CHAPTER III

THE RESULTS OF THE STUDY

I. INTRODUCTION

This chapter is divided into five sections. The first section is the introduction. The next section concerns the use of rules of evidence. It includes a discussion of those state statutory provisions which might be considered "rules of evidence" for teacher termination hearings. It also includes a review of a number of judicial decisions which have considered the specific issue of the use of formal "rules of evidence" in such hearings.

The third section is a reporting of the judicial decisions in which specific issues of evidence law for teacher termination hearings have been considered. The cases are organized around the general topics of relevance, safeguards, and privileges.

Section four contains a discussion of the admission and use of evidence of board and administrator bias and of decisions which are not based "on the record." The concept of burden of proof as related to both statutory and constitutional hearings is included at this point. The use of written findings and reasons to control improprieties and to promote fair and rational decisions is also considered.

The last section is a discussion of the relevant Nebraska law. It includes both some general administrative law and those statutes and decisions which specifically relate to the topic of the study.

II. RULES OF EVIDENCE

If the phrase "rules of evidence" is to express the concept of the regulation of what evidence will be allowed to affect the fact-finding process, then limiting the meaning of that phrase to the narrow matter of admissibility seems somewhat inappropriate in the context of an administrative agency hearing. Where the administrative tribunal can be required to make specific findings based upon the evidence presented at the hearing, the concept of "rules of evidence" could embody not only the question of admissibility but also the question of what evidence may actually be used to support the findings. Nevertheless, the expression "rules of evidence" is generally taken to be concerned only with the question of admissibility, and the phrase is used herein only in that limited sense.

In general, the "formal" or "technical" rules of evidence which are used in the judicial system to regulate the admission and exclusion of evidence are not applicable to teacher termination hearings. A review of both the state statutes and case law provides considerable support for this general assertion.

A. Caveat

A note of caution is offered at this point. Only those statutes which relate specifically to the employment and termination of public school teachers were reviewed in this study. However, in some states teacher termination hearings are subject to the requirements of a

general state administrative procedures act. The reader is advised to determine whether there are such statutory provisions which are applicable in the state in question, and, if so, what the implications might be for the admission and use of evidence.

Furthermore, the reader is also reminded that because of either legislative or judicial activity, the statements offered herein in regard to general "rules of evidence" are subject to change. The current applicable law in the jurisdiction involved must be thoroughly researched before proceeding.

B. The Statutes

The statutes which provide for teacher employment protections and terminations in each of the fifty states were reviewed. All the statutes which are directly applicable to the termination of a public school teacher's employment are set out in Appendix A. Each of the fifty states has enacted legislation which might be fairly characterized as a "tenure law," or a "continuing contract law," or a "fair dismissal act." In some instances there are a number of statutory sections representing a comprehensive treatment of the employment of teachers; in others the entire relevant legislation is included in only one section. The diversity of the legislation which has been enacted in this area is truly remarkable.

In most cases these statutes include provisions for termination hearing procedures. These provisions occasionally make some reference to evidence law.

A number of states have statutes which specify that formal rules of evidence are not to be used at termination hearings.[1] In one state it is required that the rules of evidence followed in the superior courts are to apply.[2] One other state has legislation indicating that the same rules of procedure as used for nonjury trials may be applicable.[3]

The statutory provisions for the admission of evidence might be categorized in several groups. In several states the laws provide that the evidence produced at the hearing should be related to the reasons for termination that were stated in the notice.[4] The statutes of several other states provide that the teacher has the right to produce evidence in defense of the charges.[5] The provisions in a

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[1]Colo. Rev. Stat. § 22-63-117(7) (Supp. 1979); Iowa Code Ann. § 279.16 (West Supp. 1979); Kan. Stat. § 72-5442 (Supp. 1979); Miss. Code Ann. § 37-9-111(5) (Supp. 1980); Nev. Rev. Stat. § 391.3192(7) (1979); N.M. Stat. Ann. § 22-10-19(c) (Supp. 1980); N.Y. Educ. Law § 3020-a(3)c (Supp. 1979).

[2]Wash. Rev. Code Ann. § 28A.58.455(7)(a) (Supp. 1979).

[3]Ga. Code Ann. § 32-2101c(e) (1976).

[4]See Del. Code tit. 14 § 1413(6) (1975); Haw. Rev. Stat. § 297-12 (1976); Iowa Code Ann. § 279-16 (West Supp. 1979); Minn. Stat. Ann. § 125.17(5) (West 1979); Miss. Code Ann. § 37-9-111(2) (Supp. 1980); Neb. Rev. Stat. § 79-1254 (Reissue 1976); Ohio Rev. Code Ann. § 3319.16 (Page 1980); Wyo. Stat. § 21-7-110(c)(ii) (1977).

[5]See Ala. Code tit. 16 § 16-24-9 (1977); Colo. Rev. Stat. § 22-63-117(7) (Supp. 1979); Ill. Ann. Stat. ch. 122 § 24-12 (Supp. 1979); Ind. Code Ann. § 20-6.1-4-11 (Burns Supp. 1979); Minn. Stat. Ann. § 125.17(5) (West 1979); Neb. Rev. Stat. §§ 79-1254,-1259 (Reissue 1976); S.C. Code § 9-25-470 (1976); Tex. Educ. Code Ann. tit. 49 § 13.112 (Vernon 1972); Wyo. Stat. § 21-7-110(c)(ii) (1977).

number of states allow all relevant or competent evidence to be admitted.[6] In some states evidence relating to incidents that occurred before some point in time several years prior to the termination proceedings is not admissible.[7] If there is a general theme in those few statutes that make any provisions for rules of admissibility, it would appear to be that of basic relevancy.

It is considered fundamental that if the school officials must establish some justification for an employment termination, then such a decision must be based only on the evidence produced at the hearing. However, it is interesting to note that only a few states have that specific statutory provision.[8]

From a review of the enacted education laws, it can be inferred that the legislatures in all of the states have made the policy judgment that these local school board hearings are best conducted according to rather informal procedural rules. This preference for informality seems especially pronounced in regard to the evidence law for teacher employment termination hearings.

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[6] See Kan Stat. § 72-5442 (Supp. 1979); N.C. Gen. Stat. § 115-142(1)(2) (1978); S.D. Compiled Laws Ann. § 13-46-1 (1975); Va. Code § 22.1-312 (1980).

[7] See Ariz. Rev. Stat. § 15-263D (Supp. 1980); Cal. Educ. Code § 44944(a) (West Supp. 1979); N.C. Gen. Stat. § 115-142(e)(4) (1978).

[8] See Fla. Stat. § 231.36(6) (1977); Miss. Code Ann. § 37-9-111(4) Supp. 1980); Neb. Rev. Stat. § 79-1254 (Reissue 1976); N.D. Cent. Code § 15-47-38(2) (Supp. 1977).

C. The Case Law

There have been judicial decisions in a number of states in which it has been stated that the formal, technical rules of evidence used in the judicial system do not apply in teacher termination hearings. This has been done both in the course of construing some statutory provision[9] and by invoking the common law rule.[10]

In most of these cases, there is simply a statement of the general rule, with very little discussion of either the rationale for the rule or the implications of its application. However, an examination of several of those few opinions in which the reasoning of the court has been offered seems to reveal an approach which is quite consistent with the general theme of evidence law for administrative

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[9]Wright v. Marsh, 378 So. 2d 739, 742 (Ala. Civ. App. 1979), cert. denied, 377-80 Ala. 742, 378 So. 2d 742 (1979); Shorba v. Board of Educ., ---Hawaii---,---, 583 P.2d 313, 318 (1978); Friesel v. Board of Educ. of Medinah Elem. School, 79 Ill. App. 3d 460, 464, 389 N.E.2d 637, 640 (1979); McAlister v. New Mexico State Bd. of Educ., 82 N.M. 731, 734, 487 P.2d 159, 162 (Ct. App. 1971); Jerry v. Board of Educ. of City School Dist., 50 A.D.2d 149, 159, 376 N.Y.S.2d 737, 747 (Sup. Ct. 1975): Baxter v. Poe, 42 N.C. App. 404, 409-10, 257 S.E.2d 71, 74 (1979); Kearns v. Lower Merion School Dist., 21 Pa. Commw. Ct. 476, 481, 346 A.2d 875, 878 (1975); Moran v. Rapid City Area School Dist. No. 51-4, 281 N.W.2d 595, 602 (S.D. 1979).

[10]Forman v. Creighton School Dist. No. 14, 87 Ariz. 329, 331, 351 P.2d 165, 167-68 (1960); Conley v. Board of Educ. of City of New Britain, 143 Conn. 488, 495, 123 A.2d 747, 751 (1956); Agner v. Smith, 167 So.2d 86, 91 (Fla. Dist. Ct. App. 1964); Moran v. School Comm. of Littleton, 317 Mass. 591, 596, 59 N.E.2d 279, 282 (1945); State ex rel. Lucas v. Board of Educ. and Ind. School Dist. No. 99, ---Minn.---,---, 277 N.W.2d 524, 528 (1979).

agencies which was reviewed in Chapter II.

The first three of the following decisions are indicative of the general approach to "rules of evidence" in administrative evidence law. The reasoning incorporates elements of both statutory and common law.

Conley v. Board of Education of the City of New Britain[11] was a decision affirming the judgment of the court of common pleas which had dismissed a Connecticut teacher's appeal from the termination action of the board of education. The teacher had contended that the board had abused its discretion at the hearing by making rulings on evidence which had limited his right of cross-examination.

The court stated that the Board of Education was an administrative agency, and that administrative agencies are not bound by the strict rules of evidence. It was also said that the only requirement is that the conduct of the hearing shall not violate the fundamentals of natural justice. There must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence, to cross-examine adverse witnesses, or to be apprised of the facts upon which the board is asked to act. The record indicated that the teacher had been given a fair opportunity to exercise his right to examine and cross-examine witnesses.[12]

It was also noted in the opinion that the tenture act required

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[11] 143 Conn. 488, 123 A.2d 757 (1956).

[12] Id.

the board's decision to be based upon the evidence supporting the specific charges which had been adduced at the hearing, and there was a suggestion that in some other agency hearings the evidence might include what agency members have learned by personal observation. While that rule might hold for a legislative-type agency hearing, it would not seem appropriate for an adjudication, and in fact the court had said as much earlier in the opinion.[13]

That same issue had been considered in Moran v. School Committee of Littleton,[14] a Massachusetts case in which members of the Board had actually testified at the hearing. The court stated that if those board members had not divulged those facts and had considered them in reaching their decision, then the teacher would have been deprived of his statutory rights which prohibited his removal unless the charges were substantiated by evidence produced at the hearing. Even in the absence of such a statutory provision, a decision made in a quasi-judicial proceeding by an administrative board is a nullity if it is based on evidence known only to members of the board, for there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute.

Another issue in the case was the introduction over the teacher's objection of certain affidavits. The court acknowledged that the

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[13] Id.

[14] 317 Mass. 591, 59 N.E.2d 279 (1945).

affidavits would not have been competent evidence in a court of law to prove the truth of the statements that they contained unless they came within some exception to the hearsay rule. There was a conflict in authority as to whether an administrative board may accept affidavits as proof of the facts they stated. The court thought the better rule to be that issues of fact affecting substantial rights ought not to be decided on affidavits, especially if that method of proof can be avoided.[15]

It was also pointed out that members of a public board are frequently laymen, unskilled in law, and the rules governing the admissibility of evidence in courts cannot be expected to be rigidly enforced in hearings before such boards. The court noted that while board of education decisions that rest entirely on hearsay evidence were often not sustained, decisions based upon hearsay evidence that is supported and corroborated by competent legal evidence had been allowed to stand.[16]

In this case the teacher had failed to show that the other evidence apart from the hearsay was not adequate to support the conclusion reached by the board. The judgment of the superior court upholding the termination action was affirmed.[17]

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[15] Id.

[16] Id.

[17] Id.

Shorba v. Board of Education[18] involved the termination of the employment of a tenured Hawaii teacher. An issue on appeal was whether the teacher was entitled to a new hearing because the Board had adduced improper evidence. The hearing officer had ruled that he would consider evidence relevant to a charge which had not been specified in the notice. The pertinent statute provided that the grounds for consideration of termination must be fully specified in the notice. The hearing had been subject to the state administrative procedure act, which provided that any oral or documentary evidence may be received, but that as a matter of policy the agency shall exclude irrelevant, immaterial or unduly repetitious evidence.

It was noted that other courts had found the strict common law rules of evidence do not apply in administrative hearings, and the admission of incompetent and irrelevant evidence is not reversible error if there is substantial evidence to sustain the decision of the hearing body. The rule was stated that unless the petitioner can show prejudice resulting from the admission of irrelevant or incompetent evidence, the admission of such evidence is not grounds for reversal.[19]

The court summarized by stating that when error is alleged in the admission of evidence, the review of the appellate court is to determine from the competent evidence whether substantial evidence exists on the record to sustain the agency's finding. In this case it

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[18]---Hawaii---, 583 P.2d 313 (1978).

