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EVIDENCE LAW FOR TEACHER EMPLOYMENT TERMINATION
HEARINGS

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EVIDENCE LAW FOR TEACHER EMPLOYMENT TERMINATION HEARINGS

by

Donald F. Uerling

A DISSERTATION

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Under the Supervision of Professor John M. Gradwohl
and Professor Dale K. Hayes

Lincoln, Nebraska

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TITLE

EVIDENCE LAW FOR TEACHER EMPLOYMENT TERMINATION HEARINGS

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TABLE OF CONTENTS

| CHAPTER | PAGE |
|---|------|
| I. INTRODUCTION. | 1 |
| Context of the Problem. | 1 |
| General Statement of the Problem. | 2 |
| Statement of the Specific Objective | 3 |
| Definitions | 3 |
| Assumptions | 5 |
| Delimitations and Limitations | 6 |
| Significance of the Study | 7 |
| II. REVIEW OF LITERATURE. | 10 |
| Introduction. | 10 |
| Educational Management. | 12 |
| The Employment Relationship | 12 |
| Personnel and Administration. | 17 |
| The Teacher's Employment Security | 23 |
| The Basis of Legal Protections. | 23 |
| The Teacher Termination Hearing | 37 |
| Administrative Evidence Law | 51 |
| Administrative Hearings | 52 |
| Evidence Law--Some General Concepts | 58 |
| Evidence Law--Rules of Evidence | 64 |
| Rules of Evidence for Administrative Hearings | 71 |
| Findings and Reasons. | 82 |
| Judicial Review | 85 |
| III. THE RESULTS OF THE STUDY. | 98 |
| Introduction. | 98 |
| Rules of Evidence | 99 |
| Caveat. | 99 |
| The Statutes. | 100 |
| The Case Law. | 103 |
| The Judicial Approach to Evidence Law Issues. | 111 |
| Rules of Relevance. | 113 |
| Rules of Exclusion. | 150 |
| Rules of Privilege. | 169 |
| The Tribunal and the Decision | 178 |
| The Nature of the Tribunal. | 178 |
| Burden of Proof | 190 |
| Findings and Reasons. | 195 |
| Some Pertinent Nebraska Law | 203 |
| General Administrative Evidence Law | 203 |

| CHAPTER | PAGE |
|--|------|
| Evidence Law for Teacher Termination Hearings. . . | 207 |
| Judicial Review. | 210 |
| IV. SUMMARY AND CONCLUSIONS | 221 |
| Summary. | 221 |
| Evidence Law | 222 |
| Rules of Relevancy | 224 |
| Rules of Exclusion | 225 |
| Rules of Privilege | 226 |
| The Tribunal | 226 |
| Burden of Proof. | 227 |
| Findings and Reasons | 228 |
| Nebraska Law | 228 |
| Conclusions. | 228 |
| Evidence Law | 229 |
| A Possible Approach. | 231 |
| A Rational and Just Decision | 233 |
| Implications | 235 |
| BIBLIOGRAPHY | 238 |
| APPENDIX I - State Statutes. | 251 |
| APPENDIX II - Revised Statutes of Nebraska | 255 |

CHAPTER I

INTRODUCTION

CONTEXT OF THE PROBLEM

A decision by the governing board of an educational governance unit to terminate the employment of a public school teacher will be made in most instances only after the teacher has been given an opportunity for a hearing. The purpose of the hearing is to provide the teacher with a forum in which to contest the termination action which is being considered. If such a hearing is held, and if the board is required by law to justify its action, then any decision to terminate the teacher's employment must be based solely upon the evidence produced at the hearing. Therefore, the questions of what evidence may be introduced at the hearing and what evidence may be used to support the findings upon which the actual decision to terminate can be based become quite significant.

The purpose of this study was to research the law of evidence as it relates to teacher termination hearings in the public school setting. The major questions considered were: (1) What are the standards for the admission or the exclusion of evidence at a hearing? (2) What evidence which has been admitted may be used to support the findings made by the hearing tribunal?¹

¹See K. Davis, Administrative Law for the Seventies (1976).

II. GENERAL STATEMENT OF THE PROBLEM

Although the two major questions are distinct, a preliminary consideration of the law of evidence for administrative hearings has indicated that the questions were so interrelated and were possibly so interdependent that the most practical approach was to consider them together. The essentials of evidence law for teacher termination hearings seemed to be more related to the use of the evidence to build a record which would support the necessary findings than to the question of admissibility.

The evidentiary procedures used in teacher termination hearings have not been considered with any great degree of either comprehensiveness or specificity by either the legislatures or the courts. However, as the law relating to teacher employment terminations continues to develop, many of the more general substantive and procedural questions relating to the authority of the governing board and the rights of the teacher will be resolved, and one might expect that more disputes will arise over the resolution of questions of fact. Issues involving evidence law for teacher termination hearings may then become more prominent in this area of frequent legal controversies.²

School administrators are generally responsible both for initiating the termination procedures and for producing the evidence at the hearing which will provide a justifiable basis for the termination. In many instances the hearing will be conducted according to

²See M. Nolte, Duties and Liabilities of School Administrators 57 (1973).

procedures adopted by the governing board after having considered the recommendations of the administrative staff as to what evidentiary procedures are appropriate. The administrator must not only have a general awareness of what evidence will be required to support a termination and whether certain evidence may be admitted at the hearing and used as a basis for a decision, but he or she must also consider the dictates of sound educational management practice in determining what evidence can and should be produced and how it will be used to support the necessary findings.

III. STATEMENT OF THE SPECIFIC OBJECTIVE

The objective of this study was to identify some of the basic legal principles that relate to the admission and use of evidence at a teacher termination hearing. This dissertation was intended to be the kind of material that anyone who has some responsibility for establishing or following termination hearing procedures would want to read for general information. Both a general overview of the law on the subject and a discussion of some of the more salient issues are included. The study is not intended to suggest any set of "rules" to be followed in every instance or to be a comprehensive treatment of every issue that might arise.

IV. DEFINITIONS

Administrator. A professional educator employed by the governing board whose primary function is to exercise the administrative

aspects of educational management; includes superintendents, principals, and other staff and supervisory personnel.

Argument. An attempt to support a contention by reasoning and persuasion.

Educational governance unit. The quasi-corporate entity to which has been delegated the responsibility and authority to carry on at the local level the function of education.

Educational management. To be distinguished from educational policy-making; concerned with the organization and operation of an individual governance unit or school; a function shared by governing boards and administrators.

Evidence. That which tends to prove or disprove an allegation of fact.

Finding. A decision upon a question of fact which is the result of the deliberations of the hearing tribunal.

Hearing. An opportunity for a teacher to contest the possible termination of his or her employment; a forum for the presentation of evidence and argument before a decision-making tribunal.

Record. An account of the entire hearing proceedings, either in writing or recorded electronically.

Rules of evidence. The standards applied at a hearing to determine what evidence will be admitted for consideration by the tribunal.

School. The institutional unit by which the process of education is carried on.

Teacher. A professional educator employed by the governing board whose primary duties are related to the supervision and instruction of students; includes both those who work directly with students and those administrative and support personnel who may be considered teachers by virtue of legislative or contractual provisions.

Termination. The ending of the employer-employee relationship by the action of the employer without the consent of the employee, the employer being the governing board and the employee being the teacher.

Tribunal. The individual or group before whom the arguments and evidence are presented at a hearing; may consist of either members of the governing board or a separate panel or officer; will generally include an individual who will preside at the hearing.

V. ASSUMPTIONS

1. There is in fact a body of evidence law relating to teacher termination hearings.

2. This body of law could be determined by an analysis of constitutions, statutes, judicial opinions, and rules and records of administrative proceedings.

3. There are certain educational management considerations which should be taken into account when the evidence law for teacher termination hearings is considered.

4. The evidentiary procedures which meet the standards imposed by law are not necessarily congruent with those which are consonant

with good educational management practices.

VI. DELIMITATIONS AND LIMITATIONS

This study was subject to certain delimitations.

1. Although the general areas of procedural and substantive law relating to the termination of a teacher's employment were necessarily considered to some extent so that the subject could be placed in the proper context, the study was directed specifically towards the evidence law that is involved in termination hearings.

2. The research necessarily involved the investigation of the manner in which numerous teacher termination hearings have been conducted; however, there was no specific survey of any current practices.

3. The laws of all fifty states were involved in the research to some extent, but there was special emphasis on the law of the state of Nebraska.

4. The research has been primarily confined to the specific area of teacher termination hearings; however, other areas of administrative law and evidence law were examined for relevant principles.

5. To the extent that is feasible, the study has been based upon the law which is current at the time of the writing of the research report.

The study was subject to certain limitations.

1. The conclusions relate only to the admission and use of evidence at a hearing, and are not a comprehensive treatment of the law of teacher terminations.

2. The results are sufficiently general in nature so that any suggestions would have to be adapted in more specific form prior to actual use.

3. The results are more pertinent for Nebraska than for any other state.

4. The results are oriented toward public elementary and secondary education.

5. Developments in the law may affect the validity of the results soon after the study is completed.

VII. SIGNIFICANCE OF THE STUDY

Teacher terminations are not only a difficult school management problem, but they have been a frequent source of litigation.

According to Neill and Custis, "[o]ne of the most difficult problems confronting school administrators and board members today is the dismissal of staff members who are not up to district standards."³ They have also pointed out that "[d]eclining enrollments and determined, economy-minded voter-taxpayers are forcing schools to do something totally foreign to their experience of recent decades:

³S. Neill & J. Custis, *Staff Dismissal: Problems and Solutions* 7 (1978).

cut back their teaching staff."⁴

Nolte has also stated that:

One of the major legal problems facing the school administrator is to determine whether school personnel are performing their assigned duties at a sufficient level of competence to merit their continuing employment and retention. Where competency is in doubt, the school administrator often has the onerous duty of instituting proceedings against this or that employee in the interests of better education for children of the district. This area of school law has assumed gigantic proportions, and represents one of the most extensive grounds for litigation in the entire educational enterprise.⁵

Such disputes must surely distract attention from the primary mission of the school and are expensive in terms of both human and financial resources.

This study should be of some theoretical significance by virtue of its being somewhat of an initial venture into a subject on which there is practically no reported research and on which little has been written. Hopefully, it will serve as a basis for further work in an area where there is substantial interplay between the law and educational management.

There are also elements of the study which have practical significance. First of all, the results should be useful to educational management in making correct decisions regarding the termination or continued employment of a teacher, thereby furthering the cause of

⁴Id. at 5.

⁵M. Nolte, Duties and Liabilities of School Administrators 57 (1973).

quality education. Furthermore, the results should provide the lawyers who represent the parties involved in teacher termination with some additional insights into this rather specialized area of practice.

Finally, the results should assist in the making of termination decisions which will withstand the scrutiny of judicial review, thereby promoting the control of the schools by the locally elected governing boards.

Among the various functions which school administrators and board members must sometimes perform are those involved in teacher termination hearing. Actions taken in such a quasi-judicial setting would seem to represent a specific instance of where the interfacing of educational management and the legal system is inherent. There is little literature on the subject, and the results of this study should be of use to anyone who is concerned with the educational management questions and the legal issues related to these proceedings.

The writer has been a teacher and an administrator and is licensed to practice law. It is hoped that this study reflects some benefit from that combination of academic and work experience.

CHAPTER II

REVIEW OF LITERATURE

I. INTRODUCTION

The purpose of this chapter is to examine the literature which, at least in part, relates to the subject of evidence law for teacher termination hearings. No comprehensive treatment of that specific topic has been found in the literature of either law or education.

Basic texts and treatises in educational administration, administrative law, and evidence law were reviewed. The legal encyclopediae were examined. The guides to periodical literature and card catalogues at Love Library and at the College of Law library, both of which are on the campus of the University of Nebraska-Lincoln, were systematically searched for citations to related literature, and those articles and books were examined.

The computer search by use of the terminal at Love Library indicated there were no dissertations or journal articles on the specific subject which could be found through the use of that information retrieval system. Undoubtedly there is substantial unpublished research which has been done on specific issues within the general subject of evidence law and teacher termination hearings, particularly by attorneys who have been involved in such hearings or in ensuing litigation or judicial review.

The writing in the field of law tends to follow one of two patterns--either a collection and reporting of individual teacher termination cases, with little attempt at either analysis or synthesis, or a more comprehensive discussion of administrative evidence law dealing primarily with state and federal regulatory agencies. The writing in the field of educational management tends to stress the ways that good teachers can be selected and how a teacher's performance can be evaluated and improved; the rather unpleasant subject of what boards of education and administrators must do in order to properly terminate a teacher's employment generally receives less emphasis.

There is considerable literature on the general substantive and procedural law that is involved in teacher terminations. However, there is little material available to which the administrator, board member, or attorney can refer when it becomes necessary to develop specific standards and procedures for dealing with the evidence which is the essential basis upon which the termination decision must stand.

The remainder of this chapter is divided into three major parts. Part II is a review of the literature relating to educational management. The employment relationship between the teacher and the board of education and some of the fundamentals of personnel administration are discussed. Part III is a review of the literature relating to the teacher's employment security. The legal bases of protection, both substantive and procedural, and the elements of a termination hearing are considered. Part IV is a review of the literature relating to

some pertinent aspects of administrative evidence law. The basic elements of an administrative hearing, some fundamentals of evidence law, and the nature of judicial review are examined.

This review of literature has been a substantial research project in itself, especially in regard to the review of treatises, texts, and periodicals in the subject area of administrative evidence law. It should provide an adequate basis for the research of statutes and case law which specifically relate to the topic of "Evidence Law for Teacher Employment Termination Hearings."

II. EDUCATIONAL MANAGEMENT

A. The Employment Relationship

"The local school district is a state agency, created by either statute or constitution, to which the legislature by law delegates the power to govern the schools."¹ A board of education is the corporate body responsible for managing the affairs of a local school district and for administering the laws of the state which govern the schools.²

¹K. Alexander, School Law 118 (1980). See also L. Peterson, R. Rossmiller, & M. Volz, The Law and Public School Operation 88 (2nd ed. 1978); E. Reutter & R. Hamilton, The Law of Public Education 73 (2nd ed. 1976).

²L. Peterson, R. Rossmiller, & M. Volz, The Law and Public School Operation 34 (2nd ed. 1978). See also K. Alexander, School Law 118 (1980); W. Hazard, Education and the Law 4 (2nd ed. 1978).

Local boards of education are vested with a portion of the sovereignty of the state through delegation.³ All power and authority enjoyed by a board of education are derived either from the state constitution or from legislative enactments.⁴ Boards of education are sometimes said to hold three kinds of power: (1) express power granted by law, (2) implied power arising from the express power, and (3) those powers reasonably necessary to achieve the purposes of the granted powers.⁵

It has been frequently noted that the members of a board of education are not "professional" board members. Rather, they are lay persons, who tend to be representative of all walks of life and of all social and economic classes.⁶ It is generally agreed that these lay boards of education should function as policy-making bodies, and that

³K. Alexander, *School Law* 118 (1978). See generally L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 34-36 (2nd ed. 1978); E. Reutter & R. Hamilton, *The Law of Public Education* 121-124 (2nd ed. 1976).

