "Integration and Desegration" from the U.S. Department of HEW, and played it to her classes. Two days later, she was summoned to the Superintendent's office and told she would be severely punished, and if it were discovered she had ordered the materials, she would be fired.

[55] *Infra* note 41, at 204: "...neither the burden of going forward nor the burden of proof shifts to the state until it has been established by the complainant that he has been dismissed for exercising his Constitutional rights."

[56] Tinker v. Des Moines Independent Community School Dist., 363 U.S. 503 (1969).

ling is that teachers with tenure can only be dismissed for cause. Cause comprises many things, such as incompetency[57] and neglect of duty.[58] These would obviously be valid causes for dismissal of untenured teachers[59] but the one essential difference here is that, for tenured personnel, school administrations bear the burden of proof of their alleged reasons for dismissal.

A secondary feature that distinguishes the untenured teachers from the tenured is the delineation in the applicable statutes of the procedures to be followed in a dismissal.[60] This procedural distinction is ancillary to the real distinction in the light of the case development of the rights of untenured teachers. However, it does give the tenured teacher something more to rely on than does case law development, and certainly more specificity.

The initial problem faced by untenured teachers in getting court action on a summary dismissal was in the right-privilege dichotomy, which has continually held that there is no right to the teacher's public job, hence there were no procedural safeguards necessary under section 1983 of the Civil Rights Act. Through *Pickering, Wieman* and other cases, the general law seemed to move towards allowing a suit to be maintained where the allegation is based on dismissal for a reason that is constitutionally impermissable. The question then becomes, what will happen to the teacher who is summarily dismissed, with no hearing or notice, for reasons that are arbitrary or capricious? Can *Pickering, et al.,* be extended to cover this situation?

Due Process

In *Roth* v. *Board of Regents,*[61] the plaintiff was an untenured college professor. He was informed that he would not be offered a contract for the ensuing year following a period of unrest on the campus during which he was rather vocal in criticism of the administration. No reason for the decision was given, nor was a hearing offered. The suit was brought under section 1983, seeking restoration of the position. In an extremely well-reasoned opinion Justice Doyle posed the crux of the question: "... if there need be no reasoned basis whatever for the decision ... (not to re-

[57] Horosko v. School Dist., 335 Pa. 369, 6A.2d 866, *cert. denied,* 308 U.S. 553 (1939).

[58] Hamberlin v. Tangipahoa Parish School Board, 210 La. 483, 27 S.2d 307 (1946). *Also see* Pettigrew, *infra* note 40, at 478, for other citations as to "cause".

[59] *See, e.g.,* Petition of Davenport, 283 A.2d 452 (1971).

[60] *See* Pettigrew, *infra* note 40, at 478: (1) Written notice of the intended sanction, (2) a formal written statement of the charges, (3) a right to request an open or closed hearing, (4) a trial-type hearing.

[61] 310 F. Supp. 972 (W.D. Wis. 1970), *aff'd.,* 446 F.2d 806 (7th Cir. 1971), *cert. granted,* 40 U.S.L.W. 3194 (U.S. Oct. 26, 1971) (No. 71-162).

hire) . . . then it may be concluded that the Constitution . . . affords him no substantive protection. If he enjoys no substantive protection . . . then it also follows that he need be afforded no procedural protection . . . ".[62]

After undertaking a detailed analysis of the balancing test found in *Cafeteria Workers,*[63] taking judicial notice of the differences between short-order cooks and college professors in finding a new job,[64] Justice Doyle asserted, " . . . under the due process clause of the Fourteenth Amendment, the decision not to retain a professor . . . may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason." [65] He quickly follows with the caveat that this policy is to fall short of being a circumvention of tenure.[66] Thus, a substantive protection becomes available to the teacher with no specific basis that can be pointed to—a constitutional substantive protection, *in vacuo,* carrying with it all the ramifications of due process procedures.