[19]Id.

was found that there had been no reliance on the improperly admitted evidence and that the record did not show the teacher had been prejudiced by its admission.[20]

The next three cases include a discussion of whether the use of the more liberal approach to "rules of evidence" in administrative hearings is a violation of due process. The general similarity to the analysis in the preceeding decisions can be noted.

In Baxter v. Poe[21] a North Carolina career teacher who had been dismissed after a hearing before the Board of Education contended on appeal that she had been denied due process. The superior court had concluded that the procedures adopted by the Board and the rulings made with reference to the admission of evidence were fair and without error. The court of appeals agreed.

According to the court, the teacher's contentions regarding due process were based on a fundamental misconception of the procedures involved in a case of this nature, where the proceedings mandated by statute were essentially administrative rather than judicial. The Board was not bound by the formal rules of evidence, and it was permitted to operate under a more relaxed set of rules than a court of law. Boards of education, normally composed in large part of non-lawyers, have been vested by statute with the responsibility for the general management of the schools, and this responsibility was thought

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[20] Id.

[21] 42 N.C. App. 404, 257 S.E.2d 71 (1979), cert. denied.

to require a wider latitude in procedure and in the reception of evidence than was allowed in court.[22]

At the hearing the Board had employed a rule of evidence promulgated by the State Board of Education. The rule permitted the Board to admit and give probative effect to "evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs." The court found that such a rule properly allowed boards of education to consider a wide range of evidence in reaching their decisions. A teacher's protection was seen to lie in a statutory provision which gave the reviewing court the power to reverse or modify a board's decision if the teacher's rights had been prejudiced because the administrative decision was "[u]nsupported by competent, material, and substantial evidence in view of the entire record."[23]

In Brandt v. Wissahickon School District[24] a Pennsylvania teacher argued that the very failure of a dismissal statute to prescribe a code of evidence for use at termination hearings deprived teachers of the ability to prepare their defenses in light of established evidentiary rules and therefore was in itself a denial of due process. The federal court noted that the teacher's dismissal proceedings were conducted according to common law rules of evidence and that her counsel handled her case accordingly. It was held that

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[22] Id.

[23] Id.

[24] 475 F. Supp. 503, 507 (E.D. Pa. 1979), aff'd, 615 F.2d 1352 (3rd Cir. 1980).

since the statutory failure to specify evidentiary rules did not prejudice the teacher in her defense, she lacked standing to raise the claim.

A federal court in Nebraska considered an alleged deprivation of due process of law in Miller v. Dean.[25] The case involved the dismissal of a superintendent during the term of his contract. The plaintiff had argued that although there may have been some evidence to support some of the complaints, the majority of the complaints were unfounded and were not supported by competent, relevant, admissible evidence, and that therefore the decision of the Board of Education was arbitrary and capricious. The court noted that although the Board had acted improperly in allowing some irrelevant evidence to be received, the issue was not whether the Board considered irrelevant evidence and had before it certain unsubstantiated complaints, but whether the Board was presented with sufficient evidence from which it could reasonably decide to terminate the contract. Even if some of the stated reasons were arbitrary and capricious, another of the reasons may have been adequate to support the action. No violation of either procedural or substantive due process was found.

To recapitulate, it might be noted that there are two points in the teacher termination hearing procedures at which it can be determined whether a particular item of evidence will be allowed to affect the

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[25] 430 F. Supp. 26 (D. Neb. 1976), aff'd, 552 F.2d 266 (8th Cir. 1977).

fact-finding process. One is when the item is presented for admission and for consideration by the tribunal, and the other is when the evidence which has been admitted is evaluated to determine whether it can be used to support a finding. It appears from both the statutes and the case law that the point at which the evidence on the record is evaluated and used to support the findings is the more significant point of control.

It is clear that courts will sometimes set aside a termination decision which is based upon evidence which was either improperly admitted or improperly used to support findings.[26] Such specific evidentiary problems are a major focus of this study and are considered in the next section.

III. THE JUDICIAL APPROACH TO EVIDENCE LAW ISSUES

This part is an examination of the cases in which specific questions relative to the admission and use of evidence at teacher termination hearings have been considered. In many instances the opinions do not clearly make the distinction between the separate issues of whether certain evidence should have been admitted and whether certain evidence, once admitted, could be used to support a decision. Because the purpose of this study is to examine both of these questions, the cases in which either or both of these issues have been discussed are considered together.

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[26] See, e.g., Miller v. Chico Unified School Dist., Bd. of Educ., 24 Cal. 3d 703, 597 P.2d 475, 157 Cal. Rptr. 72 (1979); Murphy v. Berlin

It may be recalled from Chapter II that Wigmore stated in his treatise that the modern system of evidence rests upon two axioms which underlie its whole structure.[27] The first is that "[N]one but facts having rational probative value are admissible";[28] the second is that "[A]ll facts having rational probative value are admissible, unless some specific rule forbids."[29] It followed from those axioms that the rules of evidence might be grouped under three headings.[30] The first deals with probative value (relevancy); the second includes artificial rules which do not profess to define probative value but aim to protect it (safeguards); and the third covers those rules which rest on extrinsic policies irrespective of probative value (privileges).[31]

The first section of this part is organized around the first axiom and the concept of relevancy. The second and third sections are concerned with the second axiom and the two concepts of safeguards

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B. of Educ., 167 Conn. 368, 355 A.2d 265 (1974); Aulwurm v. Board of Educ. of Murphysboro Com. Unit School Dist. No. 186, 67 Ill.2d 434, 367 N.E.2d 1337 (1977); Board of Trustees of School Dist. No. 9, Glacier County v. Superintendent of Public Instruction, 171 Mont. 323, 557 P.2d 1048 (1976); Roberson v. Board of Educ. of City of Santa Fe, 80 N.M. 672, 459 P.2d 834 (1969); Powell v. Board of Trustees of Crook County School Dist. No. 1, 550 P.2d 1112 (Wyo. 1976).

[27] 1 Wigmore on Evidence § 9 (3rd ed. 1940).

[28] Id.

[29] Id. at § 10.

[30] Id. at § 11.

[31] Id.

and privileges.

A. Rules of Relevance

The Notice

If a hearing is to provide a meaningful opportunity for a teacher to contest the charges upon which a termination may ultimately be based, then it is essential that the teacher be given adequate notice of those charges, so that an effective defense can be prepared.[32] It has been suggested that at a minimum, due process requires that the notice afforded must be appropriate to the charges made; clear and actual notice of the reasons for termination must be given in sufficient detail to enable the teacher to present evidence relating to them, including both the names of those who have made allegations and the specific nature and factual basis for the charges.[33]

The notice is of major significance for both the teacher and the school officials as they consider what evidence to produce at the hearing. It is generally the notice which determines the scope of the proceedings and establishes the standard of relevance which will govern all evidentiary matters.[34] Questions regarding both the

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[32]McGhee v. Draper, 564 F.2d 902, 911 (10th Cir. 1977); Board of Trustees of School Dist. No. 9, Glacier County v. Superintendent of Public Instruction, 171 Mont. 323, 327, 557 P.2d 1048, 1050 (1976).

[33]Brouillette v. Board of Dir. of Merged Area IX, 519 F.2d 126, 128 (8th Cir. 1975).

[34]Murphy v. Berlin Bd. of Educ., 167 Conn. 368, 374, 355 A.2d 265, 269 (1974); State ex rel. Lucas v. Board of Educ. and Ind. School Dist. No. 99, Esko, ---Minn.---, ---, 277 N.W.2d 524, 527 (1979).

admissibility and the useability of evidence will be answered initially by reference to the provisions of the notice.

While the charges in administrative proceedings need not be drawn with the same precision as in judicial actions, it has been pointed out that they must fairly apprise the teacher of the allegations.[35] There have been decisions which indicate that the teacher may be notified of these charges either in an original notice that dismissal is being considered or in a subsequent bill of particulars.[36] In one instance, even letters and evaluations which had preceded the official notice were thought to have adequately apprised the teacher of specific complaints.[37]

The notice of charges should include both the ultimate grounds upon which the contemplated termination would be based and the specific evidentiary facts to be offered in support of those grounds. For example, the ultimate grounds might be among those specified by statute as constituting just cause for termination, such as insubordination, neglect of duty, etc. The specific facts relating to those grounds might be the circumstances of the teacher's refusal to comply

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[35]Grissom v. Board of Educ. of Buckley-Loda Com. School Dist. No. 8, 75 Ill.2d 314, 323, 388 N.E.2d 398, 401 (1979).

[36]See Grissom v. Board of Educ. of Buckley-Loda Com. School Dist. No. 8, 75 Ill.2d 314, 388 N.E.2d 398 (1979); Powell v. Board of Trustees of Crook County School Dist. No. 1, 550 P.2d 112 (Wyo. 1976).

[37]Valter V. Orchard Farm School Dist., 541 S.W.2d 550 (Mo. 1976).

with a superior's directive, an instance of leaving a class unsupervised, etc.[38]

There have been a number of decisions in which a teacher has argued on appeal that a termination decision had resulted from the consideration of evidence that was not related to the charges set forth in the notice. The success of such contentions has varied.

Aulwurm v. Board of Education of Murphysboro Community Unit School District No. 186[39] involved an Illinois teacher who had been dismissed from his position by the Board of Education following a public hearing. The Board had sent a notice to the teacher which set forth eight claimed grounds for dismissal; at the teacher's request, the notice was followed by a bill of particulars from the Board which detailed the charges. At the hearing evidence was introduced, over the teacher's objections, to prove two additional charges that had not appeared either in the notice or in the bill of particulars provided by the Board.

The Illinois school laws provided that a termination for cause must be based upon specific charges, and that written notice of such charges must be served on the teacher. The court stated that the Board's failure to notify the teacher in advance that evidence concerning these

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[38] See Rost v. Horky 422 F. Supp. 615, 617 (D. Neb. 1976); Grissom v. Board of Educ. of Buckley-Loda Com. School Dist. No. 8, 75 Ill.2d 314, 322-23, 388 N.E.2d 398, 400-01 (1979); Valter v. Orchard Farm School Dist., 541 S.W.2d 550, 555-56 (Mo. 1976); Adams v. Clarendon County School Dist. No. 2, 270 S.C. 266, 269-70 & n.2, 241 S.E.2d 897, 898-99 & n.2 (1978).

[39] 67 Ill.2d 434, 367 N.E.2d 1337 (1977).

two additional matters would be presented at the hearing precluded the board from seeking to base a dismissal on these charges or from considering evidence on them. The supreme court concluded from the record that the Board had erred in dismissing the teacher, and reversed the judgments of the appellate and circuit courts that substained the board's decision.[40]

In Powell v. Board of Trustees of Crook County School District No. 1[41] a Wyoming teacher had been dismissed by the Board of Education on the grounds of failure to establish rapport with students. After a hearing, the Board had made as the only relevant purported "finding of fact" that the teacher had been unable to control the conduct of his students and as a purported "conclusion of law" that the teacher had failed to establish rapport with his students. The teacher had been notified of several charges, including the failure to establish rapport with students, but the charges did not include the inability to control the conduct of his students. The supreme court held that he had had no fair notice of the charge concerning student discipline and that therefore he could not be dismissed for a cause based upon that finding. Furthermore, it was necessary to exclude all the testimony and evidence of any kind bearing upon a purported inability to control the conduct of the students as proof of the teacher's failure to establish rapport.

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[40] Id.

[41] 550 P.2d 1112 (Wyo. 1976).

It was also held that the failure to establish rapport with students was neither among the specified grounds for dismissal nor in the category of "other good and just cause" as required for dismissal by the Wyoming statutes. The inadequacy of the board's findings was cited as another reason for reversal of the district court's denial of relief.[42]

A dissenting opinion[43] argued that the majority had reversed on technicalities and had intruded upon the district's management prerogatives. It was stated that there was no suggestion anywhere in the record that the teacher did not know what he was required to defend against. His problems with discipline and student rapport were clearly known to be the subject of the hearing, and he came prepared to contest those charges. The dissent contended that detailed pleadings are unimportant in the administrative process, and that the key to administrative pleadings is simply to provide the opportunity to prepare.

This decision contains a rather comprehensive discussion of the relationships among the notice, the evidence, and the findings. It is discussed again in a subsequent section.

Another case in which these relationships were involved was Johns v. Jefferson Davis Parish School Board.[44] The Louisiana school

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[42] Id.

[43] Id. at 1121.