⁴L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 39 (2nd ed. 1978). See generally K. Alexander, *School Law* 118-119 (1980); E. Reutter & R. Hamilton, *The Law of Public Education* 121-124 (2nd ed. 1976).

⁵W. Hazard, *Education and the Law* 4 (2nd ed. 1978). See also K. Alexander, *School Law* 118-119 (1978); L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 38-39 (2nd ed. 1978); E. Reutter & R. Hamilton, *The Law of Public Education* 122-123 (2nd ed. 1976).

⁶See e.g., D. Gatti & R. Gatti, *The Teacher and the Law* 149 (1972); V. Miller, G. Madden, & J. Kincheloe, *The Public Administration of American School Systems* 52-53 (2nd ed. 1972); E. Stoops, M. Rafferty, & R. Johnson, *Handbook of Educational Administration* 87 (1975).

the execution of these policies is best left to a professional administrative staff, which operates under the direction of the superintendent of schools.⁷

Hazard has stated that among the powers of a board of education are those relating to the employment, supervision and evaluation, and the termination of teachers. He has indicated that these powers may be "express," "implied," or "reasonably necessary."⁸

Perhaps few of the powers of a board of education have more significant consequences than those which involve the employment relationship between the board and the teachers. The importance of a first-rate teaching staff to the effectiveness of the district's instructional program can hardly be overemphasized. It has often been pointed out in the literature that the quality of education depends upon the quality of teaching.⁹

⁷See, e.g., R. Campbell, L. Cunningham, R. Nystrand, & M. Usdan, *The Organization and Control of American Schools* 165 (3rd ed. 1975); S. Knezevich, *Administration of Public Education* 239 (2nd ed. 1969); V. Miller, G. Madden, & J. Kincheloe, *The Public Administration of American School Systems* 59 (2nd ed. 1972); E. Morphet, R. Johns, & T. Reller, *Educational Administration* 238 (1959); E. Stoops, M. Rafferty, & R. Johnson, *Handbook of Educational Administration* 9 (1975).

⁸W. Hazard, *Education and the Law* 4 (2nd ed. 1978). See also D. Gatti & R. Gatti, *The Teacher and the Law* 149-151 (1972); E. Reutter & R. Hamilton, *The Law of Public Education* 476 (2nd ed. 1976).

⁹See e.g., R. Campbell, L. Cunningham, R. Nystrand, & M. Usdan, *The Organization and Control of American Schools* 249 (3rd ed. 1975); W. Castetter, *The Personnel Function in Educational Administration* 4 (2nd ed. 1976); V. Miller, G. Madden, & J. Kincheloe, *The Public Administration of American School Systems* 169 (2nd ed. 1972); Downey, How to get rid of your bad teachers and help your good ones get better, *American School Bd. J.*, June 1978, at 23; Sinowitz, What about teacher tenure, *Today's Educ.*, April 1973, at 40.

According to Hudgins and Vacca, local boards of education possess considerable legal authority in dealing with professional personnel, and possess the legal prerogatives for making all personnel decisions necessary for the best interests of the school system. The legal authority for employment of teachers belongs to the board of education; teachers contract with the board, not with superintendents or building principals.¹⁰

Hudgins and Vacca have also stated that school board decisions in personnel matters will not be interfered with by the courts unless it is proved that the board acted arbitrarily, capriciously, or beyond the scope of its duly constituted authority. Moreover, the legal presumption is that boards of education act in good faith when making personnel decisions. However, these authors have recognized that school board authority and control over teachers have received much attention as increasing numbers of complaints reach the courts.¹¹

The educational management function is to be shared by a board of education and its administrative staff. One particular duty which is included in this function is the termination of a teacher's employment when such an action does become necessary. A survey conducted and published by the American Association of School Administrators

¹⁰H. Hudgins & R. Vacca, *Law and Education: Contemporary Issues and Court Decision* § 7.4 (1979).

¹¹Id.

is illustrative of the cooperative responsibilities in this area of personnel management.¹²

This report listed ten reasons given by legal experts as to why school districts lose dismissal cases. These are: (1) they do not follow the law; (2) they do not adequately document their case; (3) superintendents fail to adequately prepare administrative staff to understand the law; (4) the policy which the staff member supposedly violated did not exist in writing; (5) the district ignored the policy; (6) districts are not always able to establish a case even though the case is there; (7) principals are not tough enough in evaluating staff; (8) boards overreact and "go off half-cocked" without coolly analyzing the strength of their case; (9) they get poor legal advice; and (10) they act like the case is cut and dried.¹³

It can be noted that one of the reasons not given was that in some situations the original decision to proceed with a termination action was simply wrong. If the substantive and procedural protections involved in a dismissal proceeding are to be of any significance, then it would surely follow that in some instances the teacher would deserve to retain his or her position.

¹²See S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 42 (1978).

¹³Id.

B. Personnel Administration

Supervision and Evaluation

The responsibility for personnel administration in the schools is that of the superintendent and the other members of the administrative staff. These duties include the recommendations for hiring and firing and the supervision and evaluation of teachers.¹⁴

The supervision and evaluation of the teaching staff is a major element of public school personnel administration. It is generally recognized that this administrative function has two major purposes--the improvement of instruction and the providing of information for employment decisions.

Stoops, Rafferty, and Johnson have pointed out that teacher evaluation has two main functions--the one is managerial and the other is professional development of the teacher. The managerial function helps the administrator make the decision concerning continued employment or termination. The professional development function assists the teacher in that individual's process of self-assessment and self-

¹⁴See generally, e.g., W. Castetter, The Personnel Function in Educational Administration 167-168, 231-270, 427-428 (2nd ed. 1976); S. Knezevich, Administration of Public Education 335, 348 (2nd ed. 1969); V. Miller, G. Madden, & J. Kincheloe, The Public Administration of American School Systems 177, 192 (2nd ed. 1972); E. Morphet, R. Johns, & T. Reller, Educational Administration 350, 353 (1959); M. Nolte, Duties and Liabilities of School Administrators 57 (1973); E. Stoops, M. Rafferty, & R. Johnson, Handbook of Educational Administration 618-672 (1975); Eye, The Superintendent's Role in Teacher Evaluation, Retention, and Dismissal, J. Educ. Research, May/June 1975, at 390-395.

improvement.¹⁵

Neill and Custis have also recognized that evaluation has a two-fold purpose of improving instruction and making personnel decisions.¹⁶ They have further indicated that although these purposes do not necessarily have to be incompatible,¹⁷ it may be better to have separate systems for the improvement of instruction and the rating of teachers.¹⁸ Once a teacher is believed to be unsatisfactory, the goals of evaluation change,¹⁹ and a different approach is needed.

Downey has acknowledged that teacher evaluation serves both to prune mediocre teachers and to help good teachers do a better job. But he emphasized that the primary reason for evaluation is to help improve instruction rather than merely getting rid of unsatisfactory teachers.²⁰

Although the improvement of instruction is generally viewed as the most important purpose of staff evaluation,²¹ if termination does

¹⁵E. Stoops, M. Rafferty, & R. Johnson, Handbook of Educational Administration 639-640 (1975).

¹⁶S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 21 (1978).

¹⁷Id. at 22.

¹⁸Id. at 30.

¹⁹Id. at 25.

²⁰Downey, How to get rid of your bad teachers and help your good ones get better, Am. Sch. Bd. J., June 1978, at 23, 24.

²¹See, e.g., W. Castetter, The Personnel Function in Educational Administration 231-232 (2nd ed. 1976); E. Morphet, R. Johns, & T. Reller, Educational Administration 361 (1959); Wendel, Critical Elements in Staff Evaluation, Catalyst, May 1979, at 29.

become necessary, the evaluation is likely to be a major factor in that process.²²

A fundamental question regarding the evaluation of teachers is that of determining just what constitutes effective teaching. In an article on teacher evaluation, Johnson discussed the issue of whether teaching is an activity definable in its own right or whether teaching is simply anything that may be shown to actually produce learning in students. He suggested that there is an unfortunate tendency in court decisions and legislation to presuppose that teaching is a product-related activity to be judged by its practical results. Therefore, teacher evaluation becomes the observation of the presence or absence of techniques or traits which produce learning, the ultimate validity of which rests on measurements of their effect on changing student behavior.²³

Johnson contended that since learning does not need teaching for its occurrence, we must not equate educating with the producing of learning; rather, we must link teaching with the process of educating rather than connect it with the learning outcomes of students. He defined teaching not as an activity producing learning of some specific matter, but as an activity intentionally directed toward, and potentially

²²See, e.g., S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 21 (1978); Eye, The Superintendent's Role in Teacher Evaluation, Retention, and Dismissal, J. Educ. Research, May/June 1975, at 390-391.

²³Johnson, Court, Craft, and Competence: A Reexamination of "Teacher Evaluation" Procedures, Phi Delta Kappan, May 1976, at 606.

capable of, improving the student's general intellectual functioning or "cognitive competence" in whatever subject matter is involved.²⁴

Johnson's basic proposition seemed to be that evaluation of teaching as a process per se rather than in terms of its product is not only justifiable but preferable. Although his analysis was unusually elaborate, his fundamental theme was probably consistent with what is already the most common approach to teacher evaluation.

There is sometimes a presumption that a teacher who has obtained a certificate to teach is considered ipso facto competent before the law. The burden is on the board to prove otherwise, and the standard is not "outstanding" competence; it may be only "average" skill.²⁵

It has been pointed out by numerous writers that if an evaluation is to serve as evidentiary support for a teacher's termination, then it must specifically set forth the teacher's inadequacies. It may not be a pleasant task for an administrator to confront the teacher with those items which are indicative of unsatisfactory performance. Nevertheless it must be done, both for the sake of fairness to the teacher and in the interests of developing an administrative

²⁴Id.

²⁵M. Nolte, And how hard is it to oust a bad "professional" teacher? Am. Sch. Bd. J., June 1972, at 21-22.

record that will justify a termination.²⁶

As Castetter has stated, dismissal of personnel is seldom easy or pleasant, and generally such an action is undertaken with reluctance. Terminations represent a loss to the school and often create unfavorable attitudes toward the school system. Nevertheless, the elimination of unsuitable personnel is an imperative responsibility which must be exercised for the good of the organization. The primary aim of the school should not be to develop less painful methods for dismissal of teachers, but to minimize the necessity for such action.²⁷

Miller, Madden, and Kincheloe have indicated their view that the dismissal of a teacher is an ineffective administrative device which should be used only as a last resort. The task of administration is that of having able and competent people on the job and not that of getting people out of jobs. Furthermore, unless the position has been eliminated, a dismissal means that the task of filling that position with a more capable teacher remains.²⁸

Stoops, Rafferty, and Johnson have taken the position that a teacher's dismissal should usually be regarded as a confession of

²⁶See, e.g., S. Neill & J. Custis, *Staff Dismissal: Problems & Solutions* 21-30 (1978); E. Stoops, M. Rafferty, and R. Johnson, *Handbook of Educational Administration* 650-651 (1975); Downey, How to get rid of your bad teachers and help your good ones get better, *Am. Sch. Bd. J.*, June 1978, at 24.

²⁷W. Castetter, *The Personnel Function in Educational Administration* 467 (2nd ed. 1976).

²⁸V. Miller, G. Madden, & J. Kincheloe, *The Public Administration of American School Systems* 192 (2nd ed. 1972).

failure on the part of the administration. They contend that logic leads to one of two conclusions: either an error was made in the original employment of the unfit person, or lack of proper supervisory assistance resulted in the teacher's failure.²⁹

Whatever the basic cause of the teacher's failure to meet the expected standards may be, in some situations the termination of that teacher's employment will be necessary. It will then be the responsibility of the administrative staff to identify those situations and to proceed accordingly.

Reduction in Force

Aside from terminations based on unsatisfactory performance or personal misconduct, another basis for the dismissal of staff members which is becoming more common is reduction in force (RIF) or "riffing." Reductions in force have become a significant concern for schools and teachers alike.

As Neill and Custis have pointed out, "[d]eclining enrollments and determined, economy minded voter-taxpayers are forcing schools to do something totally foreign to their experience of recent decades: cut back their teaching staff."³⁰

A reduction in force may not necessarily be a reflection on the personal qualities or competencies of the individual, but only a

²⁹E. Stoops, M. Rafferty, & R. Johnson, Handbook of Educational Administration 651 (1975).

³⁰S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 5 (1978).

situational response to decreasing student enrollments and program modifications. However, as Nolte has indicated, boards of education and administrators should make every effort to identify those teachers who are most effective and those who are least effective, and make decisions accordingly. The criterion should not be how well the teacher is teaching, but how well the youngsters are learning. Decisions on staff reduction must be reasonable, nonarbitrary, and nondiscriminatory if they are to stand up in court.³¹

Teachers and teachers' associations will not accept RIF decisions without challenge. Sinowitz has suggested that teachers' organizations should review the facts and reasons given for the staff reduction, should insist that funds for teachers' salaries and instructional programs be the last cut, and should question whether the district has sought out all available resources.³²

III. THE TEACHER'S EMPLOYMENT SECURITY

A. The Basis of the Legal Protections

A teacher's employment security is based on both substantive and procedural protections. Some of the major sources of these protections which are generally recognized in the literature are the

³¹M. Nolte, How to tell which teachers to keep and which to lay off, Am. Sch. Bd. J., June 1976, at 29.

³²Sinowitz, Fighting reductions in force, Today's Educ., March/April 1975, at 32.

individual teacher's contract, state statutes, and the federal constitution. Other sources of employment security rights which are identified as being of significance include local district policies and negotiated agreements.

According to Peterson, Rossmiller, and Volz, a teacher's employment security is anchored in four major categories of law.

The first two are found in state laws providing tenure or continuing contract status for teachers. The third is found in civil rights laws guaranteeing freedom from discrimination based on race, sex, age, marital status, and other factors unrelated to job performance. The fourth category relates to rights guaranteed by federal and state constitutions.³³

Due Process

The legal safeguards are sometimes subsumed under the general concept of due process. As Neill and Custis have indicated, there are two kinds of due process involved in terminating teachers. Procedural due process refers to the procedures and methods used to carry out regulations. Substantive due process refers to the fairness of the law or regulation.³⁴

Reutter and Hamilton also have observed that the "due process" clause of the Fourteenth Amendment of the Constitution of the United States, which has wide application to public education, includes two

³³L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 440 (2nd ed. 1978).

³⁴S. Neill & J. Custis, *Staff Dismissal: Problems & Solutions* 33 (1978).

distinct aspects.