Lest this concept offend the sensibilities of those versed in traditional Constitutional law, it should be pointed out that all that is really being done here is to require that governments not act arbitrarily or capriciously.[67] If this is a judicial incursion into government action, one must ask what the governmental interest is for which protection is sought. The ability of the school board to move unfettered by restraint is more than balanced by the possible harm to the teacher in finding a new job with the dismissal on his record. In *Lucia* v. *Duggan,*[68] where a non-tenured professor was summarily dismissed for wearing a beard and had been unable to find a job subsequently, the court said, "It is fairly inferable that one reason, if not the only one, why plaintiff has been unable to secure employment . . . is because he was dismissed . . . for no stated reason." [69] One then asks what the board's interest is to counterbalance this possible damage; how much harm to internal discipline can be wrought by the beard of one professor? Perhaps this is an over-simplified example, but it does show the damage that is possible from arbitrary actions. Adding one further step, if the teacher was unable to find public employment thereafter with this dismissal on his record, what harm will be caused by his having brought this cause of action? Has he not in fact

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[62] *Id.* at 975.

[63] *Infra* note 6, at 895.

[64] *Op. cit.* at 976.

[65] *Id.* at 979.

[66] *Id.*

[67] Since *Cafeteria Workers* was a 5–4 decision, it might be safe to presume that the only obvious distinction, that of the status of petitioner, is no longer relevant in light of developments such as *Roth.* This and other questions may be resolved by the Supreme Court in its review of *Roth.*

[68] 303 F. Supp. 112 (D. Mass. 1969).

[69] *Id.* at 116.

branded himself as a troublemaker, an unneeded problem to a conservative administrator?

It might be argued that the school may have no reason in reality to dismiss the teacher other than a warning arising from the sensitivities of the profession that the teacher, if allowed to reach the status of tenure, will fail to live up to the desired standards. The short answer to this problem is that this is no reason to wreck a man's career. Either there is or is not a reason at this level of concern to the individual. Also, if there were a problem once tenure has been achieved, the dismissal for cause procedures are still available. Again, it should be emphasized that the type of thinking found in *Roth* is not disestablishing the tenure-non-tenure distinction. Rather, it is saying that the board, when it seeks to act capriciously or arbitrarily, must instead provide the trappings and ritual of due process to the plaintiff. The distinction itself will be retained in the necessity for the plaintiff-teacher to shoulder the burden of proof for his allegation.

This fact seems misapprehended in *DeCanio* v. *School Committee of Boston.*[70] Involved here was the dismissal of six public school teachers for walking off their jobs at a predominantly black school and continuing to teach at a community house during a period of demonstrations at the school. They were serving "at discretion".[71] The Massachusetts court held that it has long been their law that a school committee could discharge a teacher.[72] In postulating the basis for its decision, the court states that the appellants' contention is that their discharge requires due process notification and a hearing. The court answers that this is not a correct statement of the issue; rather it is whether an employer has the right to discharge a probationary employee.[73] One might think the court wrong in saying, "What is concerned here is not an 'interference with such persons' freedom of employment and business activity'." [74] The focus of the *Roth* case (with which *DeCanio* disagrees) is patently concerned with this infringement on the rights of an individual. The Massachusetts court seems to ignore the balancing test set forth in *Cafeteria Workers,* instead quoting a section in which the Supreme Court speaks in terms of the government's right to dismiss summarily.[75] This provides a one-sided approach that is against the trend of cases, and which upholds the erstwhile doctrine of the sovereign's right to dismiss at will, while avoiding considera-

[70] 260 N.E.2d 676 (Mass. 1970), *cert. denied,* 39 U.S.L.W. 3374 (U.S. Mar. 2, 1971).

[71] MASS. G.L.C. 71, § 41: they were untenured. The decision here speaks in terms of a "probationary status".

[72] *Op. cit.* at 679.

[73] *Id.* at 680.

[74] *Id.* quoting Milligan v. Board of Registration in Pharmacy, 348 Mass. 491, 498, 204 N.E.2d 504, 510.

[75] *Id.* at 681, quoting *Cafeteria Workers v. McElroy* at 896.

tion of the individual's rights. This view makes no balancing of interest, but merely assumes that once the absolute government right to dismiss is found no further interest of the individual teacher can be considered.

In *Drown* v. *Portsmouth School District,*[76] a more moderate, middle-ground was taken.[77] Involved here was a section 1983 action in which the teacher claims the administration's failure to offer her a teaching contract for the next year deprived her of rights guaranteed by the Constitution. The interesting feature of this case is that the appellant makes no allegation of the dismissal being for constitutionally impermissable grounds, but argues, rather, that the board, in failing to give her a list of reasons and a hearing, denied her due process.