[44] 154 So.2d 581 (La. Ct. App. 1963).

board had dismissed a tenured high school principal after notice and a formal hearing, and the trial court had rejected the principal's demand for reinstatement.

The principal had been charged with willful neglect of duty and incompetence. The court commented that the generalized findings of the school board did not correspond with the charges, and that it was difficult to ascertain the Board's conclusions as to the specific charges in the notice. That difficulty was increased because some of the evidence had been improperly taken at the hearing. That evidence had concerned alleged delinquencies with which the principal had not been charged in the notice prior to the hearing, and based upon that evidence, the Board had found the principal to be guilty as to those delinquencies.[45]

The court noted that the statutory requirement of formal notice and hearing contemplated a reasonable and substantial compliance with the general principles of due process of law. That principle meant that the hearing should be limited to the formal charges of which the teacher had received prior notice, so that there is a reasonable opportunity to examine and refute the adverse evidence and to raise any available legal defense to it.[46]

The court did sustain two of the Board's findings which were related to the charge of incompetence. However, it appeared that the

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[45] Id.

[46] Id.

dismissal was based to a large extent upon unsustained charges and upon the improperly admitted evidence of alleged deficiencies with which the principal had not been formally charged prior to the hearing. The court reversed and set aside the action of the Board insofar as it was based on findings which were improperly made and on evidence which was improperly received. The proceedings were remanded to the Board for such action as it might deem justified by the findings affirmed by the court.[47]

In a case discussed supra, Shorba v. Board of Education,[48] the circuit court had denied a Hawaii teacher's motion for reinstatement, but had ordered a new hearing. The statutes required that the notice furnished the teacher was to fully specify the grounds for the consideration of termination. The notice had indicated that the charges were related to improper corporal punishment of students, but the hearing officer ruled over objections that he would also consider evidence relevant to the teacher's competency. The trial court had ruled that the hearing was conducted in violation of the statute and in violation of due process of law in that the evidence entertained and admitted exceeded the scope of the charges set forth in the notice.

The supreme court disagreed and concluded that the teacher was entitled to neither reinstatement nor a new hearing. Although the admission of evidence relevant to the teacher's competency was improper

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[47] Id.

[48] ---Hawaii---, 583 P.2d 313 (1978).

because that charge had not been included in the notice, that alone was not reversible error, because the record did not indicate that the Board had relied on that evidence in reaching its decision. The record did show that substantial evidence had been adduced of the teacher's violation of the Board's rule on corporal punishment, the charge that had been included in the notice. Since the record did not show the teacher was prejudiced by the irregularity, the supreme court concluded that the trial court had erred in granting the teacher a new hearing.[49]

A similar analysis was used in Targuin v. Commission on Professional Competence.[50] A California teacher had been dismissed by the Commission on Professional Competence on grounds of incompetence, evident unfitness for service, and persistent violation of and refusal to obey reasonable regulations prescribed by the governing board of the district. These statutory causes for dismissal had been specified in the statement of charges. However, the education code provided that a board could not act upon any charges of unprofessional conduct or incompetency unless it had given, within a certain time frame, a written notice of the unprofessional conduct or incompetency, specifying the nature thereof and including an applicable evaluation. Several of these notice requirements had not been met. Furthermore, it was intended that such a notice would give the teacher an opportunity

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[49] Id.

[50] 84 Cal. App. 3d 251, 148 Cal. Rptr. 522 (1978).

to correct the deficiencies, but in this instance the teacher had been suspended from his teaching duties and had no chance to remedy any deficiencies.

At the hearing the teacher objected to the introduction of evidence on the ground that because of the improper notice of unsatisfactory service, the Commission was without jurisdiction to proceed on the charges. The objection was overruled and a subsequent motion to strike was denied. The Commission determined that cause existed on each of the three grounds and ordered the teacher dismissed.[51]

The teacher successfully contested his dismissal at the trial court level. That court concluded that the receipt of evidence of incompetency tainted the entire proceedings, thereby denying a fair hearing. However, the court of appeal found that the erroneous admission of evidence on the charges of incompetency did not deprive the teacher of a fair hearing on the remaining charges and reversed, directing the trial court to determine whether the sufficiency of the evidence on these other charges justified the dismissal.[52]

The court of appeal reasoned that the three causes--incompetency, evident unfitness for service, and persistent violation of and refusal to obey reasonable regulations--each were discrete grounds for the dismissal of the teacher. Although a particular act or omission

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[51] Id.

[52] Id.

may constitute more than one of the causes for removal, each cause refers to acts or omissions not necessarily included in the others. Even though the failure to provide proper notice and an opportunity to correct deficiencies precluded the Commission from proceeding on the incompetency charges, the proceedings on the other charges were unaffected by that error. At the hearing, the evidence on each of the charges had been presented separately, so that evidence on the charges of unfitness and violations of rules did not include any of the erroneously admitted evidence on the charges of incompetency.[53]

It is not only the evidence which the school officials offer to support a termination decision that is sometimes found to be irrelevant by the reviewing courts. In some instances it is the evidence which the teacher offers as a defense to the charges.

Such evidence was rejected as irrelevant in Phillips v. Board of Education of Smyrma School District.[54] A Delaware teacher's services had been terminated for incompetency in controlling students. The teacher argued that the Board's refusal to hear testimony of a witness who professed experience in teaching industrial arts was reversible error. The offer of proof indicated that the witness had been prepared to testify that the industrial arts equipment was inadequate and that this inadequacy created disciplinary problems in the classroom. The Board had considered the witness not qualified to

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[53] Id.

[54] 330 A.2d 151 (Del. Super. Ct. 1974).

so testify since there was no indication that he had ever been in the teacher's room and no indication that he had recently taught industrial arts. There was also evidence that the room in question had been approved by the Department of Public Instruction and that the teacher had made no requests for additional equipment or complaints concerning the lack of equipment.

The notice to the teacher indicated an intent to terminate for incompetence in managing classroom discipline. A statute provided that the testimony to be heard should be confined to the reasons stated in the written notice of intent to terminate service. The superior court believed there were serious doubts about the relevance and admissibility of the proposed testimony, and if it was error to exclude it, the error was of no consequence to the outcome.[55]

In Sutherby v. Board of Education of Gobles Public Schools[56] a Michigan teacher's employment had been terminated at the end of the year on the ground that his professional services were unsatisfactory because he had violated the rules and policies of the Board of Education. The State Tenure Commission had upheld the discharge, the circuit court had affirmed, and the court of appeals affirmed that decision.

One of the issues raised on appeal was the teacher's claim that it had been error to deny him the right to cross-examine the principal regarding his educational philosophy and to refuse him the

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[55] Id.

[56] 73 Mich. App. 506, 252 N.W.2d 503 (1977).

opportunity to offer evidence concerning his teaching competency. The court noted that although cross-examination is essential to test the credibility of a witness and the weight to be attached to his testimony, it is not an unlimited right. Cross-examination must be relevant and material to the issues. The court found that neither the principal's philosophy nor the teacher's competency was relevant to whether or not the teacher had violated the rules and policies of the Board.[57]

Fike v. Catalina Foothills School District[58] was a decision involving an Arizona teacher who had been dismissed by the Board on charges of physical abuse of students. He contended that the hearing commission had erred in refusing to allow him to introduce his personnel file into evidence; he maintained that a statutory provision mandated the admission of such evidence. The court disagreed, stating that the statute merely gave the commission discretion to allow into evidence the records regularly kept by the governing board concerning the teacher and that the teacher had failed to point out how he was prejudiced by the commission's failure to consider his personnel file. The dismissal, which had been upheld by the superior court, was also affirmed by the court of appeals.

However, if relevant evidence offered by the teacher is excluded, a new hearing may be required. That was the result in McCrum

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[57] Id.

[58] 121 Ariz. 285, 589 P.2d 1317 (Ct. App. 1978).

v. Board of Education of New York City School District.[59] A New York court held that a hearing officer acted improperly in refusing to allow a teacher to offer evidence of test scores which, according to the offer of proof, showed that the students in that teacher's classes did better than did the students in classes taught by others. The charges against the teacher had alleged that he was so inept in maintaining proper classroom decorum that the pupils were being deprived of an education and that he was rendering incompetent and inefficient service. The court acknowledged that passing judgment on the level of disruption in a classroom and the level of competence of a teacher is a situation where subjective perceptions are unavoidable, but that when seemingly objective tests results are available they are relevant and should be considered.

The Teacher's Conduct at the Hearing

The extent to which the notice may determine the scope of the hearing is illustrated by Murphy v. Berlin Board of Education,[60] a Connecticut decision in which the very conduct that the teacher exhibited at the hearing was found to be an improper basis for a decision. A teacher who had been subject to a disciplinary action after a hearing before the Board of Education contended on appeal that, in coming to its decision, the Board had considered evidence against her that was not related to the particular charges of which she

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[59] 58 App. Div. 2d 864, 396 N.Y.S.2d 691 (Sup. Ct. 1977).

[60] 167 Conn. 368, 355 A.2d 265 (1974).

had prior written notice. The court of common pleas had dismissed her appeal.

A letter of complaint had been filed by the parents of one of the teacher's students, and the teacher had requested a hearing before the board to reply to the contents of the letter. The parents' letter complained of the teacher's grading practices in their son's history class and of their dissatisfaction in regard to their attempts to discuss the matter with the teacher. The notice of the hearing which the teacher had received stated that the purpose of the hearing was to give her an opportunity to confirm or deny the complaints presented in the letter.[61]

At the hearing the teacher had introduced evidence tending to show that the particular student in question had a generally poor record in regard to both his attendance and his academic performance in her class. Apparently there had been some additional discussion with the Board relating to general aspects of the teacher's performance. After the hearing the Board had agreed to place her on probation for one year and to freeze her salary, and had notified the teacher of its action. Three separate grounds for the Board's decision had been identified: her failure to adequately contact the parents of the student in question; her attitude, displayed in the presence of the Board, which demonstrated a lack of sympathy and understanding of the problems of students of average and below average ability; and her failure to

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[61] Id.

make use of the channels available for students participating in a work-experience program.[62]

The supreme court first concluded that the administrative procedure act was applicable to these proceedings conducted by the Board of Education. The act provided that the notice shall include a short and plain statement of the matters asserted. It was noted that the function of a sufficient notice in an administrative proceeding was to notify the adverse party of the claims to be adjudicated so that adequate preparation could be made; furthermore, the notice was to set a standard of relevance to govern the proceedings at the hearing. Although a notice will not ordinarily be held insufficient for non-prejudicial deficiencies, such as where the record shows the person had actually known what the charges were, the notice might well be found insufficient if the person did not learn of all the charges prior to the hearing, even though evidence is presented in cross-examining witnesses on the issue with respect to which the notice is deficient.[63]

In this instance the notice sent by the Board to the teacher had included only charges which specifically related to the letter of complaint. However, the Board had based its decision to take disciplinary action not only upon a determination of those charges, but also on the general attitude which she had demonstrated at the hearing toward students of average and below average ability and on her

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[62] Id.

[63] Id.

inadequate involvement with students participating in a work-experience program. There was no indication in the record that the teacher knew prior to the hearing that she would have to respond to the charges upon which the latter two conclusions were based. The supreme court concluded that this deficiency of notice prejudiced her interests, since she could not have prepared an adequate defense to charges of which she was unaware.[64]

The administrative procedure act also required that findings of fact must be based exclusively on the evidence and on matters officially noticed. The record had indicated that the Board's findings were not based exclusively on the evidence, nor had these other matters been officially noticed. The act also provided that irrelevant, immaterial, or unduly repetitious evidence should be excluded, and therefore any evidence as to those matters not set out in the notice of charges was irrelevant and should not have been considered by the Board in deriving its conclusions. Since it could not be determined from the record if the Board would have made the same decision if it had considered only the evidence relevant to the complaints of which the teacher had proper notice, the case was remanded for further proceedings.[65]

A similar issue was considered in a New Jersey case. In Re Fulcomer[66] was an appeal from a decision of the State Board of

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[64] Id.

[65] Id.

[66] 93 N.J. Super. 404, 226 A.2d 30 (1967).

Education which had sustained the decision of the Commissioner of Education who had affirmed the dismissal of a tenured teacher by the Board of Education. Under a newly enacted statute, local boards had jurisdiction only to hold a preliminary review of the charges and to certify the matter to the Commissioner, who then had the duty of conducting the hearing and both rendering a decision on the charge in the first instance and fixing the penalty, if any. The cause was remanded to the Commissioner to fix the proper penalty rather than to merely affirm the determination of the Board. Although the decision turned on the determination of the proper roles of the Board and the Commissioner, there was dictum in the opinion in which concepts of relevancy were discussed.