"Substantive" due process pertains to legislation itself. A law must have a purpose within the power of the government to pursue, and it must be clearly and rationally related to the accomplishment of that purpose. "Procedural" due process pertains to the decision-making process followed in determining whether the law has been violated. A basic fairness is required.³⁵

Neill and Custis stated that due process rights are generally found in the teacher's contract, state law or regulations of the state board of education, and court rulings construing the United States Constitution. Sometimes collective bargaining agreements provide additional protections for probationary teachers.³⁶

Common Law

Reutter and Hamilton have noted that, under the common law, the right to employ a teacher includes the right to terminate that employment except as restricted by contractual or constitutional considerations. They also pointed out, however, that the mere fact that a statute gives the board of education the right to hire teachers does not give the board the right to fire them arbitrarily or at any time. If the teacher complies with all express and implied conditions in the teaching contract, then that teacher has the right to remain

³⁵E. Reutter & R. Hamilton, *The Law of Public Education* 5 (2nd ed. 1976).

³⁶S. Neill & J. Custis, *Staff Dismissal: Problems & Solutions* 34 (1978).

in the position until the end of the contract period or to be remunerated in damages if the board refuses to retain him or her. The critical distinction was made between the failure to renew a contract which had expired and the termination of employment during the period of the contract or under a tenure law.³⁷

Tenure Laws

At the present time most state legislatures have enacted some form of teacher tenure laws. These statutes commonly provide that after having served a probationary period, a teacher is entitled to continued employment unless the board of education specifically acts to terminate. The reasons for which a tenured teacher may be discharged and the procedures which must be followed are generally set out in the statutes.³⁸

The purpose of teacher tenure laws is generally recognized to be two-fold. First of all, they protect teachers against arbitrary dismissal; therefore, the teacher is provided with considerable employment security. Secondly, because these laws protect competent and qualified teachers against unjustified dismissal, the students are likely to benefit by better instruction than they might have otherwise.³⁹

³⁷E. Reutter & R. Hamilton, *The Law of Public Education* 476 (2nd ed. 1976).

³⁸See K. Alexander, *School Law* 590-591, 594-595 (1980); W. Hazard, *Education and the Law* 368-373 (2nd ed. 1978); A. Morris, *The Constitution and American Education* 620-625 (2nd ed. 1980); E. Reutter & R. Hamilton, *The Law of Public Education* 476-482, 491-493 (2nd ed. 1976).

³⁹See, e.g., W. Castetter, *The Personnel Function in Educational Administration* 423-424 (2nd ed. 1976); E. Stoops, M. Rafferty, & R.

Hazard has found that tenure statutes generally are explicit in stating causes for termination. Although a few states do not state causes for dismissal, the greatest majority of tenure laws justify terminations on the basis of one or more of the following causes: incompetency, physical or mental incapacity, immoral or unprofessional conduct, neglect of duty, serious insubordination, conviction of certain crimes, elimination of the teaching position, and other good and just causes. The language is both specific and general and provides boards with a wide range of causes for dismissal, all of which are more or less related to "quality teaching."⁴⁰

Peterson, Rossmiller, and Volz have stated that when the statutes specifically enumerate the causes for discharge, a teacher may not be terminated for any other cause; however, legislatures sometimes include a provision that dismissal may be for any other good or just cause. They have also noted that a variety of reasons for dismissal have been used, including the following: condition of health, both physical and mental; age; causing or supporting disruption; engaging in illegal activities; using offensive language; personal appearance, sex-related activities; insubordination; incompetency or inefficiency; neglect of duty; unprofessional conduct; subversive activities; decreased need for services; marriage; civil rights

Johnson, *Handbook of Educational Administration* 653-654 (1975); Sinowitz, What about Teacher Tenure, *Today's Educ.*, April 1973, at 40.

⁴⁰W. Hazard, *Education and the Law* 372 (2nd ed. 1978).

activities; political activities; and reasons such as intoxication and use of drugs.⁴¹

Continuing Contract Laws

Hazard has cited a 1972 NEA study which classified the statutes of the 50 states and the District of Columbia into three categories--tenure laws, continuing contract laws, and annual or long-term contracts. Continuing contract laws were those which require only that the teacher be given advance notice of nonrenewal of the employment contract but do not require cause for dismissal or due process rights to the teacher.⁴²

Peterson, Rossmiller, and Volz have also pointed out that some states which do not grant teachers tenure status have developed an intermediate level of security between annual contracts and tenure through continuing contract statutes. Under these laws teaching contracts are automatically renewed unless notice of termination of the contract is given by a specific date. In some states these continuing contract statutes provide for a statement of the reasons for termination and an opportunity for a hearing; in other states neither is required.⁴³

⁴¹L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 451 (2nd ed. 1978).

⁴²W. Hazard, *Education and the Law* 370 (2nd ed. 1978).

⁴³L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 468 (2nd ed. 1978).

Due Process Rights of Nontenured Teachers

It must be clearly recognized that under certain circumstances associated with the nonrenewal of their contracts, even nontenured teachers are entitled to due process protections. Board of Regents v. Roth⁴⁴ and Perry v. Sindermann⁴⁵ are the touchstone cases in which the Supreme Court discussed when procedural due process would apply to termination actions. There is considerable literature regarding these decisions and the resulting implications for teacher terminations.

It is clear from Roth and Sindermann that nonrenewal of a probationary teacher's contract does not generally impinge upon any interest protected by the due process clause of the fourteenth amendment. A protected property or liberty interest is generally not at stake, and therefore the procedural due process protections are not applicable. However, if there are existing rules or understandings that a teacher may keep his or her job as long as that individual's performance is satisfactory, then a protected property interest might exist. Furthermore, if the nonretention of the probationary teacher is carried out in such a manner that the individual is stigmatized in some way as to substantially interfere with other employment possibilities, then a protected liberty interest might be implicated. In either of these instances, the teacher would be entitled to procedural

⁴⁴408 U.S. 564 (1972).

⁴⁵408 U.S. 593 (1972).

due process.⁴⁶

In publications by the National Organization for Legal Problems in Education (NOLPE), it has been stated that judicial decisions dealing with alleged liberty interest infringements are commonly based on several guidelines. First the action of the public employer must stigmatize the employee; second, the adverse information must be publicized by state action; and third, the employee must challenge the truth of the information. If these elements are present and the teacher is therefore entitled to a hearing, the purpose of the hearing is to give that person an opportunity to clear his or her good name.⁴⁷

Neill and Custis have summarized six factors, any one of which would entitle a teacher to a due process hearing before termination. They are: (1) tenure; (2) a contract for a period of years or even one year if termination is contemplated before the end of it; (3) an implied promise of continued employment; (4) an objective expectancy of reemployment; (5) nonrenewal based on a reason that would damage the teacher's standing or associations in the community or injure his or her reputation; and (6) a situation where a stigma would be created

⁴⁶See, e.g., K. Alexander, School Law 609-611 (1980); National Organization for Legal Problems of Education, The Yearbook of School Law 1979 § 2.5b; S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 34 (1978); M. Nolte, Duties and Liabilities of School Administrators 181 (1973); E. Reutter & R. Hamilton, The Law of Public Education 382-383 (2nd ed. 1976); Currier & Michalak, New Guidelines for Nonrenewal of Nontenured Teachers, Phi Delta Kappan, April 1974, at 571.

⁴⁷National Organization for Legal Problems of Education, The Yearbook of School Law 1979 § 2.5b.

which might tend to foreclose the teacher's freedom to take advantage of other teaching opportunities. The first four factors are classified as property interests and the last two as liberty interests.⁴⁸

It has also been explained in the NOLPE publications that in considering substantive due process claims, the courts go beyond the procedures followed to examine the justification for the policy or action. However, in situations where the teacher has no claim to procedural due process safeguards, the courts will not recognize as valid any claim to substantive due process protections.⁴⁹

Substantive Constitutional Rights

Aside from tenure statutes and the terms of the individual employment contracts, there are other substantive protections for a teacher's continued employment. These include both the substantive provisions of the federal and state constitutions and the statutes enacted at both the federal and state levels which prohibit various types of discrimination in public employment.⁵⁰

Morris has pointed out that teachers have a number of constitutional rights which limit the school's power to dismiss. These

⁴⁸S. Neill & J. Custis, *Staff Dismissal: Problems & Solutions* 34-35 (1978).

⁴⁹National Organization on Legal Problems of Education, *The Yearbook of School Law* 1979 § 2.4 d.

⁵⁰L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 440, 449 (2nd ed. 1978). See also, e.g., K. Alexander, *School Law* 531-533 (1980); E. Reutter & R. Hamilton, *The Law of Public Education* 481-491 (2nd ed. 1976).

rights include academic freedom, free expression, privacy, etc. A state has no constitutional power to terminate a teacher's employment simply because the teacher exercised a constitutional right, even though school officials may not have liked the way in which the constitutional right was exercised.⁵¹

Alexander has provided an excellent discussion of the relationship between a teacher's constitutional rights and employment security. He first noted that the earlier view of public employment as a privilege and not a right is no longer controlling, and that today public employees are not expected to shed their rights upon taking positions in public institutions.⁵²

He then pointed out that the courts have developed a flexible rule which merely provides that the public's interests will be balanced against the private interest of the employee in each circumstance. However, this balancing does not remove all vestiges of state restraint from teacher activities; on the contrary, the courts have reflected a strong belief that because of their sensitive position in the classroom, the teacher must be held accountable for activities both internal and external to the school. Since a teacher enters the school setting with the constitutional presumption of freedom of speech and association, the school must have a compelling reason to

⁵¹A. Morris, *The Constitution and American Education* 596 (2nd ed. 1980).

⁵²K. Alexander, *School Law* 531 (1980).

overcome the teacher's interest.⁵³

It has been stated that if a termination is related to the teacher's exercise of constitutionally protected rights, then that individual is entitled to procedural due process. Such rights as freedom of speech, freedom of association, and privacy are perhaps most often involved. The right to procedural due process is often taken to include an administrative hearing. Although such a hearing might be a good educational management practice, it is perhaps more likely that the teacher would challenge his or her termination and invoke those constitutional protections in a court of law.⁵⁴

It has also been pointed out that just because a teacher has been involved in constitutionally protected activities, that does not preclude termination on other grounds independent of those activities. However, the school officials would have to be able to prove that the teacher would have been dismissed on the basis of those other grounds.⁵⁵

As Morris has indicated, if a teacher who is entitled to a hearing relies on the constitutional right as a defense to the charges,

⁵³Id.

⁵⁴See K. Alexander, *School Law* 610 (1978); J. Nowak, R. Rotunda, & J. Young, *Constitutional Law* 485, 488 (1978); L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 449 (2nd ed. 1978).

⁵⁵S. Neill & J. Custis, *Staff Dismissal; Problems & Solutions* 39 (1978); L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 449 (2nd ed. 1978).

then that hearing must be of sufficient scope to allow for the full development of all the necessary facts and law in order to judge whether that constitutional right exists in the specific circumstances and whether it has been infringed.⁵⁶

Local District Regulations and Agreements

Local district policies and negotiated agreements may also provide teachers with some measure of employment security. Although such provisions may facilitate effective and appropriate personnel management practices, if they go beyond the rights generally afforded by statutes and constitutions, legal difficulties can be the result.

The adoption of formal, detailed, specific personnel policies by the local school district in lieu of tenure statutes has been advocated by the American Association of School Administrators. Such policies would include statements of the entire personnel-action sequence, including statements of standards regarding teacher performance and evaluation and clear delineation of grounds for personnel action.⁵⁷ These policies could also provide for impeccable due process, with proper procedures to be followed to insure fairness. The essential elements of fair teacher termination practices would include: (1) specific written charges capable of verification must

⁵⁶A. Morris, *The Constitution and American Education* 649 (2nd ed. 1980).

⁵⁷American Association of School Administrators, *Teacher Tenure Ain't the Problem* 17-18 (1973).

be presented; (2) a hearing with counsel if desired, (3) assurances that no new charges will be introduced at the hearing; and (4) a provision for appeal.⁵⁸

Weber has also proposed that boards of education should establish rules and regulations governing the dismissal of tenured teachers which conform to the requirements of the law. These should include, among other things, a description of hearing procedures and requirements concerning evidence.⁵⁹

Collective bargaining agreements may include provisions dealing with nonrenewal of probationary teachers. These provisions could require the district not only to notify the teacher but also to notify the union. Such negotiated agreements might grant such additional rights as a statement of reasons, a hearing, and the use of specified evaluation procedures. Districts have been advised not to include "just cause" clauses in contracts regarding probationary teachers because they could lead to an expectancy of reemployment on the part of the probationary teacher.⁶⁰

Legal problems can arise when provisions giving additional procedural protections to nontenured teachers are enacted at the local district level. Such provisions come into being either by boards of

⁵⁸Id. at 23-24.

⁵⁹C. Weber, *Leadership in Personnel Management in Public Schools* 130 (1970).

⁶⁰S. Neill & J. Custis, *Staff Dismissal: Problems & Solutions* 34 (1978). See also, American Association of School Administrators, *Teacher Tenure Ain't the Problem* 26 (1973).

education acting unilaterally or through the collective bargaining process. The inclusion of the phrase "for cause" as a criterion for discharge of nontenured teachers is particularly troublesome. If this is equated to a requirement for a complete adversary procedure, the situation becomes indistinguishable from tenure, and "instant" tenure protection is provided. This is contrary to good personnel theory and also contrary to the judicial cannon that when separate provisions apply to separate sets of closely allied circumstances the enacting body (the legislature) is presumed to have intended a distinction.⁶¹

B. The Teacher Termination Hearing

The Purpose of the Hearing

Reutter and Hamilton have stated that the core of procedural due process is the hearing, at which the teacher must have an opportunity to refute the charges or to establish that they do not constitute grounds for discharge.⁶² Punke has written that the main purpose of a hearing is to present evidence on the charges before an impartial judgment tribunal.⁶³ Gatti and Gatti have asserted that the main purpose of a hearing is to allow the teacher to offer evidence and

⁶¹E. Reutter & R. Hamilton, *The Law of Public Education* 166 (2nd ed. 1979 Supp.).

⁶²E. Reutter & R. Hamilton, *The Law of Public Education* 491 (2nd ed. 1976).

⁶³H. Punke, *The Teacher and the Courts* 670-671 (1971).

reasons as to why he or she should not be terminated.⁶⁴ Neill and Custis have found that hearings have a two-fold purpose; first, to provide an opportunity to establish the validity of the charges and their relationship to the statutory grounds for separation and, second, to provide an opportunity for the teacher to rebut the charges or minimize their importance.⁶⁵

General Procedural Requirements

The matter of the proper procedure to be followed in the termination of a teacher's employment is most important.⁶⁶ Although specific termination procedures may vary from state to state and from one school system to another within a state, certain steps are usually required and there is a great deal of uniformity in this regard.⁶⁷

There are a number of rights to which a teacher whose termination is being considered is entitled. Some of these major rights which are generally identified in the literature include: (1) notice of the charges upon which the contemplated discharge is to be based; (2) an opportunity for a hearing to contest those charges; (3) a decision based solely on the evidence produced at the hearing; and

⁶⁴D. Gatti & R. Gatti, *The Teacher and the Law* 120 (1972).