This court finds its basis for decision squarely in the *Cafeteria Workers* balancing of interests test.[78] However, it then breaks the interests down, forming separate issues of the request by the teacher for a list of reasons for dismissal, and the request for a hearing. It weighs the interests of the parties on each issue and finds opposite results, first allowing a statement of reasons as requested by the appellant and then denying the requested hearing. On the former issue, the court finds the interest of the school board to be very slight in comparison with the need of the teacher, yet the board on the latter issue would be faced with a large incursion into its policies which the court feels outweighs the interests of the teacher. This burden would be, "... added, expensive and unfamiliar... (with) two side effects... Administrations would be less likely to recommend teachers not be rehired... At the same time administrators would... follow a counsel of overcaution in their hiring practices."[79] Against this is balanced the teacher's interests as previously noted, yet the court does not feel these are necessarily protectible by the requirement of a hearing. The court finds the required statement of reasons will act as a means of deterrence to caprice, and also that remedy in the state courts remains. Finally, it distinguishes this situation as being one involving a non-tenured teacher, "... whose contract is not renewed during a probationary period."[80] The teachers are left to the process of either bargaining for change in their contract or a shift in locale to a more favorable contract.

It would seem that the *Drown* court has indeed taken a middle-of-the-road approach, at least on the matter of the requested hearing. Possibly this is distinguishable on the facts, since the hearing requested in this

[76] 435 F.2d 1182 (1970), *cert. denied,* 402 U.S. 972 (1971).

[77] *Compare Roth with* Freeman v. Gould Special School District, 405 F.2d 1153 (8th Cir. 1969), *cert. denied,* 396 U.S. 843 (1969), *and* Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). This presents the three views: (1) no hearing but legal remedies; (2) hearing if Constitutional grounds alleged; and (3) hearing absent Constitutional allegation.

[78] *Op. cit.* at 1184. *Cf. DeCanio, infra* note 70.

[79] *Id.* at 1186.

[80] *Id.* at 1187.

case is rather overpowering in its requirements,[81] going beyond what would have been merely an effective hearing, possibly pressing the court's indulgence too much. However, the court seems to make the assumption, perhaps unwarranted, that this type of hearing will be required in every instance of a dismissal. It is equally feasible that the granted list of reasons will suffice for the dismissed teacher in at least several instances. As to the access of the teacher to the court with his grievances, even assuming that such access exists in each instance, might it not be better to allow the preliminary hearing with the board, at least in instances where the matter is of internal disagreement or misunderstanding?

Both *DeCanio* and *Drown* have been denied certiorari by the U.S. Supreme Court.[82] One question is why there is this difference of action by the Court on such seemingly similar issues as *Roth* and *Drown*. It may well be that the distinction *Roth* carries is that it more clearly presents the issue of a general right of the individual to due process in governmental action than is presented by the other cases. This seems to be borne out by the language of the opinions.[83]

The cases disagree as to what constitutes procedural due process, once it is decided that this is, in fact, to be extended. How much of the panoply of the judiciary is to be extended to the hearing, for example? If it be granted that there is to remain a distinction between tenured and non-tenured teachers, then it would seem logical that the procedures must also remain distinctive between the two. In *Orr* v. *Trinter*,[84] the Court, in discussing comparative procedures, said that the distinction is the requirement for dismissal of tenured teachers only, "for good and just cause." [85] Aside from the distinction of the burden of proof discussed *ante*, the court feels, "... a reviewing court will be bound to respect bases for non-retention which would not satisfy the standard of cause, but which fit within the rationale for making a distinction between tenure and non-tenure." [86]

In *Ferguson* v. *Thomas*,[87] the Circuit Court of Appeals lists factors which it feels form the basis for due process termination of the non-tenured

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[81] *Id.* note 1, at 1183.

[82] *See* notes 70 and 76, respectively. *Also see* in this light: Freeman v. Gould Special School Dist., *infra* note 77; Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); Parker v. Board of Educ., 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1965). *Compare with* Sinderman v. Perry, 430 F.2d 939 (5th Cir. 1970), *cert. granted*, 403 U.S. 917 (1971).

[83] *E.g.*, *Roth* says, "... the decision not to retain ... may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason.", at 979. *Drown* seems more interested in a mechanistic approach in its application of the *Cafeteria Workers* test.