The teacher had been charged with conduct unbecoming a teacher, the charges arising out of alleged acts of physical violence directed at a student on one particular day. The court noted that apparently the Board's determination that the teacher should be discharged was influenced considerably by its view of the teacher's general attitude displayed at the hearing and was not confined to a decision of the proper punishment for his conduct on the one day in question. The Commissioner had indicated in his review of the Board's action that a lesser penalty might have resulted if the teacher had shown any disposition to cooperate. A meeting which was supposedly convened by the Board solely to determine the extent of the penalty to be imposed for the teacher's departure from decorum in the particular episode involved became the occasion for a heated debate as to his philosophy

of education and school discipline and his general attitude toward the Board. Faced with what was characterized as a belligerent and defiant attitude, the Board decided that the teacher's usefulness to the school system was ended and that he should not be reinstated. In the view of the court, the teacher's rights were seriously prejudiced by the intrusion of such extraneous considerations.[67]

A variation on the influence that the teacher's approach to the hearing may have on the board's decision-making process can be illustrated by the apparent application of the "adverse inference rule." If the teacher does not produce evidence to refute the charges, then the rule permits the finder of fact to take that into account when weighing the evidence.

In Application of Yorke[68] a New York teacher's termination was remanded to the Board for the purpose of making appropriate findings. In the course of the opinion, the court noted a rule which the Board should follow concerning the failure of the teacher to call as witnesses other faculty members with knowledge of a matter at issue. The failure to call a witness does not permit speculation as to what the testimony might have been and cannot furnish the basis for a finding. However, it does allow, although it does not require, the trier of fact, in weighing the evidence, to draw the strongest inference against the party who failed to call the witness that the

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[67] Id.

[68] 61 Misc. 2d 794, 306 N.Y.S.2d 343 (Sup. Ct. 1969).

opposing evidence permits. The Board could, if it deemed it proper to do so, draw an inference from the failure of the teacher to call faculty members who were not adverse to him.

Prior Conduct

The question of whether a teacher's prior conduct is relevant to the matters at issue in a termination hearing is sometimes raised.

Board of Trustees of School District No. 9, Glacier County v. Superintendent of Public Instruction[69] was a case involving a Montana teacher who had been dismissed during the term of his contract for missing a half-day opening exercise at the beginning of the school year. He had claimed illness, but it had been discovered that he had been working elsewhere.

The letter of notice had indicated that the charges were based on his failure to attend that one particular exercise and that he should be prepared to state his reasons for that absence. However, at the hearing the Board had also inquired into and considered the absences of the teacher during the entire nine years of his employment.[70]

The teacher had appealed to the county superintendent and had been reinstated on the basis that one half-day absence did not justify dismissal. The Board had then appealed to the State Superintendent of Public Instruction who had affirmed the reinstatement,

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[69] 171 Mont. 323, 557 P.2d 1048 (1976).

[70] Id.

finding the absence de minimis. The Board had then appealed to the district court, who had reversed the State Superintendent, concluding that the Board was entitled to consider the teacher's prior absences and that when combined with such absences, the one-half day absence was sufficient to justify dismissal. The supreme court reversed and affirmed the reinstatement.[71]

The supreme court stated as a principle that in circumstances where dismissal must be for good cause and regulated by statute, one is entitled, in common justice, to an opportunity to meet the charges before being dismissed. That opportunity must necessarily include notice of the charges, for without such notice the opportunity is meaningless. While the notice need not meet formal requirements, it must be sufficiently detailed to inform the teacher of the charges against him, so that he is reasonably able to formulate a defense.[72]

The court adopted the doctrine that although school board hearings may be somewhat informal, it must appear that the dismissal is based only upon evidence supporting the charges. Since the teacher had not been given notice of the additional charges relating to the prior absences, the Board could not consider them nor make them a basis or a portion of the basis for termination.[73]

The question of the relevance of evidence relating to events which have occurred at some prior point in time was also raised in

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[71] Id.

[72] Id.

[73] Id.

State ex rel Lucas v. Board of Education and Independent School District No. 99.[74] That Minnesota decision involved the termination of a principal's continuing contract on numerous grounds relating to deficiencies in the manner in which he had performed his administrative duties. Pursuant to the statutory scheme, the principal had been provided a notice of deficiency, which is apparently intended to give the individual an opportunity to remedy the situation. If the deficiencies continue, the board can set forth the unremedied deficiencies in a notice of termination, and after proper hearing, decide to end the contract. This was what in fact had occurred.

After his contract had been terminated by the Board, the principal petitioned for a writ of certiorari, which was denied by the district court. The supreme court affirmed.[75]

The principal contended on appeal that his due process rights had been violated by a ruling of the hearing officer which had excluded evidence pertaining to matters occurring prior to and included in the notice of deficiency, including evidence intended to impeach the testimony of school board witnesses on the ground of bias. He argued that the scope of the termination proceeding was not limited to the contents of the notice of termination, but that the affected individual is afforded the opportunity to challenge the validity of the notice of deficiency and to demonstrate that any deficiencies which were

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[74] ---Minn.---, 277 N.W.2d 524 (1979).

[75] Id.

substantiated had been corrected. The Board had maintained that only the matters contained in the notice of termination are relevant.[76]

The supreme court found that the scope of the termination hearing was essentially framed by the notice of termination. If an unsatisfactory situation had been remedied after the notice of deficiency, then facts relating to the problem which had once existed would not be relevant. If the specific item of complaint had re-occurred, then the continuing deficiency would be set out in the notice of termination, and evidence of both the pre-existing deficiency and its persistence could be presented and rebutted. In short, only evidence relating to items of specific complaints set forth in the notice of termination would be relevant.[77]

In this case the court found that it was implicit in the evidence presented that the deficiencies set forth in the notice of deficiency had not been remedied, and that therefore the principal was entitled to attack the school board's evidence on the basis that past deficiencies either had been remedied or had never existed. However, even though his testimony had been limited by the hearing officer, the court found no prejudicial error, apparently at least in part because the principal had failed to object to adverse testimoney and had failed to make an offer of proof when his testimony had been excluded.[78]

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[76] Id.

[77] Id.

[78] Id.

The admissibility of evidence concerning the teacher's acts during prior years of employment was one of the issues in Roberson v. Board of Education of City of Sante Fe.[79] A contract had been tendered to a New Mexico teacher on March 11 for the ensuing school year, and she had timely accepted it on May 11. On May 26, she had been discharged by the Board of Education for "good cause" before she had entered into performance of that contract.

The discharge resulted in a long history of litigation, and this decision was the third time the matter had been before the supreme court. This particular appeal was from a holding by the district court that the decision by the Board to terminate the teacher's employment, which had been affirmed by the State Board of Education, should be reversed.[80]

The supreme court examined the record made before the State Board of Education to determine if the decision was supported by substantial evidence. That answer turned on the issue of whether conduct prior to the making of the contract which was terminated could be considered in arriving at the decision.[81]

Relevant decisions from other states were discussed. The court noted that one rule which had been established was that where the charge and ground for termination is gross inefficiency, evidence

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[79] 80 N.M. 672, 459 P.2d 834 (1969).

[80] Id.

[81] Id.

of prior conduct amounting to inefficiency may be considered, but not particular acts of misconduct. More compelling to the court was another holding that matters which occurred under a previous contract would not support cancellation of a subsequent contract.[82]

It was found that the proof in this case, which consisted of alleged misconduct known to the school officials prior to entering into the new contract sought to be terminated, was in the nature of particular conduct rather than gross inefficiency. The supreme court concluded that, notwithstanding that such evidence might form a proper basis for denial of renewal of a tenured teacher's employment, it could not furnish a basis for cancellation of a contract for the future and therefore had been improperly admitted and considered.[83]

Absent this inadmissible evidence, the State Board's determination lacked substantial support in the record. Although there was some evidence of problems that the teacher had had after the new contract had been tendered, the court did not consider it as adequate to establish any of the charges asserted as grounds for the termination. The trial court's findings were affirmed.[84]

In Hebert v. Lafayette Parish School Board,[85] a permanent teacher had been discharged on the basis of incompetency. The specific

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[82] Id.

[83] Id.

[84] Id.

[85] 146 So.2d 848 (La. Ct. App. 1962).

reasons given were the inability to control and discipline his classes and poor teaching procedures. Prior to this discharge the teacher had been transferred from a different position which had paid a higher salary, and he had sued the school district seeking reinstatement and back wages. At the time of his discharge, the teacher had been employed in the new position for over a year, and it had not been contended that his performance in his new capacity was unsatisfactory. Instead, the School Board had discharged him for the allegedly incompetent performance of his duties during his earlier assignment. The trial court had reversed the action of the School Board, and the Board appealed.

The issue on appeal was whether a teacher who was satisfactorily performing his present duties could be discharged because of his alleged incompetence several years earlier while assigned to another teaching position. The only evidence introduced at the hearing before the Board concerned the teacher's alleged incompetent performance in the earlier assignment.[86]

The court of appeal agreed with the holding of the district court that the Board had not produced any relevant evidence to prove the teacher was incompetent in his present position. The evidence offered by the Board as to the teacher's alleged incompetency in the former position had been properly disregarded by the district court as

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[86] Id.

irrelevant. The judgment of that trial court was affirmed.[87]

A dissenting opinion[88] contended that if this ruling became the established jurisprudence in the state, it would enable school boards to deliberately transfer a competent tenured teacher to a position for which he was not qualified, and after one year to dismiss him for incompetency. It was argued that according to this decision a teacher in those circumstances would not be permitted to show that he had been competent in his former position, because evidence relating to the original position would not be relevant.

Sargent v. Selah School District No. 119[89] involved a Washington teacher who had been discharged by the Board of Directors for cause, specifically for repeated violations of school regulations and improper disciplinary techniques. Following the discharge, the teacher had requested a hearing to determine if there was sufficient cause for the Board's action, and the hearing officer had affirmed the discharge. On appeal, the superior court had affirmed the hearing officer's decision.

The precipitous incident had been one in which the teacher had kicked the leg of a student's chair, which caused the student to fall backwards and injure himself. The notice of probable cause for discharge had also referred to the record of previous instances of

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[87] Id.

[88] Id. at 851.

[89] 23 Wash. App. 916, 599 P.2d 25 (1979).

improper disciplinary techniques and to a previous notice that had been given to the teacher regarding the possible consequences of repeated violations of district rules and regulations. The record indicated that the teacher had been a good teacher academically, but it also confirmed a pattern of unacceptable disciplinary practices.[90]

The court of appeals conducted a de novo review of the hearing record and affirmed. The teacher had argued that prior instances of improper discipline should be precluded from consideration. The court did not agree.[91]

The court stated that although a single act of teacher misconduct may not give rise to sufficient cause for discharge, the fact of that misconduct does not lose its relevancy with respect to teacher efficiency and performance merely because it was not sufficiently flagrant to justify immediate dismissal. The better rule was thought to be that prior acts of teacher misconduct extending back for a reasonable length of time should be permitted consideration. In that way, sufficient cause for discharge could be evaluated in light of the teacher's record as a whole.[92]

In Soucy v. Board of Education of North Colonie Central School District No. 5,[93] the termination of a New York teacher's

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[90] Id.

[91] Id.

[92] Id.

[93] 41 A.D.2d 984, 343 N.Y.S.2d 624 (Sup. Ct. 1973).

employment by the Board of Education was annulled. One of the reasons for setting aside the Board's action was that the hearing panel had received into evidence testimony which the court found to be completely irrelevant and prejudicial and in no way germane to the charges. By innuendo a question of the tenure granted the teacher some 18 years before had been allowed to be brought to the panel's attention.

A Pennsylvania teacher appealed from an order by the Secretary of Education in Blascovich v. Board of Directors of Shamokin Area School District.[94] The Secretary had dismissed his appeal from the decision of the Board of School Directors, who had discharged him on grounds of cruelty and insubordination. The teacher had paddled a number of students after being explicitly prohibited by written order from administering corporal punishment.

The order was issued by the principal to the teacher because of a series of incidents which had begun the previous year. Over the teacher's objections, testimony with regard to complaints by students and parents had been admitted for the limited purpose of developing that background. The court determined that the limited purpose of that testimony had been clearly set forth as being to establish the setting and basis for the prohibitory order that was subsequently violated, and that contrary to the teacher's contentions, the charge of cruelty was not based on those earlier incidents.[95]

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[94]---Pa. Commw. Ct.---, 410 A.2d 407 (1980).

[95]Id.

The court's review of the record disclosed substantial supporting evidence and no procedural defect or due process violation. The Secretary's decision was affirmed.[96]

There are a number of states which have statutory provisions relating specifically to the admissibility and/or useability of evidence of a teacher's prior conduct. There have been several decisions in which the implications of those provisions have been considered.