⁶⁵S. Neill & J. Custis, *Staff Dismissal: Problems & Solutions* 50 (1978).

⁶⁶L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 446 (2nd ed. 1978).

⁶⁷D. Gatti & R. Gatti, *The Teacher and the Law* 118 (1972); 8 *The Encyclopedia of Education* 623 (1971).

(4) an opportunity for judicial review.⁶⁸

According to Neill and Custis there are ten specific aspects of due process associated with teacher terminations with which administrators and board member should be aware. They are: (1) notice; (2) right to counsel; (3) judgment by an impartial tribunal; (4) right to avoid self-incrimination; (5) presentation of evidence; (6) right to cross-examination; (7) right to have witnesses; (8) proof of guilt; (9) record of hearing; and (10) right of appeal.⁶⁹

The hearing procedures need not be those followed in a court of law.⁷⁰ However, fundamental notions of fairness should govern the proceedings.⁷¹

If the statutes prescribe the procedure, then it must be followed precisely.⁷² In the absence of a statutory directive, the

⁶⁸See, e.g., 8 The Encyclopedia of Education 623 (1971); D. Gatti and R. Gatti, *The Teacher and the Law* 118-121 (1972); A. Morris, *The Constitution and American Education* 648-649 (2nd ed. 1980); L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 446-451 (2nd ed. 1980); E. Reutter & R. Hamilton, *The Law of Public Education* 491-492 (2nd ed. 1976).

⁶⁹S. Neill & J. Custis, *Staff Dismissal: Problems & Solutions* 35 (1978).

⁷⁰A. Morris, *The Constitution and American Education* 648 (2nd ed. 1980); L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 46 (2nd ed. 1978); E. Reutter & R. Hamilton, *The Law of Public Education* 491 (2nd ed. 1976).

⁷¹78 C.J.S. *Schools and School Districts* § 204d (1952); L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 46 (2nd ed. 1978); E. Reutter & R. Hamilton, *The Law of Public Education* 491 (2nd ed. 1976).

⁷²A. Morris, *The Constitution and American Education* 649 (2nd ed. 1980); M. Nolte, *Duties and Liabilities of School Administrators* 178 (1973); M. Nolte, *How to Survive in Teaching* 38 (1978).

local district may adopt its own procedures,⁷³ so long as they are adequate for justice to be done.⁷⁴ If either statutes or board rules set out the details for conducting a hearing, then they must be strictly followed or the hearing will be a nullity and any action based on it will be void.⁷⁵

Constitutional due process is less precise as to its requirements than are statutes. It is generally a question of "fair play," and the concept encompasses different rules in accordance with different factual contexts and different types of proceedings.⁷⁶

Notice

The concept of notice has two separate components. First of all, it is the continuing duty of the board and administrative staff to inform the teachers of what is expected of them by way of duties and standards of performance. Secondly, in the event that school officials are considering the termination of a teacher's employment, there is then the obligation to notify the teacher of that possibility.⁷⁷

⁷³68 Am. Jur. 2d Schools § 185 (1973); 78 C.J.S. Schools and School Districts § 204d (1952).

⁷⁴N. Edwards, The Courts and the Public Schools 499 (3rd ed. 1971).

⁷⁵E. Reutter & R. Hamilton, The Law of Public Education 492 (2nd ed. 1976).

⁷⁶E. Reutter & R. Hamilton, The Law of Public Education 491 (2nd ed. 1976). See also S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 35 (1978).

⁷⁷See W. Hazard, Education and the Law 360 (2nd ed. 1978); A. Morris, The Constitution and American Education 648 (2nd ed. 1980); S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 35-36 (1978).

Peterson, Rossmiller, and Volz have stated that some form of notice to the teacher regarding the termination of employment is always required, either by state statute or constitutional due process.⁷⁸

If the teacher is entitled to a hearing, then the notice must provide adequate information concerning the charges, the witnesses, and the evidence so that the teacher will have an opportunity to prepare an adequate defense and to contest the basis for the termination.⁷⁹

The Tribunal

As Morris has noted, one of the major problems inherent in this whole procedure is insuring that the teacher receives a fair and impartial hearing. The reason is that in many instances the board of education acts as prosecutor, judge, and jury.⁸⁰ Two solutions have been proposed to resolve this situation. One is to separate functions, so that the administrators serve as prosecutors; another is to provide for a hearing examiner to make a record and findings along

⁷⁸L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 448 (2nd ed. 1978).

⁷⁹D. Gatti & R. Gatti, *The Teacher and the Law* 119 (1972); W. Hazard, *Education and the Law* 360 (2nd ed. 1978); A. Morris, *The Constitution and American Education* 648 (2nd ed. 1980); S. Neill & J. Custis, *Staff Dismissal: Problems & Solutions* 36 (1978); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 Duke L. J. 841, 865.

⁸⁰A. Morris, *The Constitution and American Education* 649 (2nd ed. 1980).

with a recommendation to the board.⁸¹

The fact that members of the governing board have knowledge of the situation or prior involvement in the matter does not bar them as members of the hearing tribunal.⁸² In fact, if the board acts to initiate the termination proceedings, that presupposes some familiarity with the facts.⁸³ Board members can be called to testify as to their possible bias against the teacher and to their ability to render a fair decision.⁸⁴

It is also generally recognized that the teacher as well as the board may be represented by an attorney.⁸⁵ An issue of some concern is whether the board sitting as a tribunal and the administration prosecuting the case should be represented by the same attorney; it has been recommended that the school district employ two separate

⁸¹S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 36-37 (1978).

⁸²78 C.J.S. Schools and School Districts § 204d (1952); E. Reutter & R. Hamilton, The Law of Public Education 491-492 (2nd ed. 1976).

⁸³22 Am. Jur. Proof of Facts Dismissal of Teachers § 50 (1969).

⁸⁴68 Am. Jur. 2d Schools § 198 (1973).

⁸⁵68 Am. Jur. 2d Schools § 192 (1973); 22 Am. Jur. Proof of Facts Dismissal of Teachers § 50 (1969); 78 C.J.S. Schools and School Districts § 204d (1952); D. Gatti & R. Gatti, The Teacher and the Law 120 (1972); A. Morris, The Constitution and American Education 648 (2nd ed. 1980); S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 35 (1978); L. Peterson, R. Rossmiller, & M. Volz, The Law and Public School Operation 448 (2nd ed. 1978); Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L.J. 841, 865.

attorneys to represent these two separate entities.⁸⁶

Burden of Proof

A number of authorities have stated that the school district has the burden of proof regarding the charge or charges on which the termination is to be based.⁸⁷ The burden is not on the individual teacher to prove that the charges are untrue.⁸⁸ The standard of proof relative to these charges is "by a preponderance of the evidence,"⁸⁹ which is the same standard as that generally applied in regular civil law suits.⁹⁰ Furthermore, it is often noted that any termination decision must be based only upon evidence produced at the hearing.⁹¹

⁸⁶S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 37 (1978).

⁸⁷68 Am. Jur. 2d Schools § 192 (1973); 22 Am. Jur. Proof of Facts Dismissal of Teachers § 50 (1969); 78 C.J.S. Schools and School Districts § 204d (1952); D. Gatti & R. Gatti, The Teacher and the Law 121 (1972); S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 37 (1978); L. Peterson, R. Rossmiller, & M. Volz, The Law and Public School Operation 449 (2nd ed. 1978).

⁸⁸78 C.J.S. Schools and School Districts § 204d (1952); S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 37 (1978).

⁸⁹68 Am. Jur. 2d Schools § 192 (1973); 22 Am. Jur. Proof of Facts Dismissal of Teachers § 50 (1969); D. Gatti & R. Gatti, The Teacher and the Law 121 (1972); S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 37 (1978).

⁹⁰S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 39 (1978).

⁹¹22 Am. Jur. Proof of Facts Dismissal of Teachers §§ 50-51 (1969); 78 C.J.S. Schools and School Districts § 204d (1952); A. Morris, The Constitution and American Education 649 (2nd ed. 1980); L. Peterson, R. Rossmiller, & M. Volz, The Law and Public School Operation 449 (2nd ed. 1978); E. Reutter & R. Hamilton, The Law of Public

Neill and Custis have pointed out a variation regarding the burden of proof. When it is alleged that the termination is based upon the exercise of a constitutional right, the teacher must first prove that claim. Then the burden shifts to the school district to prove that the dismissal was actually based on another valid reason.⁹² Although this is generally correct for lawsuits filed in federal court,⁹³ it is not clear just what the implications would be for an administrative termination hearing.

Another variation may be those instances identified in the NOLPE publications where the termination action has allegedly infringed upon a liberty interest by stigmatizing an employee or damaging his or her good name. It has been pointed out that in such a situation the only purpose of the hearing is to give the employee an opportunity to clear his or her good name.⁹⁴ Although this source does not discuss the issue, it would seem that in such a situation the burden of proof may be on the employee to clear his or her good name, unless the termination is to be actually based upon whatever element it is that constitutes the stigmatizing or damaging factor.

Education 492 (2nd ed. 1976); Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L.J. 841, 865.

⁹²S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 44 (1978).

⁹³See Mt. Healthy City School Dist. Bd. of Educ. v Doyle, 429 U.S. 274 (1977).

⁹⁴National Organization on Legal Problems in Education, The Yearbook of School Law 1979 § 2.5 b.

It is generally the responsibility of the administration to make the case for termination.⁹⁵ This is a duty which is not without its difficulties. Many states have statutes which specify the causes upon which a termination must be based. However, French has pointed out that the terms used in the statutes--insubordination, incompetence, immorality, inefficiency, neglect of duty, etc.--may be difficult to define in relation to the evidence available to the administrator. Therefore, it is necessary first to determine which cause the evidence tends to support, and then to establish that there is sufficient evidence to support a finding that such cause exists.⁹⁶ Rosenberger and Plimpton have indicated that the quality of the evidence supporting the reasons for the termination is as important as the reasons themselves.⁹⁷

Evidence

The usual method of offering evidence is through the testimony of witnesses. These witnesses might include professional educators, students, parents, or other community members; however, administrators are the most common witnesses.⁹⁸ Written reports and evaluations,

⁹⁵L. French, Secondary School Administrators Legal Handbook 13 (1975); 8 The Encyclopedia of Education 623 (1971).

⁹⁶L. French, Secondary School Administrators Legal Handbook 13 (1975).

⁹⁷Rosenberger & Plimpton, Teacher Incompetence and the Courts, 4 J.L. & Educ. 469, 479 (1975).

⁹⁸S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 38 (1978); Rosenberger & Plimpton, Teacher Incompetence and the Courts, 4 J.L. & Educ. 469, 479-480 (1975).

samples of the teacher's work, and student test scores are also used as evidence. Such written evidence may become part of the record, but it is better that it is explained or substantiated by oral testimony.⁹⁹

It has been suggested that witnesses should be sworn, but that failure to do so does not necessarily render the hearing invalid.¹⁰⁰ However, along with this generalization it must be noted that many state statutes do specify that witnesses shall be sworn.

Expert opinion evidence has been liberally allowed in teacher dismissal proceedings. It is recognized that teaching is an art as well as a science and that the ordinary layman is not in a position to measure the qualifications of teachers.¹⁰¹ An expert witness might be either an administrator who is responsible for the supervision and evaluation of the teacher or a professional educator from outside the school system who is called to testify in that capacity.¹⁰²

⁹⁹ S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 38-39 (1978); Rosenberger & Plimpton, Teacher Incompetence and the Courts, 4 J.L. & Educ. 469, 481-482 (1975).

¹⁰⁰ 22 Am. Jur. Proof of Facts Dismissal of Teachers § 51 (1969); 78 C.J.S. Schools and School Districts § 204d (1952); N. Edwards, The Courts and the Public Schools 499 (3d ed. 1971); cf. D. Gatti & R. Gatti, The Teacher and the Law 120 (1972) (all witnesses are sworn).

¹⁰¹ 68 Am. Jur. 2d Schools § 196 (1973); 22 Am. Jur. Proof of Facts Dismissal of Teachers § 51 (1969); H. Punke, The Teacher and the Courts 676 (1971).

¹⁰² See 68 Am. Jur. 2d Schools § 196 (1973); 22 Am. Jur. Proof of Facts Dismissal of Teachers § 51 (1969).

A basic purpose of a termination hearing is to afford the teacher an opportunity to refute the charges. The teacher's right to contest the evidence presented in support of the charges by cross-examination of adverse witnesses is clearly recognized in the literature.¹⁰³ The right of the teacher to present evidence on his or her own behalf and to bring witnesses to the hearing is also commonly acknowledged.¹⁰⁴

Some writers have asserted that a teacher has a right to subpoena witnesses and documents.¹⁰⁵ However, this may or may not be true, depending upon applicable statutory provisions and due process considerations.

¹⁰³68 Am. Jur. 2d Schools § 199 (1973); 22 Am. Jur. Proof of Facts Dismissal of Teachers § 51 (1969); 78 C.J.S. Schools and School Districts § 204d (1952); D. Gatti and R. Gatti, The Teacher and the Law 120 (1972); S. Neill and J. Custis, Staff Dismissal: Problems & Solutions 38-39 (1978); 8 The Encyclopedia of Education 24 (1971); Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L.J. 841, 865; Comment Procedural Due Process and the Teacher, 29 Ark. L. Rev. 87, 99-100 (1975).

¹⁰⁴68 Am. Jur. 2d Schools § 199 (1973); 22 Am. Jur. Proof of Facts Dismissal of Teachers § 51 (1969); 78 C.J.S. Schools and School Districts § 204d (1952); D. Gatti & R. Gatti, The Teacher and the Law 120 (1972); A. Morris, The Constitution and American Education 649 (2nd ed. 1980); S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 35 (1978); L. Peterson, R. Rossmiller, & M. Volz, The Law and Public School Operation 449 (2nd ed. 1978); 8 The Encyclopedia of Education 24 (1971); Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L.J. 841, 865; Comment, Procedural Due Process and the Teacher, 29 Ark. L. Rev. 87, 99-100 (1975).

¹⁰⁵See D. Gatti and R. Gatti, The Teacher and the Law 120 (1972); 8 The Encyclopedia of Education 624 (1971).

Rules of Evidence

A number of writers have stated that the formal rules of evidence used in judicial proceedings do not apply to teacher termination hearings.¹⁰⁶ No authority has been found in which the contrary position was asserted. However, it must be noted that either statutes or local district rules of procedure might provide for the use of such rules of evidence.