[84] 318 F. Supp. 1041 (1970).

[85] *Id.* at 1046, citing OHIO REV. CODE § 3319.16.

[86] *Id.*

[87] 430 F.2d 852 (5th Cir. 1970).

teacher.[88] A similar list is presented in *Trinter*.[89] Both include: (a) a written statement of reasons for his dismissal, to allow the teacher to show any error, if it exists; (b) adequate notice for a hearing at which he may defend himself of the listed charges; (c) a hearing at which he may put forth evidence in his own behalf. These three factors appear to be the lowest level of due process that can be afforded the non-tenured teacher. The two cases also extend the rights to include names of witnesses and the reasons for the decision of the Board not to rehire if the Board decides not to rehire him after the hearing.

When compared with the reasons listed in *Drown*,[90] this does indeed seem to be a bare skeleton of due process procedures. When these three criteria are examined separately, nothing would seem evident that will substantially interfere with the interests of the school as previously discussed. The only factor that possibly could work hardship on the school is the requirement to hold a hearing, which could turn into a real expense. For example, in *Thaw* v. *Board of Public Instruction*[91] the appellant was denied a new contract for the fourth year that would have been the equivalent under Florida laws of tenure. The court held that there was no need to hold a hearing in the absence of an allegation of a constitutionally impermissable reason for dismissal and that this would be too much to ask of a school board. Specifically, the appellant was one of 1487 terminations that were approved at one meeting.[92] Obviously it would be a large expense to require 1487 hearings. However, it is quite possible that if the three-step procedures set forth in *Ferguson* and *Trinter* were viewed as a policy of escalation there would be many people who would not reach the stage of actual hearing, being instead satisfied with the statement of reasons. It seems reasonable that the teacher who is given a statement of reasons, for example, might simply feel that it is better to move on than to have the issue raised in public and thus become part of his employment record.

While these three procedures in a ladder-like manner of escalation

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[88] *Id.* at 856.

[89] *Infra* note 84, at 1046.

[90] *Infra* note 76, at 1183, n. 1. The appellant there in addition asked for: (1) the right to cross-examine witnesses; (2) the right of counsel; (3) a decision based on legal rules; (4) an impartial decision-maker other than the board; (5) a verbatim transcript; and (6) the right to be advised of these rights. One feels that the cost involved in number (4) alone would preclude adoption of the appellant's plan, at least when viewed as setting up a method of hearings for non-retained teachers.

[91] 432 F.2d 98 (1970).

[92] *Id.* at 100. It would seem of interest to learn why 1487 people were being terminated at one time, even in Dade (Miami) County, and how many of the 1487 were also approaching the tenure status as was the appellant. While the point is admittedly without basis, it does stand to reason that non-tenured beginning teachers are less a salary item than tenured teachers, after several years seniority have been acquired. *See* Toney v. Reagan, 326 F. Supp. 1093 (1971).

would seem to form the basis for a school system under the influence of decisions such as *Roth,* or if *Roth* is upheld by the Supreme Court, it must be cautioned that, "... the standards of procedural due process are not wooden absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved." [93] This cannot be over-emphasized. The procedures must be made to fit the fact situation as it develops embellishing on the bare skeleton outlined as needed to fit the case.

Conclusion

The scope of this article is not designed to be all inclusive. Rather, it is a limited discussion of the problem and a possible solution based on the cases,[94] and a means of general comportment via adequate procedures.

The decision of the Supreme Court on the *Roth* case and related cases should provide some light in this rather murky area. However, it should always be remembered that what is being requested here is only that the school not act in such a manner as to deprive the teacher of possible rights without some measure of protection being available to him, that the termination not be, "... wholly unsupported in fact, or ... wholly without reason." [95]

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[93] *Infra* note 87, at 856.

[94] Principally *Roth* and companion cases; *See* Sinderman v. Perry, 430 F.2d 939 (5th Cir. 1970), *cert. granted,* 403 U.S. 917 (1971); and Gouge v. Joint School Dist. No. 1, 310 F. Supp. 984 (W.D. Wisc. 1970), the *Roth* court, extending the decision to include public schools as well as college-level.

[95] *Roth, infra* note 61, at 979.