In Baxter v. Poe[97] a case discussed supra, the teacher had also objected to the admission of evidence of events which had occurred more than three years prior to the written notice of the superintendent's intention to recommend dismissal. Her objection had been based on a pertinent statutory provision. The court pointed out that the statute prohibited a board of education from basing a dismissal on conduct or actions which occurred more than three years prior to the date of mailing of the notice, but that there was no prohibition against the board hearing evidence of that nature. It had been proper for the Board to hear such evidence to learn of the background of the case, and the teacher had made no showing that the Board had based her dismissal on conduct beyond the three-year limit.

A tenured Arizona teacher contested her termination for alleged insubordination and unprofessional conduct in Defries v.

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[96] Id.

[97] 42 N.C. App. 404, 410, 257 S.E.2d 71, 75 (1979), cert. denied.

School District No. 13 of Cochise County.[98] She claimed irregularities in the dismissal procedures, including that the commission which had conducted the hearing had heard evidence of incidents occurring prior to the contract year in question that were unrelated to any cause for termination arising during that year. A statute provided that evidence relating to teacher competency which had occurred more than four years prior to the date of service of the notice was inadmissible and that no decision relating to dismissal or suspension could be based on such evidence.

The court noted that the teacher's slate had not been wiped clean by the rehiring so that prior incompetency or acts of misconduct could not have been considered in conjunction with incompetency or misconduct demonstrated in the more recent work of the teacher. Since the charges had been insubordination and improper conduct, but did not involve competency, the statute had not restricted the admission and use of evidence on those charges. The record contained evidence of episodes supporting those charges occurring both before and during the year in question. The trial court had affirmed the decision of the Board, and the court of appeals agreed.[99]

Jerry v. Board of Education of City School District[100] involved a New York teacher who had been dismissed partly on the basis

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[98]116 Ariz. 83, 567 P.2d 1212 (Ct. App. 1977).

[99]Id.

[100]50 A.D.2d 149, 376 N.Y.S.2d 737 (Sup. Ct. 1975).

of using unreasonable and excessive force on students. He contested the admission of evidence concerning incidents that occurred more than three years prior to the bringing of the charges as being in violation of a statute. The court rejected that contention, stating that the evidence was not offered to prove that the earlier incidents had occurred, but to demonstrate that the teacher had been given notice that he was not to use physical force on students, and that for such a purpose the evidence was clearly relevant.

In Kearns v. Lower Merion School District.[101] a Pennsylvania school board had terminated a teacher's contract because she had failed to report to school on opening day. She had previously requested a leave of absence for health reasons which had been denied. At the hearing held subsequent to her termination, the Board had received evidence concerning both misstatements on the teacher's original employment application and the state of her health prior to and during the term of her employment, and the teacher contended that this had been error. The court believed that if the medical history had any relevance at all, it was that it tended to confirm what the teacher had already admitted--that she was unable to work because of her health, and that the introduction of the evidence had been mere surplusage, which if error, had been such as to require reversal. The Board's decision was affirmed.

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[101] 21 Pa. Cmmw. Ct. 476, 346 A.2d 875 (1975).

Criminal Charges

The admissibility and use of evidence regarding criminal charges against the teacher have been an issue in some cases. Such evidence has been found properly relevant to the termination proceedings.

Baker v. School District of City of Allentown[102] involved a Pennsylvania teacher who had been dismissed on the ground of immorality, specifically that of engaging in illegal gambling. The only evidence to support the dismissal had been the teacher's plea of nolo contendere to the federal offense of operating an illegal gambling business. The teacher had contended that a plea of nolo contendere was not competent evidence in such a proceeding, but the court held that the plea was admissible as evidence of an admission of guilt, and that it would support the termination of the contract.

In Yang v. Special Charter School District No. 150, Peoria County, [103] an Illinois board had dismissed a teacher for misconduct, having found the conduct to be irremedial and the dismissal to be in the best interests of the school. The misconduct, which the teacher had admitted at the hearing, was playing strip poker in a parked automobile with a minor female student. A collateral criminal complaint had been based on that incident, but following a jury trial the teacher had been acquitted of the criminal charges. The Board had heard a

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[102] 29 Pa. Commw. Ct. 453, 371 A.2d 1028 (1977).

[103] 11 Ill. App. 3d 239, 296 N.E.2d 74 (1973).

total of thirteen witnesses attesting to the teacher's good character and reputation, but the hearing officer employed by the Board had refused to allow eleven other witnesses to so testify. The hearing officer had also refused to allow into evidence the teacher's acquittal on the criminal charges.

The reviewing court thought that limiting the number of witnesses had been no abuse of discretion. The court also noted that generally a prior acquittal in a criminal prosecution is not admissible as evidence in a civil action to establish the truth of the facts on which it is based, but where an acquittal is an element or a fact to be proved in a civil action it is competent. In this instance, the Board's charges had referred to the collateral criminal action, and therefore the court believed that the acquittal should have been admitted; however, it was not deemed prejudicial error in view of the teacher's own admissions.[104]

Reduction in Force

Reduction in force proceedings give rise to some interesting evidential issues. There are generally two separate decisions made in this process of cutting staff. The first is a policy matter, and relates to whether or not the district will reduce staff in a particular area. The second is the determination of whether or not a particular teacher will be "RIF'd."

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[104] Id.

In Yaffe v. Board of Education of City of Meridian[105] a Connecticut Board of Education had terminated a teacher's contract of employment as a reading supervisor because the position had been eliminated. At the hearing requested by the teacher, the Board of Education had refused to allow any testimony by the teacher, by the superintendent of schools, or by numerous expert witnesses on the question or whether or not the position of reading supervisor should have been eliminated. The issue raised on appeal was whether the Board's refusal to entertain evidence on the educational school system deprived the teacher of a fair hearing.

The statutes provided as one of the reasons for terminating a continuing contract the elimination of the position to which the teacher was appointed, if there was no other position to which he may be appointed if qualified. The court stated that for a board to justify a termination because of the elimination of the position it must be established (1) that the position to which a teacher was appointed has been eliminated, and (2) that there exists no other position for which the teacher is qualified.[106]

The court decided that whether or not a board of education should have exercised its discretion and eliminated a teaching position was an educational policy matter and not relevant to the issues at the dismissal hearing. What the Board had refused to hear was

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[105] 34 Conn. Sup. 115, 380 A.2d 1 (C.P. 1977).

[106] Id.

evidence to the effect that as a matter of policy the school should provide a reading supervisor as a part of its educational program. The Board had not refused to hear evidence regarding the fact of the elimination of the teacher's position or the absence of another position for which the teacher was qualified; such evidence would have been relevant to the issue of whether or not legal cause existed for termination. The court found this distinction to be critical.[107]

The court did note that under some statutory schemes, a board of education would have the burden of proving at a hearing that a reduction in the number of teachers is necessary because of decreased enrollment or a decrease in educational services. However, in the instant case the court believed that the teacher and her counsel simply wished to use the hearing to force a public forum on the policy question of providing a reading supervisor for the school system. Finding no abuse of discretion in the exclusion of such evidence, the court dismissed the appeal.[108]

Foesch v. Independent School District No. 646[109] suggested that in some instances the hearing before the board may be the proper forum to take evidence and resolve certain educational questions. A Minnesota school board had passed a resolution discontinuing two teaching positions in the elementary school on grounds of a decrease in

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[107] Id.

[108] Id.

[109] 300 Minn. 478, 223 N.W.2d 371 (1974).

enrollment, and pursuant to this decision, had voted to terminate two teachers' contracts. A major issue raised by one of the teachers who contested her termination at a hearing before the Board and then in the judicial system was what constitutes a teacher's "position."

The teacher's contract had specified her assignment only as "elementary teacher"; however, her administrative evaluation form had specified her teaching assignment as "2nd grade," and that is what she had been teaching. After the Board's decision to reduce staff, the elementary principal evaluated each elementary teacher, and the two teachers terminated had evaluation scores indicating less competence relative to the other teachers. Although the total elementary enrollment had decreased, the question arose because the enrollment in the second grade for the ensuing year had increased, and two teachers rather than one had been assigned to that grade for the next year. The Minnesota statutes provided in relevant part that a continuing contract may be terminated upon the discontinuance of position or the lack of pupils. The teacher contended that her position was that of second grade teacher as was designated on her evaluation form, and that since the enrollment in second grade had increased, that position was not eliminated. The Board contended that the teacher held the position of "elementary teacher" as set forth in her contract, and that since two elementary positions had been eliminated due to an unquestioned decrease in the number of elementary students, its action was proper.[110]

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[110] Id.

The court did not feel qualified to decide what constituted a proper "classification" or "position" without a complete record. The court believed that, absent legislative clarification, the administrative tribunal was the proper forum to take testimony relative to what constitutes a teacher's "position" in the light of current practice. Such testimony should include that of expert witnesses on the specialized training and classification of teachers as such evidence might have some hearing on what grades and subjects a teacher might be qualified to teach. The court also indicated that to define a position as that of a teacher of a specific grade is too narrow, and that to classify a teacher as a teacher within the entire school system is too broad.[111]

The district court had upheld the termination order. The supreme court held that further findings were necessary in regard to the teacher's qualifications to teach at various grade levels as well as to the qualifications of the other teacher to replace her at the second grade level. The matter was reversed and remanded.[112]

It is clear from this review of the cases that the courts have attached much significance to the relevance of evidence. That general concept has been taken to include the need for providing fair notice of the charges, the matter of what reasons may be used to justify a decision, and the issue of what questions are to be

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[111] Id.

[112] Id.

decided at a termination hearing.

But relevancy is not the only criterion to be met. There are other considerations which may prevent certain evidence from being a factor in the decision-making process.

B. Rules of Exclusion

It may be in the area of the safeguards which are required in addition to the required probative value of the evidence where there is the clearest distinction between the formal rules of evidence used in the judicial system and the more informal procedures generally followed in a hearing before an administrative tribunal. The majority of the "rules of evidence" would be included in this category.

Hearsay

Perhaps the most commonly invoked auxiliary test or safeguard relative to the admission or use of evidence is the hearsay rule. There have been a number of decisions in which the hearsay issue has been considered.

The basic function of the hearsay rule is to exclude from consideration the substance of statements made by individuals who do not testify at the hearing. In such an instance there is no opportunity to test the substance of the statement by cross-examination of the individual who made it.

In Wright v. Marsh[113] the contract of a tenured teacher had

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[113] 378 So.2d 739 (Ala. Civ. App. 1979), cert. denied, 377-80 Ala. 742, 378 So.2d 742 (1979).

been cancelled after a hearing before the Board of Education, and the Alabama State Tenure Commission had sustained the action of the Board. The teacher had then filed a petition for a writ of mandamas before the circuit court, who had granted the mandamus and reinstated the teacher.

Most of the evidence against the teacher had been testimony by the principal of the school. He had testified to a number of teaching inadequacies that he had observed as the teacher's supervisor, and he had also testified that based on his observations and evaluations, the teacher was incompetent. In addition, the Board had also admitted some hearsay evidence against the teacher, which alleged the use of a racial slur and profanity in class and drinking on the school grounds.[114]

The trial court had held that hearsay evidence could not be considered by the Board, and that such matters should be proved by the direct testimony of witnesses who observed the conduct. That court had based its findings on an Alabama statute which provided that a teacher had the right to cross-examine adverse witnesses. It had also held that the due process or equal protection clause of the fourteenth amendment required cross-examination of such adverse witnesses. The court of appeals reversed and remanded.[115]

The teacher had argued on appeal that allowing hearsay testimony violated the statutory right of cross-examination and so

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[114] Id.

[115] Id.

infected the hearing as to require reversal of the Board's judgment. It was the court's interpretation of the statute that the legislature had not intended that the hearing before the board be raised to the status of a court of law insofar as the rules of admission of evidence were concerned. It was noted that a board is not a court, but merely an administrative body unskilled in the rules of evidence. It was also pointed out that according to the rules of civil procedure the admission of hearsay, even in a court of law, would not fatally infect the entire proceeding unless its consideration was so injurious as to cause or contribute to an adverse judgment.[116]

A prior Alabama decision had established that in the absence of a statute to the contrary, administrative boards were not restricted to the consideration of evidence which would be legal in a court of law, but that they would consider evidence of probative force even though it may be hearsay or otherwise illegal. It was found in this decision that the legislature intended only to give the teacher the right to cross-examine adverse witnesses, and that the grant of that right did not repeal the rule of the prior case. The court believed that if the legislature had so intended, it had only to say that hearsay evidence could not be considered by the board.[117]

Vorm v. David Douglas School District No. 40[118] was an

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[116] Id.

[117] Id.