This is not to say that no restrictions on the admission of evidence have been recognized. Neill and Custis have cautioned that the evidence presented should be limited to the charges.¹⁰⁷ Only evidence that is material and relevant should be admitted and considered by the hearing tribunal.¹⁰⁸ Hyman has suggested that evidence must be more than facts; it must be facts that connect the teacher to some criteria, and it must be pertinent to the case at hand.¹⁰⁹ Rosenberger and Plimpton have indicated that the time period over which evidence is gathered has a bearing on its relevance, because incompetence (and

¹⁰⁶68 Am. Jur. 2d Schools § 195 (1973); 22 Am. Jur. Proof of Facts Dismissal of Teachers § 51 (1969); 78 C.J.S. Schools and School Districts § 204d (1952); D. Gatti & R. Gatti, The Teacher and the Law 120 (1972); S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 37 (1978); E. Reutter & R. Hamilton, The Law of Public Education 491 (2nd ed. 1976).

¹⁰⁷S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 37 (1978).

¹⁰⁸22 Am. Jur. Proof of Facts Dismissal of Teachers § 51 (1969); 78 C.J.S. Schools and School Districts § 204d (1952).

¹⁰⁹R. Hyman, School Administrators Handbook of Teacher Supervision and Evaluation Methods 10 (1975).

perhaps other "causes") is not manifested by an isolated act but by patterns of behavior.¹¹⁰

It has been stated that hearsay is generally admissible, but that the fact that it is hearsay should be taken into account when evaluating such evidence.¹¹¹ It has also been stated that hearsay is not evidence.¹¹²

Some forms of hearsay evidence, such as school personnel records and evaluations, have been held admissible under the Uniform Business Records as Evidence Act. Such reports are regularly prepared and filed according to the administrative procedure of the school. Such records have also been held to constitute legally competent evidence without reliance on any statutory exception to the hearsay rule.¹¹³

The exclusion of certain testimony under the doctrine of privilege has been recognized. This privilege includes both social policy considerations regarding confidential relationships and the

¹¹⁰Rosenberger & Plimpton, Teacher Incompetence and the Courts, 4 J.L. & Educ. 469, 484 (1975).

¹¹¹68 Am. Jur. 2d Schools § 195 (1973); 22 Am. Jur. Proof of Facts Dismissal of Teachers § 51 (1969); 78 C.J.S. Schools and School Districts § 204d (1952); H. Punke, The Teacher and the Courts 675 (1971).

¹¹²R. Hyman, School Administrators Handbook of Teacher Supervision and Evaluation Methods 10 (1975); S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 38 (1978).

¹¹³22 Am. Jur. Proof of Facts Dismissal of Teachers § 51 (1969). See also S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 38 (1978).

constitutional protection against self-incrimination or involuntary confession.¹¹⁴

The Record

Following the hearing, the board must render its decision and make specific findings of fact based on the evidence produced at the hearing.¹¹⁵ Such findings have been said to serve two purposes. First of all, findings enable a reviewing court to know the factual basis for a determination and avoid a judicial encroachment on a school board's function. Furthermore, the making of findings of fact evokes care on the part of the decision-maker in ascertaining the facts and deciding according to the facts and the law, rather than arbitrarily or from extra-legal considerations.¹¹⁶

The findings of fact should include not only the charges on which the termination is based, but also those basic facts reported in the transcript of the proceedings which support those charges.¹¹⁷ If more than one reason for termination exists, the findings should set out

¹¹⁴22 Am. Jur. Proof of Facts Dismissal of Teachers § 51 (1969).

¹¹⁵A. Morris, *The Constitution and American Education* 648-649 (2nd ed. 1980); S. Neill & J. Custis, *Staff Dismissal: Problems & Solutions* 50 (1978); E. Reutter & R. Hamilton, *The Law of Public Education* 492 (2nd ed. 1976).

¹¹⁶68 Am. Jur. 2d Schools § 200 (1973).

¹¹⁷Id.

those reasons separately,¹¹⁸ and indicate what evidence is relied upon to support which findings of fact.¹¹⁹

A record of the hearing proceedings is necessary for the purpose of judicial review.¹²⁰ It has been suggested that a court reporter be present to make a record of the hearing.¹²¹

Judicial Review

According to Peterson, Rossmiller, and Volz, the primary purpose of judicial review of a decision of an administrative agency--such as a board of education--is to keep the agency within the jurisdictional and judicial bounds prescribed by law and to protect the rights of the parties which are guaranteed to them by the constitution or the statutes. To exercise this responsibility, a reviewing court must examine the record of the hearing to satisfy itself that relevant, probative, and substantial evidence supports the board's finding and conclusion.¹²²

¹¹⁸S. Neill & J. Custis, *Staff Dismissal: Problems & Solutions* 50 (1978).

¹¹⁹A. Morris, *The Constitution and American Education* 649 (2nd ed. 1980).

¹²⁰D. Gatti & R. Gatti, *The Teacher and the Law* 121 (1972); L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 450 (2nd ed. 1978); H. Punke, *The Teacher and the Courts* 676-677 (1971); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 *Duke L.J.* 841, 865. But cf. N. Edwards, *The Courts and the Public Schools* 499 (3rd ed. 1971) (the failure to keep a record of the proceedings is immaterial).

¹²¹L. Peterson, R. Rossmiller, & M. Volz, *The Law and Public School Operation* 450 (2nd ed. 1978).

¹²²Id.

Some form of judicial review is provided in every state; the appeal procedures, which are governed largely by statutory provision, vary greatly from state to state. In some states there is a direct appeal to the courts.¹²³

According to Reutter and Hamilton, courts will generally uphold the findings of administrative bodies unless they are contrary to the manifest weight of the evidence.¹²⁴ Peterson, Rossmiller, and Volz have stated that courts will generally sustain boards of education if their decisions are based on substantial evidence.¹²⁵ Neill and Custis have said that teachers can appeal and win if they can prove that the board's action was "arbitrary and capricious," which means that the reason given as the basis for the termination is unrelated to the teacher's function, is trivial, or is wholly unsupported by the facts.¹²⁶

IV. ADMINISTRATIVE EVIDENCE LAW

The general theory of evidence law and how that law relates to quasi-judicial administrative agency hearings is accorded only a

¹²³68 Am. Jur. 2d Schools § 203 (1973); D. Gatti & R. Gatti, The Teacher and the Law 121 (1972). See also S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 44 (1978).

¹²⁴E. Reutter & R. Hamilton, The Law of Public Education 492 (2nd ed. 1976).

¹²⁵L. Peterson, R. Rossmiller, & M. Volz, The Law and Public School Operation 449-450 (2nd ed. 1978).

¹²⁶S. Neill & J. Custis, Staff Dismissal: Problems & Solutions 43 (1978).

very limited treatment in the literature on teacher termination hearings. For a discussion of those basic concepts it was necessary to review a number of authorities in the fields of evidence law and administrative law.

It should be noted at the outset that much of the literature in the area of administrative law assumes the use of a qualified hearing examiner and the existence of agency decision-makers with technical expertise. Although there are teacher termination proceedings which would approximate that model, the more common setting is that of a lay board of education hearing the evidence and making a decision about a teacher's continued employment in a situation with which members of the board may have considerable familiarity. While the basic principles of administrative law generally hold for teacher termination hearings, the special circumstances which often exist in the exercise of that particular educational management function should be kept in mind.

A. Administrative Hearings

Administrative Agencies

Davis has defined administrative law as "the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action."¹²⁷ He describes an administrative agency as "a governmental authority, other

¹²⁷K. Davis, *Administrative Law and Government* 6 (1975).

than the court and other than a legislative body, which affects the rights of private parties. . . ."¹²⁸

"The local school district is a state agency, created by either statute or constitution, to which the legislature by law delegates the power to govern the schools."¹²⁹ Alexander has also pointed out that since local districts are state agencies, board members are state, not local officials. Local school boards are vested with a portion of the sovereignty of the state through delegation, by virtue of which they perform various administrative functions having executive, quasi-judicial, and quasi-legislative attributes.¹³⁰

Peterson, Rossmiller, and Volz have noted that although a board of education is primarily an administrative body, it sometimes performs duties of a quasi-judicial nature.¹³¹ Many states have statutes which require boards of education to hold hearings on termination of personnel;¹³² furthermore, because teachers are entitled to both substantive and procedural due process protections, in many situations they are entitled to a hearing whether provided by statute or not.¹³³

¹²⁸Id.

¹²⁹K. Alexander, School Law 118 (1980).

¹³⁰Id.

¹³¹L. Peterson, R. Rossmiller, & M. Volz, The Law and Public School Operation 45 (2nd ed. 1978).

¹³²Id.

¹³³Id. at 449.

The Trial-type Hearing

According to Davis, there are two principal kinds of hearings-- trials and arguments. A "trial" is a process in which the parties present evidence, which is subject to cross-examination and rebuttal, and the tribunal makes a determination on the record; the key to a trial is the opportunity to know and to meet the evidence and the argument of the other side. An "argument" is a presentation of ideas, as distinguished from evidence, to a tribunal; the argument may be in either oral or written form.¹³⁴

Mashaw and Merrill have identified what are at least five possible sources of rights to trial-type procedures: (1) a specific statute which governs a particular agency function and specifies the procedures required; (2) an agency's rules of procedure; (3) a general administrative procedure act; (4) constitutional due process requirements; and (5) the common law.¹³⁵

They had also suggested that regardless of the specific source of the right to a trial-type procedure, the judicial interpretation of statutory and regulatory hearing requirements will be based on the same policies that are relevant to the decision of constitutional claims. For example, in dealing with what is perhaps the most common question of statutory interpretation--what procedures are necessary under statutes which require in general terms that action be taken only

¹³⁴K. Davis, *Administrative Law Text* § 7.01 (3rd ed. 1972).

¹³⁵J. Mashaw & R. Merrill, *Introduction to the American Public Law System* 325-326 (1975).

after a hearing--the customary judicial approach is virtually identical to that employed in determining what procedures the Constitution requires.¹³⁶

However, Reutter and Hamilton have said that there is a distinction between the court's view of statutory and constitutional procedures for teacher termination. They have stated that if within a given state various statutes have established termination procedures, those provisions will probably be strictly enforced by the courts. However, constitutional due process is not so precise as to requirements, and the question for the court will be one of whether there was "fair play" under all the circumstances.¹³⁷

Hearing Procedures

According to Ruhlin, there is no standard model for a formal administrative hearing. The organization and form depend upon such factors as the type of case, the issues to be resolved, the number of witnesses, the custom of the agency, and the temperament of the hearing examiner. The one common criterion is the development of a fair and concise record.¹³⁸ It should be noted that this author was writing primarily in reference to federal administrative agencies.

¹³⁶ Id. at 326.

¹³⁷ E. Reutter & R. Hamilton, *The Law of Public Education* 491 (2nd ed. 1976).

¹³⁸ M. Ruhlin, *Manual for Administrative Law Judges* 30 (1974).

Mashaw and Merrill have identified several basic elements which are generally included in a trial-type hearing: (1) timely and specific notice of the issues to be resolved; (2) the right of affected parties to appear personally or through representatives to present evidence and to argue their positions; (3) the right to confront and cross-examine adverse witnesses; (4) open or public proceedings; (5) an impartial decision-maker; (6) a decision based exclusively on the evidence and argument submitted at the hearing or otherwise made a part of the record of the proceeding; and (7) written findings of fact and conclusions of law.¹³⁹

Davis has described a trial as a proceeding in which a tribunal makes findings of fact on the basis of the evidence presented (or on what is officially noticed) and in which each party has had an opportunity to meet that evidence through rebuttal evidence, cross-examination, and argument.¹⁴⁰

Flick has asserted that the right to cross-examine adverse witnesses is particularly significant in the informal proceedings typical of an administrative hearing.¹⁴¹ When the formal rules of evidence do not apply and evidence is admitted subject to very few restrictions, the procedural safeguard of cross-examination is essential

¹³⁹J. Mashaw & R. Merrill, *Introduction to the American Public Law System* 325 (1975).

¹⁴⁰2 K. Davis, *Administrative Law Treatise* § 10:7 (1978).

¹⁴¹Flick, The Opportunity to Controvert Adverse Testimony in Administrative Proceedings: A Search for Criteria, 28 U. Toronto L.J. 1 (1978).

to test the reliability of evidence which might otherwise not be admitted because of the exclusionary rules.¹⁴² Furthermore, in the absence of formal discovery procedures, cross-examination may be used as a substitute for discovery and as a means of securing information.¹⁴³

According to Davis, when sufficient interests are at stake, due process generally requires a trial-type hearing to resolve issues of adjudicative fact.¹⁴⁴ He has provided what has become a generally accepted and fundamental concept regarding two principal kinds of "facts."

Adjudicative facts usually answer the questions of who did what, where, when, how, why, and with what motive or intent; adjudicative facts are roughly the kind of facts which go to the jury in a jury trial. Legislative facts do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion.¹⁴⁵

Davis has also stated that it is the essence of justice that adjudicative facts--facts pertaining to a particular party--normally ought not be found without allowing that party an opportunity for a full hearing.¹⁴⁶

If a trial-type hearing does occur at some point in the teacher

¹⁴²Id. at 2.

¹⁴³Id. at 9.

¹⁴⁴2 K. Davis, Administrative Law Treatise § 12:1 (1978).

¹⁴⁵Id. at § 12:3.

¹⁴⁶K. Davis, Administrative Law Text § 7.16 (3rd ed. 1972).

termination process, it is at this stage that the employer and the employee will attempt to establish their respective positions. The school officials will attempt to provide some justification for the proposed termination, which will involve the demonstration (1) that certain elemental facts exist and (2) that because those facts exist, certain legal consequences should follow. The teacher will attempt to show either (1) that those facts do not exist or (2) that even if those facts do exist, the legal consequences should not follow. As Wigmore has suggested, these two elements illustrate the distinction between "fact" and "law"; and although the distinction is often difficult to apply, the former may be thought of as belonging to a class of actual phenomena, while the latter may be considered as belonging to a body of abstract legal principles.¹⁴⁷

B. Evidence Law--Some General Concepts

Evidence

This process of presenting evidence for the purpose of establishing that an asserted fact exists is the primary concern of "Evidence."¹⁴⁸ In his treatise, Wigmore defined "Evidence," in the context of this process, as:

Any knowable fact or group of facts, not a legal or logical principle, considered with a view to its being offered before a legal tribunal for the purpose

¹⁴⁷ See 1 Wigmore on Evidence § 1 (3rd ed. 1940).

¹⁴⁸ 1 Wigmore on Evidence § 1 (3rd ed. 1940).

of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked.¹⁴⁹

Wigmore also pointed out that evidence is a relative term. It signifies a relation between two facts--a "fact" (proposition) to be established and a "fact" (evidentiary fact) which tends to establish the proposition. The evidentiary fact is presented as a reality for the purpose of convincing the trier of the fact that the proposition is also a reality. Therefore, the nature of any evidential question necessarily involves two related questions: (1) What is the proposition to be proved? and (2) What is the evidential fact offered to prove it?¹⁵⁰

It should be noted that each evidentiary fact may in turn become a proposition with one or more elements to be proved by the offer of more elemental data.¹⁵¹ Conversely, each proposition proved may be used as "basic fact" to be offered in support of a more general proposition or "ultimate fact."¹⁵²

Official Notice

Although the concept of official notice seems to have limited

¹⁴⁹Id.

¹⁵⁰Id. at § 6.

¹⁵¹Id.

¹⁵²See K. Davis, Administrative Law Text § 16.04 (3rd ed. 1972).

application to teacher termination hearings, it is a fundamental of administrative law and a brief discussion seems appropriate. According to McCormick, official notice, like its counterpart, judicial notice, involves reliance by the hearing tribunal on extra-record information. This means that the tribunal, in making a decision, may rely on facts and opinions not supported by evidence "on the record." The primary reason for official notice is to simplify the process of proof. When facts are known or can safely be assumed, the process of proving them is both time-consuming and unduly formal.¹⁵³

Davis has stated that the difference between adjudicative facts and legislative facts is the cardinal distinction which governs the use of extra-record facts by courts and agencies. Adjudicative facts relate to the specific circumstances of the dispute, whereas legislative facts are ordinarily of a general nature and do not specifically concern the immediate parties. The difference is that findings of adjudicative facts, apart from facts properly noticed, must be supported by evidence, but legislative facts need not be and in fact sometimes cannot be.¹⁵⁴

Furthermore, Davis has rejected the requirement of Rule 201 of the Federal Rules of Evidence that judicial notice must be limited to facts not subject to reasonable dispute. He has asserted that the basic principle of official notice is that extra-record facts should

¹⁵³ McCormick on Evidence § 357 (2nd ed. 1972).

¹⁵⁴ K. Davis, Administrative Law Text § 15.03 (3rd ed. 1972).

be assumed whenever it is convenient, subject to the fundamental fairness requirement that the parties should have an opportunity to meet all the facts that influence the decision.¹⁵⁵

McCormick has disagreed with the notion that the Davis categories of adjudicative and legislative facts are of controlling significance. However, he has agreed that it is necessary to safeguard the elements of a fair trial by providing the parties notice of what facts are to be "officially noticed" and by giving the parties an opportunity to contest those facts. He has given his view that the primary practical effect of official notice is to shift the burden of proof on the noticed fact from the agency to the other party.¹⁵⁶

Burden of Proof

Berman and Greiner have stated that since it is assumed the court knows nothing about the truth of any proposition except as it is persuaded by the parties, no finding can be made as to the truth of a contested proposition unless sufficient evidence is produced upon which a reasonable finding can be based. Furthermore, the adversary process imposes on the parties to the proceedings the responsibility to develop and produce this evidence. It follows from this that the court must allocate the responsibility for the necessary evidence between the parties as to any contested proposition so that it can be decided

¹⁵⁵Id at § 15.09.

¹⁵⁶McCormick on Evidence § 357 (2nd ed. 1972).

(1) which party fails if no evidence is produced, and (2) which party must fail if, after evidence has been produced, the trier of fact is not persuaded as to the truth of the asserted proposition.¹⁵⁷

McCormick has encompassed these two separate responsibilities regarding the evidence in the concept of "burden of proof." The burden of producing evidence means that the party with that burden is liable to an adverse ruling if no evidence is produced on that particular issue. The burden of persuasion means that if the party with that burden fails to persuade the trier of fact that the allegation is true, then that issue must be decided against him.¹⁵⁸

According to Cooper and McCormick, the customary common law rule which is generally observed in administrative hearings is that the moving party, the one who is proposing the action, has the burden of proof, including both the burden of production and the burden of persuasion.¹⁵⁹

In most administrative hearings the burden of persuasion is met by the standard of "a preponderance of evidence."¹⁶⁰ A general definition of "by a preponderance of the evidence" might be that the standard is met when the trier of fact believes that it is more

¹⁵⁷H. Berman & W. Griener, *The Nature and Functions of Law* 307 (1966).

¹⁵⁸McCormick on Evidence § 336 (2nd ed. 1972).

¹⁵⁹J. F. Cooper, *State Administrative Law* 355 (1965); McCormick on Evidence § 355 (2nd ed. 1972).

¹⁶⁰McCormick on Evidence § 355 (2nd ed. 1972).

likely than not that the contested proposition is true.¹⁶¹

Since the principal significance of the burden of persuasion is limited to those instances in which the trier of fact is actually in doubt,¹⁶² the concept may not be all that relevant to many teacher employment termination decisions, where the moving party to the dispute, the school board, is also the ultimate decision-maker. It may be somewhat futile for similar reasons to discuss at what point the decision-making tribunal would determine that one party or the other has met its burden of producing evidence on a given issue so that the burden of going forward with the evidence shifts to the other party.¹⁶³

Jaffe has pointed out the significant distinction which must be kept in mind between the burden of proof and the scope of judicial review. This is related to the different functions of the initial fact-finding tribunal and the reviewing court. It is neither the task of the fact-finder nor the attitude that he is to take toward his task that he can and should find for the administrative agency just because he concludes that his finding will not be reversed by a reviewing court. It is commonplace that the evidence may be sufficient to legally support a finding either way, but the fact-finder should believe that it is more likely than not the fact found is "true."¹⁶⁴

¹⁶¹Id. at § 339.

¹⁶²Id. at § 336.

¹⁶³J. F. Cooper, *State Administrative Law* 356 (1965).

¹⁶⁴Jaffe, Administrative Law: Burden of Proof and Scope of Review, 79 Harv. L. Rev. 914, 915 (1966).

C. Evidence Law--Rules of Evidence

Wigmore has suggested that the law of evidence involves four distinct topics: (1) admissibility; (2) burden of proof and presumptions; (3) the relation of function of judge and jury as respectively deciding upon "law" and "fact"; and (4) judicial notice. He placed the last three topics on the borderline of what may be referred to as the law of evidence, which in the strictest sense is concerned only with the question of admissibility.¹⁶⁵

McCormick has also stated that "[t]he law of Evidence is the system of rules and standards by which the admission of proof at the trial of a lawsuit is regulated,"¹⁶⁶ but chapters on judicial notice¹⁶⁷ and burdens of proof and presumptions¹⁶⁸ are included in his treatise on evidence.

Fundamentals of Evidence Law

According to Wigmore, the modern system of evidence is based on two axioms which underlie its whole structure. The first is that "None but facts having rational probative value are admissible";¹⁶⁹ and the second is that "All facts having rational probative value are

¹⁶⁵1 Wigmore on Evidence § 3 (3rd ed. 1940).

¹⁶⁶McCormick on Evidence § 1 (2nd ed. 1972).

¹⁶⁷See Id. at Chapter 35.

¹⁶⁸See Id. at Chapter 36.

¹⁶⁹1 Wigmore on Evidence § 9 (3rd ed. 1940).

admissible, unless some specific rules forbids."¹⁷⁰

He has organized the rules for the admissibility of evidence under three general headings. The first group deals with the probative value that a fact must have to be regarded as evidential. The concern is with rules of logic and inference, i.e. relevancy. The second group sets out auxiliary tests and safeguards in addition to the required minimum probative value. The hearsay rule and the requirement of oath or affirmation would be examples. The third group is based on extrinsic policies which override the policy of ascertaining the truth by all available means; even if the evidence is probative and meets the various safeguards, it may be excluded because it might injure some other important interest more than it would help the cause of truth. This group would include the concept of privilege.¹⁷¹

These fundamental propositions of evidence law have been developed both in number and detail into what are generally referred to as formal "rules of evidence." These rules exist by virtue of both case law and statute. A prime example of such a legislative enactment is the Federal Rules of Evidence for United States Courts and Magistrates.¹⁷²

The expression "competent evidence" is frequently encountered in administrative evidence law and is related to a system of technical

¹⁷⁰Id. at § 10.

¹⁷¹Id. at § 11.

¹⁷²See Fed. R. Evid.

rules of evidence. Two leading commentators provide complementary expressions of the concept. According to Davis, "competent evidence" means evidence which would be admissible under formal jury-trial rules;¹⁷³ McCormick has said that "incompetent evidence" is that which would be inadmissible under such rules.¹⁷⁴

The three categories of "rules of evidence" as set out by Wigmore--those relating to relevance, those relating to safeguards, and those relating to privileges--are basic to the evidence law of both the judicial system and administrative agencies.

Relevancy

The concept of relevance is fundamental to any consideration of evidence law. The general notion of relevancy as a criterion for admissibility is valid for both judicial trials and administrative agency hearings. According to McCormick, a common test of relevancy is whether the evidence offered makes the desired inference more probable than it would be without the evidence.¹⁷⁵

The Federal Rules of Evidence give the following definition:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.¹⁷⁶

¹⁷³K. Davis, Administrative Law Text § 14.05 (3rd ed. 1972).

¹⁷⁴McCormick on Evidence § 52 (2nd ed. 1972).

¹⁷⁵Id. at § 185.

¹⁷⁶Fed. R. Evid. 401.

Relevancy is not an inherent characteristic but exists only as a relation between the item of evidence and a matter properly provable in the action. The question is whether the evidence tends to prove the matter sought to be proved.¹⁷⁷

Rule 401 uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may be directed, thereby avoiding the loosely used and ambiguous word "material." The fact to which evidence is directed need not necessarily be in dispute; evidence which is essentially background in nature should be and generally is admitted as an aid to understanding.¹⁷⁸

McCormick has explained the distinction which is sometimes made between relevancy and materiality. Relevancy is the tendency of evidence to establish a proposition which it is offered to prove. Materiality looks to the relation between the proposition for which the evidence is offered and the issues to be resolved. If the proposition is not at issue, then evidence offered to prove that proposition is not material. If the proposition is at issue, but the evidence offered does not tend to establish that proposition, then that evidence is irrelevant. Therefore, it might be said that relevancy is the tendency of evidence to establish a material proposition.¹⁷⁹

¹⁷⁷Fed. R. Evid. 401 (Advisory Committee's Note).

¹⁷⁸Id.

¹⁷⁹McCormick on Evidence § 185 (2nd ed. 1972).

McCormick has also pointed out that not all relevant evidence is admissible, and that in fact, the greater part of the law of evidence for the judicial system consists of rules that require the exclusion of evidence despite its relevancy.¹⁸⁰ There are rules of exclusion which have as their common purpose the facilitation of the ascertainment of facts by guarding against evidence which is unreliable or is calculated to prejudice or mislead.¹⁸¹ There are rules of privilege which operate to protect interests or relationships which are regarded as sufficiently important to justify the sacrificing of certain sources of facts that might be needed to resolve a controversy.¹⁸²

Rules of Exclusion

The rules of exclusion which seem to be the most pertinent for teacher termination hearings include those involving the competency of some witnesses, variations on the opinion rule, and the rule against hearsay. The issue of whether a witness is sufficiently capable of worthwhile testimony to be a "competent" witness sometimes arises when young children are called to testify.¹⁸³ The requirement that a witness who testifies to a fact must have had firsthand

¹⁸⁰ Id. at § 53.

¹⁸¹ Id. at § 72.

¹⁸² Id.

¹⁸³ See Id. at § 62.

knowledge of that fact insures that the most reliable sources of information are made available;¹⁸⁴ however, an expert witness may give an opinion based on facts and information supplied by others.¹⁸⁵ These related rules sometimes come into play when the quality of a teacher's performance is at issue and an administrative observer or other educational "expert" is called on for an evaluation.

Perhaps the most frequently invoked exclusionary rule is the rule against hearsay. The Federal Rules of Evidence give this definition of hearsay:

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.¹⁸⁶

As McCormick has stated, the factors upon which the credibility of testimony depends are the abilities of a witness to perceive, remember, and convey an accurate impression. To encourage witnesses to put forth their best efforts and to expose inaccuracies in any of the foregoing factors, witnesses are ordinarily required to testify under oath, to be personally present at the trial or hearing, and to be subject to cross-examination. The rule against hearsay is intended to insure compliance with these conditions, and when one of them is absent the hearsay objection is pertinent.¹⁸⁷

¹⁸⁴See Id. at § 10.

¹⁸⁵See Id. at §§ 13-15.

¹⁸⁶Fed. R. Evid. 801(c).

¹⁸⁷McCormick on Evidence § 245 (2nd ed. 1972).

It should be noted that even in the most formal judicial trials, there are a great many exceptions to the rule against admitting hearsay. The Hearsay Rule is set out in the Federal Rules of Evidence, and it states that "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress";¹⁸⁸ that rule is immediately followed by two other rules which give twenty-nine categories of exceptions when hearsay is admissible.¹⁸⁹

There is considerable dissatisfaction with the hearsay rule even for jury trials,¹⁹⁰ and in administrative hearings hearsay is generally admissible.¹⁹¹ Nevertheless, the issue of whether hearsay evidence should be admitted and used in a trial-type administrative hearing arises rather frequently.

Rules of Privilege

The concept of privilege seems to be invoked only infrequently in teacher termination hearings. However, as McCormick has acknowledged, the concept of privilege is generally recognized in administrative hearings as agencies follow the judicial lead in recognizing certain exceptions to the obligation to testify. Some of these exceptions,

¹⁸⁸Fed. R. Evid. 802.

¹⁸⁹Id. at 803, 804.

¹⁹⁰K. Davis, Administrative Law Text § 14.02 (3rd ed. 1972).

¹⁹¹McCormick on Evidence § 350 (2nd ed. 1972).

such as the exclusion of illegally obtained evidence and the assertion of the right against self-incrimination, are constitutional commands. Others, such as the attorney-client privilege, are based upon the need to protect certain important communications and relationships.¹⁹²

In reference to federal agencies, Ruhlin has stated that the Fifth Amendment privilege against self-incrimination is applicable to administrative proceedings.¹⁹³ Cooper has also noted that the attitude of the state courts appears to be that of giving effect to generally recognized rules of privilege in contested cases before administrative agencies.¹⁹⁴

D. Rules of Evidence for Administrative Hearings

The General Rule

According to a number of leading authorities, the technical rules of evidence which are used for judicial trials are not generally applicable to the admission or exclusion of evidence before an administrative hearing tribunal.¹⁹⁵

However, as McCormick has pointed out, "[t]he fact that administrative hearings need not follow the exclusionary rules and

¹⁹²Id. at § 354.

¹⁹³M. Ruhlin, *Manual for Administrative Law Judges* 38 (1974).

¹⁹⁴J. F. Cooper, *State Administrative Law* 397 (1965).

¹⁹⁵See J. F. Cooper, *State Administrative Law* 379-380 (1965); K. Davis, *Administrative Law Text* § 14.13 (3rd ed. 1972); McCormick on Evidence §§ 348-350 (2nd ed. 1972); J. Wigmore on Evidence § 4a (3rd ed. 1940).

the fact that the admission of remote or repetitious evidence is not reversible error does not suggest that 'anything goes' or that all proffered evidence, whatever its relevance or trustworthiness, should be admitted."¹⁹⁶

He has further noted that "[s]ince administrative hearings differ so widely in scope and significance, it is impossible to suggest a single standard to govern admission of all evidence. It is probably . . . true, however, . . . that the more closely administrative proceedings approach judicial proceedings in formality and in the nature of the issues to be tried, the greater the degree to which the exclusionary rules will be applied."¹⁹⁷

Cooper has also approved the adoption of basic principles of relevancy, materiality, and probative force as being a recognition of the innate wisdom of the evidentiary rules.¹⁹⁸ Even Davis, who takes a very liberal stance on admissibility, has seemed to suggest that only "relevant and useful evidence" should be admitted.¹⁹⁹

Davis has indicated that the trend of evidence law throughout the legal system, in the judicial process as well as in the administrative process, is toward replacing rules with discretion, admitting all relevant and useful evidence, and basing finding on the kind of

¹⁹⁶McCormick on Evidence § 351 (2nd ed. 1972).