[118] 45 Or. App. 225, 608 P.2d 193 (1980).

unsuccessful appeal by a teacher from an order of the Oregon Fair Dismissal Appeals Board affirming his dismissal by the school district on grounds of inadequate performance. One of the teacher's assignments of error was that hearsay evidence of parent complaints, reports of which were included in his personnel file, may have influenced the Fair Dismissal Appeal Board's decision. He also contended that his constitutional rights were violated by the reception of the hearsay reports, absent his ability to cross-examine the complaining parents.

The court found that the reports could have been admitted as evidence and considered by the FDAB consistently with the the administrative procedure act and the fair dismissal law. The court had concluded in a prior case that hearsay evidence is admissible in agency proceedings and can, where appropriate, constitute substantial evidence to support a finding. Therefore, it followed that to the extent the parental complaints were relevant to the facts relied on to support the teacher's dismissal and were probative of matters supported by other statements in his personnel file, their admission or consideration was not error.[119]

The court did not deal very directly with the contention that the teacher's constitutional rights had been violated. There was simply a reference to the fact that the teacher had contended that he was unable to subpoena the makers of the reports or that he was unaware that such reports were in his personnel file.[120]

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[119] Id.

[120] Id.

Even in those instances where the admission or consideration of hearsay is not error, there are indications that the weight accorded such evidence may be limited. Several decisions have so suggested.

In Glide School Dist. No. 12 v. Carell,[121] that same Oregon court, having reviewed an order of the Fair Dismissal Appeals Board which had set aside a teacher's dismissal by a Board of Education, remanded the proceeding to the FDAB for further findings and the possible application of a proper standard of review. The court noted an issue, which although not decisive in the case, might have some applicability on remand. The FDAB, which is the primary fact-finder under Oregon's dismissal law, had excluded the testimony of the principal with respect to what a student had told him about a bank account under the teacher's control. The court stated that while the evidence was clearly hearsay, that alone would not require its exclusion in a proceeding under the state's administrative procedure act, but that is not to say what weight the FDAB might accord such testimony.

Morey v. School Board of Independent School District No. 492[122] was the third separate occasion that a certain Minnesota teacher termination case had reached the state's highest court. The basic difficulties with the termination were apparent board bias and inadequate evidence and finding, and the district court had found for the teacher each time. The supreme court agreed and noted that what evidence there was to substantiate any of the charges was so polluted by gossip,

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[121] 39 Or. App. 727, 731-32, 593 P.2d 1224, 1226 (1979).

[122] 276 Minn. 48, 148 N.W.2d 370 (1967).

hearsay, and rumor, having no probative value, that it was impossible to determine whether the Board had based its findings, such as they are, on probative evidence or on matters that should have been excluded in the first place, if in fact it had considered the evidence at all. The case was sent back to the Board, either to dismiss the matter or to provide a fair hearing and base its determination on evidence having some probative value and relevance.

Some decisions have clearly indicated that although the admission of hearsay might not be reversible error, no consideration should be given to such evidence. If it appears that the decision was based on hearsay, then the reviewing court might overturn the termination action.

In Rafael v. Meramac Valley B-111 Board of Education[123] a tenured Missouri teacher had been terminated on charges of incompetency, inefficiency, and insubordination. The circuit court had affirmed the action of the Board.

There were several issues raised on appeal. One was the contention by the teacher that the Board had erred in admitting hearsay evidence, over her objection, as to what children and parents had told the administration in regard to her alleged mistreatment of students when those children and parents were not under oath or subject to cross-examination.[124]

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[123] 569 S.W.2d 309 (Mo. 1978).

[124] Id.

The court pointed out that the teacher had made no claim that any charge of which she had been found guilty had been based only on hearsay evidence, but rather that she had only argued that the admission of the hearsay testimony was highly prejudicial because it created doubt in the minds of the Board members as to her teaching capabilities. Her contention was found to be based purely on supposition and conjecture.[125]

The court noted that a decision of an administrative agency must be based on competent and substantial evidence, and that hearsay evidence does not meet those criteria. However, in this case the decision had not been based on hearsay, and her contention was found to be without merit. The decision of the circuit court was ultimately affirmed on all issues.[126]

However, when hearsay evidence of complaints by parents and students become the basis for the board's decision, the result on appeal may be different. Lusk v. Community Consolidated School District No. 95 of Lake County[127] reversed the termination of an Illinois teacher. The proceeding had been initiated by a petition to the Board of Education by a number of parents who had objected to the teacher's methods of disciplining their children. The teacher's resignation had been requested, she had refused to submit it, and

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[125] Id.

[126] Id.

[127] 20 Ill. App. 2d 252, 155 N.E.2d 650 (1959).

the Board had proceeded to discharge her. She had then asked for a hearing. At the hearing a number of witnesses, many of whom had never even seen the teacher, had been called to testify against her. These witnesses had testified to conversations between themselves and their children and between themselves and other third persons. This mass of hearsay evidence had been admitted over repeated objections. A number of witnesses had also testified on behalf of the teacher. The court noted that the record revealed that the Board was as consistent in sustaining the objections of its attorney to evidence on behalf of the teacher as it had been in overruling the objections of the attorney for the teacher.

The circuit court had held that the Board's decision was manifestly contrary to the weight of the evidence. That court had struck from the record certain matters not introduced into evidence at the hearing and had indicated that the Board should have made some finding of fact.[128]

The appellate court pointed out that the teacher was not only entitled to a hearing, but to a fair hearing, and that the dismissal should be based upon competent and sufficient evidence and should be for some substantial reason. The court noted that it would decide the case on its merits upon an examination of the competent evidence introduced at the hearing. It was found that the bulk of the record consisted of hearsay testimony, much of which was highly

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[128] Id.

prejudicial and admitted over the teacher's objections, and that the finding of the Board was manifestly contrary to the meager amount of competency evidence introduced at the hearing.[129]

A similar decision resulted in Allione v. Board of Education of South Fork Community High School District No. 310,[120] in which the termination of another Illinois teacher was overturned by the appellate court after the trial court had sustained the Board's action. The Board had found the teacher guilty of a number of charges, including insubordination, making false accusations against the principal, neglect of duty, using insulting language toward pupils, and ridiculing them and their parents. Some competent evidence regarding the first three grounds had been introduced, but the court found that this testimony had not been sufficient evidence to justify the Board's findings regarding those charges. The evidence upon which the Board had found the teacher guilty on the last two grounds consisted primarily of conversations between the children or between them and their parents, all of which was outside the teacher's presence. The court stated that such evidence was pure hearsay and should not have been considered.

Courts will sometimes find hearsay to be admissible under some exception to the hearsay rule. In Morelli v. Board of Education,[131]

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[129] Id.

[130] 29 Ill. App. 2d 261, 173 N.E.2d 13 (1961).

[131] 42 Ill. App. 3d 722, 356 N.E.2d 438 (1976).

an Illinois court was urged to overturn a principal's termination on the basis of several allegations. One of the contentions was that the admission at the hearing before the Board of Education of testimony concerning the results of polls taken of the faculty was error, because the polls were hearsay and therefore inadmissible. The court in this instance assumed without deciding that the strict rules of evidence did apply in such an administrative hearing, but indicated that even under the rules of evidence the testimony which demonstrated the attitude of the faculty would have been properly admitted under the state of mind exception to the hearsay rule.

Written evaluations prepared by the administrators who have the responsibility for teacher supervision and evaluation are commonly introduced as evidence at the termination hearing. Because the reports are statements made outside the hearing and are introduced as proof of what is asserted therein, the admission and use of such records is sometimes objected to on the basis of the rule against hearsay.

Fox v. San Francisco Unified School District[132] involved a probationary California teacher who had been dismissed by the Board of Education for numerous and varied inadequacies as a teacher. He had been notified that the Board intended to take action on the superintendent's charges against him at a certain meeting, and that he could have a hearing before the Board on those charges if he so requested.

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[132]111 Cal. 2d 885, 245 P.2d 603 (Dist. Ct. App. 1952).

He neither requested a hearing nor attended the meeting, although his counsel did make a special appearance to object to the proceedings. The board overruled the objection. The superintendent was called as a witness and identified a number of efficiency reports on the teacher as being the regularly kept personnel records prepared for all probationary teachers. He also testified that before filing the charges against the teacher, he had considered all of the reports and had conferred with the principals who made them. The superintendent recommended dismissal and the Board so voted.

The teacher's main contention on appeal was that he had been denied proper notice and a hearing as a matter of right. The court found that he had voluntarily and effectively waived his right to an adversary public hearing. The teacher also raised the point that both the departmental reports upon which the discharge had been predicated and the testimony of the superintendent were hearsay, and that the Board had had no authority to dismiss him on such evidence. The court also rejected that argument, and provided the following analysis.[133]

Although the education code required that the Board could only dismiss for "cause," once there had been a waiver of an adversary hearing, the means of determining "cause" were left to the discretion of the Board. It had chosen to ascertain whether such cause existed at a board meeting at which evidence was produced. Even if the evidence was all hearsay that could have been objected to in an adversary

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[133] Id.

hearing, since the teacher had waived his right to a hearing, he could not object on appeal that the testimony was hearsay, if that hearsay testimony was of sufficient probative value to show "cause" for dismissal. Hearsay, even at common law, if unobjected to when offered, can be of probative value, and would have a similar status in an administrative proceeding.[134]

Moreover, while it was true that in an adversary hearing, hearsay which is properly objected to is insufficient alone to support a finding, that rule would not apply to admissible hearsay. Even if the principals' reports were hearsay, they still would have been admissible in an adversary hearing. Under the provisions of the uniform business records as evidence act, those records were admissible as business records. They were not records which had been prepared after the charges had been made and in preparation for the proceeding. They were regular personnel records prepared in the regular course of business. They had been identified by the superintendent who testified as to their mode of preparation. Under those circumstances they were admissible under the business records exception to the hearsay rule.[135]

In McAlister v. New Mexico State Board of Education,[136] the court upheld the affirmation of the State Board of Education of the in-term termination of the employment contract of a New Mexico principal on

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[134] Id.

[135] Id.

[136] 82 N.W. 731, 487 P.2d 159 (Ct. App. 1971).

grounds of insubordination. The principal had complained on appeal of the admission of four written exhibits at the local board hearing on the basis that the documents were hearsay and prejudicial to his interests. A statute provided in part that in ruling on admissibility, a board may require reasonable substantiation of statements or records tendered when accuracy or truth are in reasonable doubt, and that when a hearing will be expedited and the interests of the parties will not be substantially prejudiced, any part of the evidence may be received in written form. In this instance the issue was whether the exhibits substantially prejudiced the principal's rights. The court noted that since the exhibits had been identified and their contents verified from the witness stand, the admission of the exhibits was not prejudicial.

Whitaker v. Fair Dismissal Appeals Board[137] was an affirmation of a decision of the Oregon Fair Dismissal Appeals Board, which had upheld the dismissal of a teacher by the local district on the basis of inadequate classroom performance. One of the teacher's contentions was that the Board erred in receiving into evidence evaluations of his performance as a teacher under the business records exception to the hearsay rule because the district had not laid a proper foundation for the admission of the records. The court found that the Board had not erred in admitting the evaluation documents into evidence, and had conformed to the uniform business records as evidence

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[137] 25 Or. App. 569, 550 P.2d 455 (1976).

act. The testimony of the assistant superintendent in charge of personnel, who was the custodian of the records, had established the prerequisites for admission. His testimony had showed that the instruments were records of the teacher's performance as ascertained by evaluators and that the records had been made during the regular course of the district's operation and placed in the teacher's personnel file.

A related issue was raised in Hagerstrom v. Clay City Community Unit School District No. 10.[138] An Illinois teacher, who had been dismissed after a hearing before the Board of Education, contended that she had been denied a fair hearing because the principal, the main witness against her, was allowed to refer extensively to notes without a foundation having been laid for their use. The teacher had objected generally on a few occasions, but all objections were overruled. The circuit court had affirmed the decision of the Board, as did the appellate court, having found sufficient evidence to justify the dismissal.

The appellate court indicated that the record was unclear as to what "notes" were used by the witness, but that they did show that virtually all the matters related by the witness were contained in the several exhibits admitted into evidence before the board without objection. Therefore, it was determined that the principal's testimony could not have prejudiced the teacher before the Board.[139]

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[138] 36 Ill. App. 3d 1, 343 N.E.2d 249 (1976).

[139] Id.

The foregoing decisions seem to indicate that the mere admission of hearsay evidence is not reversible error in the absence of proof of prejudice to the interests of the teacher. However, if it appears from the record that a decision to terminate a teacher's employment may have been based upon hearsay evidence, and that such evidence would not have been admissible under some exception to the hearsay rule, then the reviewing court may nullify the board's action.

Competency of Witnesses

The competency of a witness to testify is another safeguard which is imposed to help insure the accuracy and reliability of testimony. This issue of whether the witness is "eligible" to testify has been discussed in a few decisions.