¹⁹⁷Id.

¹⁹⁸F. Cooper, State Administrative Law 381 (1965).

¹⁹⁹K. Davis, Administrative Law Text § 14.13 (3rd ed. 1972).

evidence on which responsible persons customarily rely in their own affairs.²⁰⁰ He has suggested that especially in cases tried before administrative agencies, the focus is less upon the somewhat artificial question of what evidence should be admitted or excluded and more upon the highly practical question of what weight should be given to a particular item of evidence in view of the natural safeguards as to its trustworthiness.²⁰¹

McCormick has expressed the same idea somewhat differently. He has said that it is the importance of the evidence in relation to the resolution of the ultimate issues rather than the legal standards of relevance and materiality which determines whether the evidence is admissible in an administrative hearing.²⁰² This seems to suggest that the value of evidence is taken into account not only at the point at which consideration is being given to the fundamental matter of whether or not the asserted proposition has been established, but also at the point at which it is being determined whether or not to admit the evidence for any consideration at all.²⁰³

Ruhlin has stated that while the technical rules of evidence are less important in administrative hearings than in formal adversary

²⁰⁰Id. at §§ 14.01-14.13. See also 1 Wigmore on Evidence § 4b (3rd ed. 1940).

²⁰¹K. Davis, Administrative Law Text § 14.01 (3rd ed. 1972).

²⁰²McCormick on Evidence § 350 (2nd ed. 1972).

²⁰³See Id. at § 351.

adjudications before judges and juries, the exercise of sound judgment concerning lack of adequate probative value of the proffered evidence is more important than ever. The tribunal should strike, upon objection or upon its own motion, evidence so confusing, misleading, prejudicial, time-wasting, or cumulative that its pernicious influence outweighs its probative value.²⁰⁴

Marginally relevant evidence is not merely unhelpful; it is positively harmful, because it inflates the record which the parties, the (hearing examiner) and agency must examine²⁰⁵

Administrative Procedure Acts

These principles, which are germane to the question of admissibility of evidence before an administrative tribunal, are reflected in the various administrative procedure acts. Both the Administrative Procedure Act,²⁰⁶ which is generally applicable to agencies of the United States Government, and the Model State Administrative Procedure Act,²⁰⁷ which has been proposed by the Uniform Law Commissioners and enacted in some version by a number of states, illustrate a generally liberal approach to admissibility.

The federal statute provides specifically for "rules of evidence" for administrative hearings in one simple sentence. "Any

²⁰⁴M. Ruhlin, Manual for Administrative Law Judges 36 (1974).

²⁰⁵Id.

²⁰⁶5 U.S.C. §§ 551-559 (1976).

²⁰⁷Model State Administrative Procedure Act (U.L.A.) §§ 1-19 (1980).

oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."²⁰⁸

The model state act is similarly succinct, setting out its "rules of evidence" in a paragraph. It provides that "irrelevant, immaterial, or unduly repetitious evidence shall be excluded," that the rules of evidence applicable in nonjury civil cases shall be followed, but any necessary evidence may be admitted "if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs," that rules of privilege will be recognized, and that evidence generally may be received in written form.²⁰⁹

Rationale

There are a number of reasons offered for the use of generally different evidentiary procedures by courts and by administrative agencies. Some relate to the origin and purpose of the rules themselves; other are based on the distinct nature and function of the particular tribunal involved.

Davis has cited several leading commentators who have recognized that the exclusionary rules are mostly the product of the jury system.²¹⁰ Many of these rules which govern the admission of

²⁰⁸ 5 U.S.C. § 556(d) (1976).

²⁰⁹ Model State Administrative Procedure Act (U.L.A.) § 10 (1980).

²¹⁰ K. Davis, Administrative Law Text § 14.03 (3rd ed. 1972).

evidence in judicial trials are designed to protect a jury from unreliable and possibly confusing evidence.²¹¹

Because the law of evidence is basically a product of the jury system, it has been suggested that it might be more expedient if these rules would be discarded in trials before judges. Nevertheless, the traditional starting point is that in general the jury-trial system of evidence governs in a trial before a judge. However, there is a tendency that the same strictness will not be observed in applying the rules of evidence in trials before judges as in trials before juries. This is due in large part to a rule of presumption in most appellate courts that the judge will be presumed to have disregarded the inadmissible and relied only on the competent evidence in arriving at the decision.²¹²

Cooper has noted that the functions of the first administrative agencies were more administrative and legislative than judicial, and the courts saw no necessity for the application of the rules of evidence. On the contrary there may have been good reason for not imposing the rules of evidence because neither the agency members nor the parties before them were familiar with the rules. The trend toward relaxation of the exclusionary rules in court cases may also have been a contributing factor.²¹³

²¹¹McCormick on Evidence § 348 (2nd ed. 1972).

²¹²Id. at § 60.

²¹³J. F. Cooper, State Administrative Law 379-380 (1965).

However, Cooper has pointed out that in many current agency proceedings the nature of the proof-taking procedure is nearly undistinguishable from that of nonjury cases in court. He seemed to attribute this to the generally increased sophistication of agency hearings and the people involved. He has advocated the use of at least the basic principles of the evidentiary rules.²¹⁴

Davis has asserted that since the exclusionary rules of evidence are largely a product of the jury system they are inappropriate for the administrative process. His position has seemed to be that all relevant and useful evidence should be admitted.²¹⁵

McCormick has noted that because there is no jury to protect and because the administrative hearing examiner is often an expert on the question to be decided, there is less need to protect against unreliable and confusing evidence.²¹⁶ He has also pointed out that since the examiner will be exposed to the evidence regardless of whether he admits or excludes it, there is little harm in admitting evidence without a ruling as long as there is some degree of reliability.²¹⁷

In his treatise, Wigmore asserted that the system of jury-trial rules of evidence are not applicable in administrative hearings, either

²¹⁴Id. at 381.

²¹⁵K. Davis, Administrative Law Text § 14.13 (3rd ed. 1972).

²¹⁶McCormick on Evidence § 348 (2nd ed. 1972).

²¹⁷Id. at § 350.

by historical precedent or practical policy.²¹⁸ The rules were developed for jury trials and should not necessarily apply in any other tribunal. He acknowledged that the rules have merit, but recognizes that those rules do not represent the only safe method of investigation. Since most of them are merely rules of caution, failure to observe a rule is still consistent with a high probability of truth. Furthermore, the administrative tribunal may be composed of experienced professional dealing with a limited class of facts as opposed to a lay jury dealing with many types of cases. Finally, the jury trial evidence system can only be used by lawyers, and that might be a calamity for administrative tribunals. He concluded by suggesting that administrative tribunals should be left to find their facts without fixed rules, and that we should rely on the expert intelligence and good faith of the administrative tribunal.²¹⁹

Objections and Offers of Proof

As McCormick has pointed out in reference to the judicial system, if the exclusionary rules of evidence are to operate fairly, the judge must be promptly informed by the objecting party that the evidence should be rejected and must be given the reasons why. The general rule is that failure to do so operates as a waiver upon appeal of any ground of complaint against the admission of the evidence. It is important to note that this approach is modified by

²¹⁸1 Wigmore on Evidence § 4a (3rd ed. 1940).

²¹⁹Id. at § 4b.

the doctrine of plain error.²²⁰

According to Cooper, a similar rule holds for administrative agency hearings. In cases where an appellant seeks to reverse an agency order on the basis of arguments relating to the receipt or exclusion of evidence, most state courts will ordinarily refuse to consider on appeal those points not appropriately raised at the hearing.²²¹

It has been stated as a general rule that in proceedings before an administrative agency, objections to call attention to non-observance of the applicable rules are necessary for the same reasons that they are necessary before a court. Where incompetent and hearsay evidence is not objected to, it is properly received by the administrative tribunal and must be accorded its natural probative effect as if it were in law admissible.²²²

According to that same source, the objections must be timely made, and where they relate to the introduction of evidence must usually be made before the testimony is given and not in a belated motion to strike. However, it has been held that rules of evidence are designed to afford protection at the crucial decision stage of the proceedings, and if an objection to evidence is not made before the examiner but before the agency entrusted with making the decision, then

²²⁰McCormick on Evidence § 52 (2nd ed. 1972).

²²¹2 F. Cooper, State Administrative Law 598 (1965).

²²²2 Am. Jur. 2d, Administrative Law § 425 (2nd ed. 1962).

it has been made soon enough.²²³

It has been pointed out that one of the most important duties of an attorney facing his opponent's attempt to introduce inadmissible hearsay evidence at an administrative agency hearing is to make a timely and specific objection to its introduction. A party's failure to make such an objection may constitute a waiver of the objection. Although as a rule incompetent and inadmissible hearsay may not be an adequate basis to establish a fact, it is almost uniformly held that if there is a failure to object to such evidence, it may be considered, if relevant, and may be given its natural probative effect.²²⁴

McCormick has also noted that if an objection to the admission of evidence is sustained, then the proponent of that evidence ordinarily should make an "offer of proof" in support of admitting the evidence. This offer of proof will become part of the record, and in the event of an appeal, the reviewing court will then be able to determine if the trial judge's ruling was proper.²²⁵

Ruhlin has suggested that rejected documents may, if requested by counsel, accompany the record and serve as offers of proof. If it is an objection to oral testimony which has been sustained, then counsel may be permitted to make an offer of proof, either orally or

²²³Id.

²²⁴₃₆ ALR3d, Administration Law--Hearsay Evidence § 2(b) (1971).

²²⁵McCormick on Evidence § 51 (2nd ed. 1972).

in writing.²²⁶

Some Concluding Observations

The three fundamentals of relevance, safeguards, and privileges which form the basis for the "rules of evidence" used in the judicial system are applicable in administrative evidence law, but there are certain distinctions. Although the general common law principle may be that anything offered as evidence may be admitted by an administrative tribunal,²²⁷ this liberal attitude may be somewhat more pronounced in quasi-legislative, policy-making proceedings than in quasi-judicial, adjudicative hearings.²²⁸ Therefore, although it would seem that the exclusionary rules and rules of privilege might generally be of less importance in an administrative hearing than in a judicial trial, those rules could nevertheless be of considerable significance in a trial-type teacher termination hearing.

Given the diversity of laws in this area, it is important to note a point made by Forkosch. There are one federal and fifty state jurisdictions, no two of which have identical procedural laws and rules of evidence; therefore, it behooves the administrative practitioner to know at least the federal and his home state's laws concerning

²²⁶M. Ruhlín, *Manual for Administrative Law Judges* 37 (1974).

²²⁷F. Cooper, *State Administrative Law* 380 (1965); McCormick on Evidence § 350 (2nd ed. 1972).

²²⁸K. Davis, *Administrative Law Text* § 14.07 (3rd ed. 1972); L. Jaffe & N. Nathanson, *Administrative Law* 975 (4th ed. 1976); McCormick on Evidence § 350 (2nd ed. 1972).

each topic.²²⁹

E. Findings and Reasons

Judicial decisions regarding the adequacy of administrative findings are one of the principal tools by which courts impose their limited control of administrative development of law and policy. If the agency must say, "this is the way we summarize the facts, this is the question, and this is our answer for these reasons . . .," then the opportunity for arbitrary action is relatively small. The orderly functioning of the process of judicial review requires that the basis for the agency action be clearly disclosed and adequately sustained.²³⁰

According to Davis, the practical reasons for administrative findings are so powerful that the requirement of such findings has been imposed with remarkable uniformity by virtually all state and federal courts, regardless of any statutory requirement. These reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan for rehearing and judicial review, and keeping agencies within their jurisdiction.²³¹

²²⁹M. Forkosch, A Treatise on Administrative Law § 229 (1956).

²³⁰K. Davis, Administrative Law Text § 16.01 (3rd ed. 1972).

²³¹Id. at § 16.03.

To be complete, the record should include findings of both ultimate facts and basic facts. An ultimate fact is commonly expressed in the language of some statutory standard. A basic finding is one upon which a finding of ultimate fact will be based. Findings of basic facts are more detailed than ultimate findings, but more general than a simple summary of the evidence.²³²

Although it is difficult to make the distinction, it would appear that from findings of ultimate fact an agency may then reach conclusions of law.²³³ However, it may be more simple and just as meaningful to equate findings of ultimate fact and conclusions of law.²³⁴

Cooper has identified two important purposes served by the well-established requirement that decisions of administrative agencies contained findings of fact.²³⁵ First of all, findings are necessary for judicial review.²³⁶ Secondly, the making of findings will improve agency decision-making.²³⁷

Cooper has stated that it is an indispensable prerequisite to effective judicial review that the agency's decision set forth

²³²Id. at § 16.04. See also 2 F. Cooper, State Administrative Law 465-467 (1965).

²³³2 F. Cooper, State Administrative Law 465-467 (1965).

²³⁴See K. Davis, Administrative Law Text § 16.04 (3rd ed. 1972); L. Jaffe & N. Nathanson, Administrative Law 736 (1976).

²³⁵2 F. Cooper, State Administrative Law 465 (1965).

²³⁶Id. at 465-467.

²³⁷Id. at 467-468.

both the findings of basic fact and the conclusions of ultimate fact and of law derived therefrom.²³⁸ He has indicated that the reviewing court has basically three functions to perform. First, it must determine whether the evidence received at the hearing affords substantial support for the findings of basic fact made by the agency. Second, it must determine whether the basic facts found to be supported by substantial evidence reasonably support the inferences of ultimate fact made by the agency. Third, the court must decide whether the agency correctly applied the law to the ultimate facts reasonably inferred by it from the basic facts.²³⁹ Obviously, the reviewing court cannot discharge its responsibilities unless the findings and conclusions are stated in the decision.²⁴⁰

Cooper has also contended that the requirement of precise and detailed findings leads to clear, hard thinking on the part of the agency decision-makers. When one is forced to demonstrate that the ultimate conclusions are consistent with all of the basic facts disclosed in the record, careful and painstaking analysis is required. The requirement that agency officials go through the process of formulating detailed findings of fact and conclusions of law is another means of assuring just, carefully reasoned, and fully informed decisions.²⁴¹

²³⁸Id. at 465.

²³⁹Id. at 466.

²⁴⁰Id. at 467.

²⁴¹Id. at 467-468.