In Carrao v. Board of Education, City of Chicago,[140] an Illinois teacher had been dismissed for conduct unbecoming a teacher. The termination had involved charges of taking indecent liberties with a minor student. The child had been eight years old at the time of the hearing. One of the issues raised by the teacher on appeal was that the trial committee of the Board had improperly refused to permit him to interrogate the girl involved in the incident as to her competency as a witness before her substantive testimony was given at the hearing.

The court indicated that in an adversary administrative hearing, such as the one in question, when a child under 14 years of age is

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[140] 46 Ill. App. 3d 33, 360 N.E.2d 536 (1977).

called to testify, the tribunal should ascertain in the first instance whether the child is competent as a witness, and a preliminary examination should be conducted to determine that fact. The court indicated that if a witness was sufficiently mature to receive correct sensory impressions, to recollect and relate intelligently, and to appreciate the moral duty to tell the truth, the child would be competent; not age but intelligence would determine a child's competency.[141]

In this instance, although the preliminary examination should have been allowed, the teacher's attorney did go into these matters on cross-examination, and the court believed that the totality of this interrogation precluded any prejudice to the teacher. The court found for the Board on this matter as well as on the other issues raised. The termination decision, which had been upheld by the circuit court, was affirmed.[142]

School District No. 48, Washington County v. Fair Dismissal Appeals Board[143] was related to the issue of a type of statutory qualification to testify. The dismissal of an Oregon teacher by the Board of Education on the single statutory ground of inadequate performance had been set aside by the Fair Dismissal Appeals Board, which had reviewed the dismissal de novo. One of the major thrusts of the appeal by the school district related to certain rulings of the FDAB

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[141] Id.

[142] Id.

[143] 14 Or. App. 634, 514 P.2d 1114 (1973).

on matters of evidence, a principal one being the refusal of the FDAB to allow certain witnesses to testify as experts and as such to express an opinion based upon the evidence.

An Oregon statute provided that when certain grounds for dismissal, including that of inadequate performance, were set forth in the notice to the teacher, then the evidence shall be limited to those allegations supported by statements in the personnel file of the teacher on the date of the notice to recommend dismissal. The provision had been interpreted by the FDAB as limiting the evidence at the hearing to the general subject of those statements in the personnel file which were either made by or attributed to the testifying witnesses. The question for the court was whether the material in the file, in particular the evaluation reports, must identify all the witnesses called at the hearing.[144]

In resolving this issue, the court looked to state statutes and evaluation guidelines of the State Board of Education to ascertain the real purpose of teacher evaluations. It determined that the primary purpose of teacher evaluations was to provide the teacher with guidance directed toward improvement rather than to build a case for dismissal. This guidance function was thought to be better accomplished in an atmosphere of cooperation rather than of adversity and through an understanding of the criticisms rather than a knowledge of all the sources. The court believed that identifying every possible

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[144] Id.

future witness in every evaluation report would serve no useful purpose and might prove inimical to the basic purpose of the improvement and development of the teacher's skills.[145]

The court concluded that the statutory provision related to the subject matter concerning which evidence may be received rather than to the persons otherwise qualified to testify to such matters. It was held that a witness otherwise qualified as an expert, who had not provided any information or data in the personnel file and had not been identified therein, was not disqualified as a witness.[146]

A number of issues related to the personal knowledge of the witness were considered in Clark v. Colonial School District.[147] A Pennsylvania school board had dismissed a teacher after hearings on charges of mental derangement.

One issue raised by the teacher was that the rating of his classroom performance by a person with the job title of administrative assistant to the principal was neither competent nor admissible evidence of his mental condition because an administrative assistant was not one of the positions specified by a statute to rate the performance of professional employees. The court noted that the teacher's performance had been rated by the superintendent (one of the positions designated in the statute), with the rating having been based in part

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[145] Id.

[146] Id.

[147] 36 Pa. Commw. Ct. 419, 387 A.2d 1027 (1978).

on observations made by the assistant principal and his administrative assistant, who was a qualified professional. The court found nothing in the statute which would prohibit one who was authorized therein to rate a teacher from basing the rating on the observations of other qualified observers.[148]

The teacher also contended that a doctor's testimony should have been disregarded because his conclusion concerning the teacher's mental condition had not been the result of a truly independent examination. This contention was grounded on the fact that the doctor had reviewed several reports of school personnel of interviews with and observations of the teacher. The court examined the doctor's testimony and found no reason to conclude that the opinions there expressed were based on anything other than the doctor's personal examination of the teacher. The doctor had testified that his evaluation was based solely on his personal examinations and had stated that if he had relied on the written reports, he would have diagnosed the condition of mental illness as being more serious than that actually described in his report. The Secretary of Education had upheld the school district's decision to dismiss, and the court affirmed the Secretary's order.[149]

The preceding decisions would seem to indicate that the most common objection to the admission and use of evidence that might otherwise

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[148] Id.

[149] Id.

be relevant is that based on the rule against hearsay. Both oral testimony and documents have been subject to that exclusionary rule. The question of the competency of a witness to testify has apparently been raised only infrequently.

C. Rules of Privilege

The doctrine of privilege in the context of an administrative agency hearing is clearly recognized in the literature. However, there have been very few decisions involving teacher termination hearings in which the privilege issue was raised.

Perhaps the best discussion of the doctrine as it is founded on a constitutional basis is provided by Governing Board of Mountain View School District of Los Angeles County v. Metcalf.[150] Although the hearing in this instance was held before the superior court, the decision by the Board had been based upon the contested evidence, and the rationale for the decision would seem applicable for a hearing before a board of education.

In Metcalf a probationary California teacher was dismissed on grounds of immoral conduct and evident unfitness for service. The teacher had been convicted of engaging in an act of oral copulation in a department store restroom. The evidence supporting the conviction had been obtained by the police in violation of the prohibitions of unreasonable searches and seizures found in both the Constitution of the

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[150] 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (1974).

United States and the Constitution of the State of California. The teacher had objected on constitutional grounds to the testimony of one of the arresting officers at the trial of the dismissal proceeding.

One of the issues on appeal was whether the exclusionary rule that applied in criminal trials should be extended to a non-administrative civil disciplinary trial such as one involved in the dismissal of a teacher. The teacher had also argued that the conduct in which he had engaged was neither immoral nor did it evidence unfitness to teach. The court of appeal affirmed the judgment of the superior court which had upheld the Board's decision to terminate.[151]

The court examined the two aspects of the policy underlying the exclusionary rule. The first and primary reason for the rule was to deter government officials from engaging in lawless conduct by denying them any of the fruits of that conduct. The secondary purpose was to preserve the integrity of the judicial process by keeping it free from the taint of the use therein of improperly obtained evidence.

The court noted that the second aspect of the policy underlying the exclusionary rule would certainly be applicable in both civil and criminal trials. However, the court doubted that the first and primary reason for the rule existed to any appreciable degree in civil cases. It was thought to be unlikely that police who had engaged in criminal investigations would have any awareness of the consequences of their

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[151] Id.

actions in any action other than a criminal prosecution for alleged illegal activity.[152]

In deciding whether the exclusionary rule should apply to the dismissal proceeding before it, the court considered the purpose of the statute authorizing dismissal of public school teachers for immoral conduct. It was noted that the law had long recognized that children are entitled to special protection, particularly during the process of compulsory eduation.

The court held that the exclusionary rule, though a part of the constitutional procedural due process in the state in criminal cases, was not a part of such process in the instant proceeding. The evidence of misconduct that was found inadmissible in the criminal prosecution was found to be properly admitted in the dismissal proceeding.[153]

The court noted that the constitutional search and seizure provisions had sometimes been applied by the courts to administrative searches. It also pointed out that in so holding it did not intimate whether the exclusionary rule should be applied in a proceeding to discipline a teacher on nonmoral grounds.[154]

Mitchell v. School Board of Leon County[155] arose from a

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[152] Id.

[153] Id.

[154] Id.

[155] 335 So.2d 354 (Fla. Dist. Ct. App. 1976).

challenge by a Florida teacher whose position had been abolished pursuant to a reorganization plan. In the course of contesting the propriety of the abolition of her position, she sought to discover who had participated in the formulation of the plan. When in the course of taking the depositions of two administrators she attempted to elicit the substance of the conversation with the school board attorney concerning the reorganization plan, the district counsel instructed the administrators not to answer. The teacher attempted to compel discovery, arguing that the state's open meeting laws aborgated the attorney-client privilege as applied to a public body. The circuit court held that the "sunshine law" did not aborgate attorney-client privileges as applied to conversations between the administration and the school board attorney. The court of appeal affirmed.

The decision was based on the view that the sunshine law was applicable only when there was a meeting between two or more public officals, and that no such meeting had occurred in this instance. The court withheld any holding on the issue of whether all communications between a public body and its attorney would be exempt from the application of the sunshine law, but it was emphasized that the law was never intended to become a millstone around the neck of the public's representatives when being sued by a private party, and it should not be construed to discourage representatives of the people from seeking legal counsel.[156]

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[156] Id.

The court analogized to a Florida Supreme Court decision where it had been said that, in regard to the employment of a labor negotiator who was an attorney, the public should not be handicapped by a purist view of opening public meetings as long as the ultimate debate and decision are public and the official actions are taken in open meeting.[157]

A different sort of extrinsic social policy was involved in Board of Education of Island Trees Union Free School District v. Butcher.[158] The school board representative had brought an action to quash or modify a subpoena served upon him to secure certain student records in the course of the disciplinary hearing for a tenured New York teacher. The supreme court granted in part the application to quash, and the teacher had appealed.

The supreme court, appellate division, determined that any degree of confidentiality accorded to students' records must yield to a teacher's right to prepare a defense to the charges made against his reputation and his competence in his profession. The court allowed the records to be subpoenaed, with the provision that all identifying data be obliterated and that the panel and the parties' attorneys examine the records and exclude any irrelvant portions.[159]

A Minnesota principal attempted to invoke a privilege to not

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[157] Id.

[158] 61 A.D.2d 1011, 402 N.Y.S.2d 626 (Sup. Ct. 1978).

[159] Id.

testify in State ex rel. Holtan v. Board of Education of Independent School District No. 84.[160] The School Board had called him as an adverse witness at his termination hearing. He had refused to take the stand on the ground that he could not be compelled to testify until after the Board had presented its evidence. The Board had thereupon concluded the hearing, and at a later time had acted to terminate the principal's contract.

The trial court found that adverse examination was not contemplated by the applicable statute, and that by terminating the hearing after the principal had refused to submit to adverse examination the Board had denied him his statutory rights, and that his employment had not been effectively terminated. The supreme court reversed.[161]

The court held that the School Board had the right to call the principal for adverse examination, noting that this was not a criminal proceeding and that in the absence of a particular privilege the School Board had a right to prove its case in whole or in part by the adverse examination of the teacher involved. It was further held that by wrongfully frustrating the Board's right to elicit his testimony he had waived his opportunity to present his own evidence.[162]

Other extrinsic policy considerations may be involved in the question of to what extent the contents of a teacher's personnel file

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[160] 301 Minn. 275, 222 N.W.2d 277 (1974).

[161] Id.

[162] Id.

may be admitted and considered by the hearing tribunal. That is controlled to some extent by a statute in a number of states. Because such statutes seem to operate as a sort of "privilege" by tending to protect informal teacher-administrator relationships from disclosure, the following decision in which this issue was raised is included in this section.

In Miller v. Chico Unified School District, Board of Education,[163] a California principal contested his reassignment to a teaching position on the grounds that the reassignment action had not been taken in compliance with certain statutory provisions. A section of the education code provided that school district employees must be given notice of, and opportunity to comment upon, any derogatory information in their personnel files which may serve as a basis for affecting their employment status.

The former principal had instituted mandamus proceedings seeking reinstatement. The trial court had found that the Board of Education had failed to comply with the aforementioned provision (and one other section not relevant here), but had also concluded that compliance was not a prerequisite to such a reassignment. The court of appeal had affirmed.[164]

In a letter notifying the principal of his reassignment, the Board had enclosed a copy of an administrative memorandum recommending

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[163] 24 Cal. 3d 703, 597 P.2d 475, 157 Cal. Rptr. 72 (1979).

[164] Id.

reassignment, a statement of reasons for that reassignment, and an attachment documenting those reasons. The attachment had included not only evaluation reports and other items from the principal's personnel file, but also a number of confidential memoranda by an associate superintendent which were critical of the principal's performance. The principal contended that prior to this notification, he had been unaware of these memoranda and had been given no opportunity to comment upon them, and that therefore the statutory provisions had not been met. The Board of Education argued that the provision had not been violated because the disputed memoranda had never been placed in the principal's personnel file, but were maintained in a separate file by the associate superintendent who wrote them.[165]

The supreme court held that a school district may not avoid the requirements of the statute by putting derogatory material in another file not designated "personnel file" and by such a process of labeling prevent the individual from reviewing and commenting upon allegations which may serve as a basis for affecting the status of employment, nor may the district insulate itself by simply neglecting to file material which the statute contemplates will be brought to the employee's notice.[166]

The court pointed out that the statute had been enacted to minimize the risk of arbitrary or prejudicial employment decisions by

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[165] Id.