It has been indicated that many state court decisions have set aside administrative orders for lack of findings. The failure to include a finding on each point necessary to support the administrative decision necessitates remanding the case to the agency for the purpose of making additional findings on those points.²⁴² However, Cooper also acknowledged that in some instances the courts thought the absence of findings to be immaterial, because the basis of the order and the reasons therefore were so clearly apparent that such error was non-prejudicial.²⁴³

F. Judicial Review

Jaffe and Nathanson have pointed out that even though only a small portion of administrative actions is reviewed by the courts, judicial review casts a long shadow, both before and after it. When we search for administrative law in general, we turn to the judicial decisions which suggest the unifying principles, or interpret the statutes which establish the framework of the administrative process. We find that much of administrative law is concerned with the functions and techniques of judicial review itself; this might be called the self-conscious aspect of judicial review.²⁴⁴

²⁴² J. F. Cooper, *State Administrative Law* 472 (1965); K. Davis, *Administrative Law Text* §§ 16.01, -.05 (3rd ed. 1972).

²⁴³ J. F. Cooper, *State Administrative Law* 472 (1965).

²⁴⁴ L. Jaffe & N. Nathanson, *Administrative Law* 27 (4th ed. 1976).

They also classified the system of judicial remedies under two main headings. There are the statutory proceedings for the review of agency actions; and there is the common law system of remedies generally available to scrutinize administrative agency actions except insofar as they are specifically excluded by statute.²⁴⁵

Cooper has suggested that the basic reason for providing some measure of judicial review of administrative findings of fact arises out of the hard truth that the findings made by administrators are not always unbiased and objective. Some officials are so over-zealous that they are emotionally incapable of making findings of fact fairly and objectively in certain cases. There are some agencies whose findings on a particular evidentiary record might not be the same as those that would be made on that record by one who was completely indifferent to the result.²⁴⁶

Scope and Standard of Review

Davis has stated that although the scope of judicial review of administrative action ranges from complete unreviewability to complete substitution of judicial judgment on all questions, the dominant tendency in both state and federal courts is toward the middle position known as the substantial evidence rule. Under this rule, the court decides the questions of law but it limits itself to a test of

²⁴⁵Id. at 738.

²⁴⁶2. F. Cooper, State Administrative Law 723 (1965).

reasonableness in reviewing findings of fact.²⁴⁷

The substantial evidence rule means that the reviewing court's inquiry is whether on the record before the agency, it could have reasonably made the findings which it did. The record must afford a substantial basis in fact from which the fact in issue can be inferred. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion.²⁴⁸

Davis and McCormick have stated that the same substantial evidence test is applied to the review of both administrative findings and jury verdicts. They contrast this with the clearly erroneous test which is used to review the findings of a judge in a nonjury case.²⁴⁹

According to Cooper, the classic formulation of the substantial evidence rule is apt in its application to findings of basic facts, but it does not lend itself to meaningful application to findings of ultimate fact which represent inferences derived from basic facts. His contention has been that when the point of attack concerns the conclusions of ultimate fact inferred by the agency from its findings of basic fact, the issue is whether the agency's inference is

²⁴⁷K. Davis, Administrative Law Text § 29.01 (3rd ed. 1972).

²⁴⁸Id.

²⁴⁹K. Davis, Administrative Law Text § 29.02 (3rd ed. 1972); McCormick on Evidence § 352 (2nd ed. 1972).

"clearly erroneous."²⁵⁰

Other tests are sometimes utilized by reviewing courts as they scrutinize an administrative agency's findings. "Arbitrary and capricious" and "substantial evidence" imply a very limited judicial review of the evidentiary support for administrative findings. "Contrary to the manifest weight of the evidence" seems to suggest some evaluation of the evidence by the reviewing court. "Clearly erroneous" and "by the preponderance of the evidence" (which is generally considered a standard of proof rather than a standard of review) suggest a more extensive judicial scrutiny of the administrative tribunal's decision.²⁵¹

It is very difficult to ascertain either what these standards mean or how the courts apply them. However, it is probably safe to offer this generalization. The more closely a finding approximates one of basic fact, the less stringent will be the scrutiny of the reviewing court. The more a finding tends to be one of ultimate fact or a conclusion of law, the more likely the reviewing court will be to substitute its judgment for that of the agency.²⁵²

However, the distinctions among these various standards go

²⁵⁰2 F. Cooper, State Administrative Law 728 (1965).

²⁵¹See 2 F. Cooper, State Administrative Law 722-737 (1965); K. Davis, Administrative Law Text § 29.01 (3rd ed. 1972); L. Jaffe & N. Nathanson, Administrative Law 953-958 (1976).

²⁵²See K. Davis, Administrative Law of the Seventies § 29.01 (1976).

more to the amount of evidentiary support required by the courts to uphold the findings of the tribunal, and the use of the different standards does not seem to be a determining factor in the matter of what evidence can be legally admitted and used to support a finding. Therefore, there will be no further discussion of the differences among these various standards of review, and for the purposes here the most common substantial evidence standard will be used in a sort of generic sense.

It is clear that under any standard of review, the record is considered as a whole. This means that the evidence which detracts from a proposition which is sought to be established must be taken into account as well as the evidence which tends to be supportive of that proposition.²⁵³ It is not enough to view in isolation the evidence adduced by the agency to determine if it taken alone supports the findings; if there is evidence in the record which suggests a contrary result, it must also be considered in the determination of whether the evidence is "substantial."²⁵⁴

Judicial Review and the Rules of Evidence

According to Cooper, the requirements and implications of the substantial evidence rule underlie the entire proof-taking

²⁵³K. Davis, Administrative Law Text § 29.03 (3rd ed. 1972); McCormick on Evidence § 352 (2nd ed. 1972).

²⁵⁴2 F. Cooper, State Administrative Law 734 (1965); M. Forkosch, Administrative Law § 246c (1956).

processes of administrative agencies.²⁵⁵ "The substantial evidence rule is important in two ways: (a) it constitutes the criterion to test the validity of agency findings of fact; (b) it accounts in large measure for the practices adopted by the agencies in receiving evidence."²⁵⁶

The first aspect of the rule--its application in judicial review to test the validity of agency findings--is the more common consideration. However, it is the second aspect of the rule--its bearing upon agency practices in receiving evidence--that is of concern here.

Cooper has noted that agencies are ever conscious that their findings may be challenged in the courts on the grounds they are not supported by substantial evidence, and that they attempt to make sure the evidence upon which they base their findings will meet the requirements of "substantiality" imposed by the courts. He has suggested that this is one of the reasons for the general tendency of many agencies to follow in the main the rules of evidence as they are applied in civil nonjury cases in the courts.²⁵⁷

Cooper's explanation of these two aspects was as follows. First of all, the rule denies the quality of substantiality to evidence

²⁵⁵1 F. Cooper, State Administrative Law 404 (1965).

²⁵⁶Id.

²⁵⁷Id. at 405.

that fails to meet certain fundamental prerequisites. If they are not met, the evidence is not substantial. However, if these basic requirements are satisfied, then the second phase of the substantiality test comes into play, and the court proceeds to determine whether the whole record justifies the validity of the agency's findings.²⁵⁸

This first consideration is ordinarily described as the "legal residuum" rule. According to this rule, a finding cannot be deemed to be supported by substantial evidence unless at least a residuum of the supporting evidence would be competent under the exclusionary rules. For example, if the supporting evidence were all inadmissible under the hearsay rule, it could not be "substantial." It is this "residuum rule" which directly affects the proof-taking practices of administrative agencies.²⁵⁹

According to McCormick, courts apply the so-called "substantial evidence" rule to judicial review of agency actions as a substitute for rules of admissibility. As applied to administrative findings, the substantial evidence rule involves two branches; he has indicated that he believed one to be sound and the other to be unsound.²⁶⁰

The first branch of the rule consists of an overall standard

²⁵⁸Id.

²⁵⁹Id.

²⁶⁰McCormick on Evidence § 352 (2nd ed. 1972).

of review of the findings of fact, and measures both the quantitative and qualitative sufficiency of the evidence. Its proper application takes into account the rationale of the exclusionary rules of evidence, the reliability of hearsay evidence, and the needs of administrative economy. In other words, the whole record is reviewed to determine whether there is a rational basis in it for the findings of fact supporting the agency's decision.²⁶¹

The second branch of the substantial evidence test is known as the "legal residuum" rule because it requires that an administrative finding be supported by some evidence admissible in a jury trial--that is, by a residuum of legal evidence. McCormick has asserted that the residuum rule is both logically unsound and administratively impractical, and that the objectives of the rule could better be secured through measuring the quantity and quality of the supporting evidence regardless of its category or label.²⁶²

Davis has also been critical of the residuum rule. He has noted that although the rules of evidence have been developed to guide the admission or exclusion of evidence in a jury trial, the residuum rules requires the use of those rules for the evaluation of evidence in cases where no jury sits. He has pointed out that rejection of the residuum rule would not mean that an agency is compelled to rely upon

²⁶¹Id.

²⁶²Id.

incompetent evidence, but only that the agency and the reviewing court are free to rely upon the evidence if in the circumstances they believe the evidence should be relied upon.²⁶³

Both Davis and McCormick have criticized the residuum rule for some of the same basic reasons. First of all, even in a jury trial, incompetent evidence once admitted without objection is given its natural probative effect, and the application of the residuum rule prevents an administrative agency from basing its findings upon evidence that under some circumstances would support a jury verdict. Secondly, the worth of evidence is not accurately measured by the application of the technical rules of evidence. Some "competent" evidence is nearly useless; some "incompetent" evidence may be very reliable and adequate to reasonably support an administrative agency's findings.²⁶⁴

Forkosch has offered a somewhat different and less critical analysis of the relationship between the substantial evidence test and the residuum rule. The substantial evidence rule requires only that agency orders be adequately supported by the evidence. Under the additional "legal residuum" limitation, after the substantial evidence rule has been applied and the record has been determined to support the agency decision, the record is then re-examined to ascertain

²⁶³K. Davis, Administrative Law Text § 14.07 (3rd ed. 1972).

²⁶⁴K. Davis, Administrative Law Text § 14.07 (3rd ed. 1972); McCormick on Evidence § 352 (2nd ed. 1972).

whether or not some legal or competent evidence is also present. Substantiality could be present and might ordinarily support the agency's findings and determination; the legal residuum rule is simply an additional safeguard that agency findings and actions be fair and reasonable.²⁶⁵

The "legal residuum" rule is generally not followed by the federal courts in reviewing federal administrative agency actions.²⁶⁶ It is more often applied by state courts as they scrutinize the decisions of state and local administrative agencies.²⁶⁷

Cooper has expressed doubt that the residuum rule will survive as a general requirement even though many courts continue to insist that there must be a residuum of competent evidence to support an administrative finding. He has also pointed out that in most cases it makes no difference whether the courts accept or reject the legal residuum rule, because there is usually more than a residuum of legally competent evidence pointing both ways, and the agency decision would be adequately supported no matter how the case was decided.²⁶⁸

²⁶⁵M. Forkosch, *Administrative Law* § 247 (1956).

²⁶⁶K. Davis, *Administrative Law of the Seventies* § 14.11 (1976); McCormick on Evidence § 352 (2nd ed. 1972).

²⁶⁷1 F. Cooper, *State Administrative Law* 406-410 (1965); K. Davis, *Administrative Law Text* § 14.09 (3rd ed. 1972); McCormick on Evidence § 352 (2nd ed. 1972).

²⁶⁸1 F. Cooper, *State Administrative Law* 410-411 (1965).

Some Implications for Administrative Evidence Law

An excellent summary of the relationship between the formal rules of evidence and judicial review of administrative agency adjudications is provided in an article by Albert.²⁶⁹ He stated that adversary administrative adjudications have never been totally free of the law of evidence, at least to the extent that incompetent evidence is ordinarily required to be ignored if not excluded in such proceedings. Administrative law judges are required to specify the evidence relied upon and this evidence must be substantial. There is thus little room for any presumption that incompetent evidence was ignored in reaching a decision; as a consequence, questions of evidential competency are often central to the judicial review of these proceedings, even though these questions may appear as matters of "substantiality" rather than "admissibility."²⁷⁰

Albert also stated the evidentiary rulings in administrative proceedings involve two separate determinations: (1) When is the ruling to be made? and (2) According to what standards will the ruling be made? He further pointed out that there are two possible times when the ruling can be made: (1) Rulings can be made as evidence is introduced, and thus be treated as rulings on admissibility. (2) Rulings can be reserved until it is time to resolve disputed questions of fact,

²⁶⁹Albert, Application of Rules of Evidence to Administrative Proceedings: The Case of the Occupational Safety and Health Review Commission, 27 Ad. L. Rev. 135 (1975).

²⁷⁰Id. at 135-136.

and thus be treated as rulings on substantiality. He also indicated there are also two general standards which might be applied: (1) Rule according to some given "black letter" formulation of the rules of evidence, such as the Federal Rules of Evidence. (2) Rule according to a "reasonableness" test, such as "the kind of evidence on which responsible persons are accustomed to rely in serious affairs."²⁷¹

Albert then pointed out the possible procedures the foregoing options imply: (a) Let everything in at the hearing, but use the "black letter" rule to make the decision. (b) Let everything in at the hearing, but use the "reasonableness" rule to make the decision. (c) Use the "black letter" rule to determine what is let in at the hearing, and decide the case on the record. (d) Use the "reasonableness" rule to determine what is let in at the hearing, and decide the case on the record.²⁷² Procedure (a) is close to the "residuum" rule. Procedure (b) is close to the more open-ended provisions of the federal Administrative Procedure Act. Although these represent the more orthodox approach, procedures (c) and (d) work better in practice and are finding increasing favor among administrative law judges.²⁷³

Albert stated that in most situations, it is better to rule on evidence questions at the time the evidence is offered. The "let

²⁷¹Id. at 137.

²⁷²Id.

²⁷³Id. at 137-138.

it in for what it's worth" approach leaves the parties in the position of not knowing whether or not offered evidence will be used as the basis for the decision. If the parties know that the decision will be "on the record" of the evidence admitted, then they will know what evidence they must produce and what adversary evidence they must contest.²⁷⁴

Although a restrictive view of the law of evidence as relating only to the question of admissibility may be appropriate for the judicial system, a less restrictive view would seem in order for the quasi-judicial functions of an administrative agency hearing. According to McCormick the admission or exclusion of evidence in a jury trial is often considered to be the last effective control on the fact-finding process because of the assumption that the jury may be affected by it. But he has noted that in an administrative hearing, as in the case of a nonjury trial, it is assumed the trial examiner will not rely upon untrustworthy evidence to support the decision.²⁷⁵ Therefore, it would seem that in administrative evidence law the question of the use of evidence may be of equal significance with the question of admissibility. Therefore, the law of evidence for administrative agency hearings would seem to logically include both the questions of what evidence may be admitted and what evidence may be used in support of a finding.

²⁷⁴ Id.

²⁷⁵ McCormick on Evidence § 351 (2nd ed. 1972).