[166] Id.

establishing a procedure whereby employees could correct or rebut incomplete or inaccurate information which might affect their employment status. Furthermore, it was noted that an employee's personnel file serves as a permanent record of employment which may be used against the individual long after the informant becomes unavailable, thus the statute provided a concurrent right to rebuttal. It was determined that unless the provision had been complied with, the district could not fairly rely on any such material in reaching a decision affecting employment status. Because the record was unclear as to whether the Board had relied on the prohibited materials in reaching its decision, the case was remanded for that determination.[167]

A dissenting opinion[168] argued that the code section applied only to material actually placed in the personnel file and did not require the inclusion of any specific information in the file. The dissenting justice suggested that the majority view would make it necessary for written reports and rebuttals to be filed on every conference or observation which might sometimes result in evidence to be used in a decision affecting employment. A career-long accumulation of derogatory information would be encouraged, most of which would never be used. The majority's construction of the statute was seen as tending to convert a section which merely provided for a rebuttal of information in personnel files into a rule of evidence.

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[167] Id.

[168] Id. at 718, 597 P.2d at 484, 157 Cal. Rptr. at 81.

It would appear that few teacher employment decisions have been decided on the privilege issue. Perhaps it is simply in the nature of teacher termination proceedings that questions of either constitutional or common law privileges seldom arise.

IV. THE TRIBUNAL AND THE DECISION

A. The Nature of the Tribunal

A Fair Tribunal

If a hearing is to provide the teacher with any kind of a meaningful opportunity to contest the termination, then that hearing must be before a fair and impartial tribunal.[169] A fair hearing before a fair tribunal, which is a fundamental requirement of due process, generally means that there can be no actual bias or prejudice toward the teacher on the part of a decision maker.[170]

When a neutral third-party examiner or panel hears the evidence presented and makes the findings of at least the basic facts, then a fair hearing before a fair tribunal may be a reality.[171] However,

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[169] Brouillette v. Board of Dir. of Merged Area IX, 519 F.2d 126, 128 (1975).

[170] Staton v. Mayes, 552 F.2d 908, 913 (1977), cert. denied, 434 U.S. 907 (1977); Williams v. Day, 553 F.2d 1160, 1163-64 (8th Cir. 1977). See also Gilliland v. Board of Educ. of Pleasant View Consol. School Dist. No. 662 of Tazewell County, 67 Ill.2d 143, 156, 365 N.E.2d 322, 327 (1977).

[171] See Blair v. Lovett, 196 Colo. 118, 122-23, 582 P.2d 668, 671 (1978).

when an employer board of education hears the evidence and makes all of the findings of fact, there will be some instances in which the opportunity for a truly meaningful hearing will be substantially diminished. Such instances would include those situations in which the members of the board of education are clearly prejudiced against the teacher and initiate and carry through with the termination proceedings.[172]

There is a presumption that administrative tribunals are able to judge a controversy fairly on its facts, and the burden is on the challenger to prove otherwise.[173] This requires more than simply showing that there was a potential for unfairness; there must be some proof or actual bias or prejudice which affected the outcome.[174]

If an individual is not capable of setting aside personal feelings and fairly judging the situation on the basis of the evidence produced at the hearing, then that person should not sit on the tribunal.[175] However, at some point such disqualifications could

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[172]See Staton V. Mayes, 552 F.2d 908 (1977), cert. denied, 434 U.S. 907 (1977); Keith v. Community School Dist. of Wilton, 262 N.W.2d 249 (Iowa 1978).

[173]See Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 497 (1976); Moran v. Rapid City Area School Dist. No. 51-4, 281 N.W.2d 595, 600 (S.D. 1979).

[174]Grisson v. Board of Educ. of Buickley-Loda Com. School Dist. No. 8, 75 Ill.2d 314, 321, 388 N.E.2d 398, 400 (1979); Schneider v. McLaughlin Ind. School Dist., 241 N.W.2d 574, 577 (S.D. 1976).

[175]Bishop v. Keystone Area Educ. Agency No. 1, 275 N.W.2d 744, 752 (Iowa 1979). See also Rost v. Horkey, 422 F. Supp. 615, 617-18 (D. Neb. 1976).

result in there not being an entity with the authority to act. Therefore, the "rule of necessity" might come into play, and what would otherwise be cause for disqualification would not be allowed to destroy the only tribunal with power to act.[176]

One distinction must be made. It is not only permissible but probably appropriate for members of a tribunal to have taken consistent positions on policy questions and even on the kinds of conclusions that might be reached if certain basic facts are found.[177] However, it is not permissible for a decision-maker to have preconceived notions about the particular facts of a case, especially if that might result in findings on controverted issues of fact being based on the personal knowledge and impressions of the decision maker.[178]

Such ex parte evidence is not a proper basis for a finding, because it has not been produced at the hearing where it could be tested in the adversarial forum. A critical question in such a case is whether the decision maker in weighing the evidence is required to call on his own personal knowledge and impression of what occurred. In such a situation, the teacher would be deprived of his right to examine

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[176]Staton V. Mayes, 552 F.2d 908, 913 (1977), cert. denied, 434 U.S. 907 (1977). See also Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 495-97 (1976).

[177]See Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976); Williams v. Day, 553 F.2d 1160, 1163-64 (8th Cir. 1977).

[178]Staton V. Mayes, 552 F.2d 908, 914 (1977), cert. denied 434 U.S. 907 (1977); Keith v. Community School Dist. of Wilton, 262 N.W.2d 249, 260 (Iowa 1978).

or cross-examine a crucial witness and the decision maker would become the arbiter of his own credibility and fairness.[179]

Furthermore, if the members of the board of education were to rely on off-the-record evidence that they had acquired by their own investigation prior to the hearing, there would not only be the possibility of injustice to the teacher at the hearing, but there is also the possibility that a reviewing court would err on appeal because it would have no way of knowing that such evidence had been considered. Even if such evidence were entered into the record by the board members, it might be improper hearsay if they had received it from another individual whom the teacher had no opportunity to confront at the hearing.[180]

Mere familiarity with the facts of a case acquired by members of a board of education in the performance of their statutory role does not necessarily disqualify the individual members as decision makers.[181] When notification that termination is being considered either comes directly from the board of education or is issued on its authority, the question of whether the board has become biased because of the members' acquaintance with the facts supporting the charges may

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[179]Keith v. Community School Dist. of Wilton, 262 N.W.2d 249, 260 (Iowa 1978).

[180]Doran v. Board of Educ. of Western Boone County Community Schools, 152 Ind. App. 250, 266-67, 285 N.E.2d 825, 828-29 (1972).

[181]Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976); Williams v. Day, 553 F.2d 1160, 1163-64 (8th Cir. 1977).

arise. The general rule appears to be that the board may give some consideration to the factual basis for the charges prior to the hearing. A prudent board should have some basis to determine whether there is sufficient substance to any charges presented by an administrator to justify the initiation of any action with such serious consequences as termination proceedings. The protection against any bias is in the requirement that the board ultimately base its decision upon the evidence which is actually presented at the hearing.[182]

Evidence of Bias and Improper Reasons for Termination

The teacher may attempt to show at the hearing that one or more members of the tribunal are incapable of rendering a fair and objective decision. Such an effort by the teacher might influence the outcome by inducing a biased board member to withdraw from the case or by causing the tribunal to more carefully consider the basis for the decision. It will also serve to get evidence of bias and prejudice into the record of the hearing, where it will be available for the scrutiny of a reviewing court. It might be equally advantageous for the school district to place evidence in the record indicating that the members of the tribunal are in fact fair and impartial, and that they are intending to decide the matter objectively and on

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[182]Weissman v. Board of Educ. of Jefferson County School Dist. No. R-1, 190 Colo.414, 424-25, 547 P.2d 1267, 1275-76 (1976); Ferguson v. Board of Trustees of Bonner County School Dist. No. 82, 98 Idaho 359, 365-66, 564 P.2d 971, 977 (1977); Schneider v. McLaughlin Ind. School Dist. No. 21, 241 N.W.2d 574, 577 (S.D. 1977).

the evidence presented.

Similar considerations may be involved where the bias or prejudice on the part of board members or the motivations of the administrators who initiated the proceedings are based on the teacher's exercise of protected rights. Those issues should also be examined at the hearing.

In Board of Education, Laurel Special School District v. Shockley,[183] a New Jersey principal who had been terminated for insubordination contended on appeal that the Board had deprived him of a substantial right at the hearing by refusing to permit him to testify or make an offer of proof relative to possible Board bias. He had been questioned at an earlier meeting regarding an application which he had made for his Negro daughter to be admitted into a white school. At the termination hearing, both his attempt to testify regarding this meeting and his attempt to make an offer of proof had been objected to by counsel for the Board and the objections had been sustained.

The principal contended on appeal that there was not sufficient evidence to support the decision and that he should have been allowed to testify and make an offer of proof regarding the alleged bias of the Board. The superior court had set aside the termination order. The supreme court reversed and remanded. Although the court found that the evidence had been sufficient to sustain a finding of insubordination, the case was sent back to the Board of Education for

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[183] 52 Del. 237, 155 A.2d 323 (1959).

the purpose of permitting the principal to show bias and prejudice on the part of the Board.[184]

The court stated emphatically that the principal should have been permitted to complete his offer of proof and that he should have been given an opportunity to prove any bias existing on the part of the Board. The need for an unbiased Board, in view of the fact that the Board was acting not only as prosecutor but as judge, was thought to be too apparent to be questioned.[185]

Although it acknowledged the incongruity in directing the Board to determine whether or not the members were guilty of bias, the court could see no other way under the statute to resolve that question, and it expressed confidence that the Board would give the principal a fair and just hearing.[186]

Board bias was also an issue in Osborne v. Bullit County Board of Education.[187] A Kentucky teacher had been discharged by the county Board of Education after a hearing before that body. The termination had been based on a number of various charges. The circuit court had upheld the action of the Board.

The issues on appeal involved the procedures to be used by a board of education to discharge a teacher. The teacher had

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[184] Id.

[185] Id.

[186] Id.

[187] 415 S.W.2d 607 (Ky. Ct. App. 1967).

challenged his termination both on the basis of the vagueness of the charges and on the fact that, at the commencement of the hearing, he had attempted to examine the members of the Board in regard to any prejudice they might have held against him and as to any information they had received which would have been adverse to him. This request had been denied.[188]

The court of appeals found that the proceedings did not comport with due process in regard to either issue, and the case was remanded to the trial court to set aside the dismissal order. The court believed that the Board members should have submitted to examination regarding their possible prejudice against the teacher. The court also expressed its concern with a procedure which required a teacher to submit to a trial at the hands of a school board, the members of which wear the three hats of employer, prosecutor, and trier.[189]

The bias of the hearing tribunal may not be the only unfairness with which a teacher may have to contend. An administrator may not treat the teacher fairly and objectively, and a reviewing court may find that a teacher should have the right to expose the real reasons underlying an administrator's recommendation to the board that a teacher's employment be terminated.

In State ex rel. Steele v. Board of Education,[190] a tenured

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[188] Id.

[189] Id.

[190] 252 Ala. 254, 40 So. 2d 689 (1949).

Alabama teacher was dismissed by the Board of Education on charges of insubordination. The charges had been based on her alleged refusal to take a mental ability test required by board rule.

At her hearing before the Board of Education, there had been evidence introduced to the effect that a number of teachers had initially refused to take the test, but that the superintendent had given all the teachers except the one an opportunity to take the test at a later date upon their request. His testimony had been to the effect that she had been uncooperative in regard to accepting another opportunity to take the test. She had testified that he had indicated his displeasure with her because of her temporary presidency of the teachers' union. Another teacher had testified that she had taken the test at a later date. A probationary teacher who had been a union member and who had had her contract terminated had testified that the superintendent had indicated to her that an example would have to be made of some of the teachers.[191]

The teacher had attempted to show at the hearing that the reason why the superintendent had permitted the other teachers to take the test but had refused her the opportunity was because he had a personal dislike for her due to her union activity. The superintendent had refused to answer questions asked by counsel for the teacher as to whether he approved of teachers' unions and as to whether he had permitted other teachers to take the test at a later date.[192]

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[191] Id.

[192] Id.

The trial court had denied the teacher a writ of mandamus requiring reinstatement and she appealed, alleging due process violations at the hearing. The supreme court reversed, directing reinstatement subject to the result of another hearing.[193]

The court thought that the teacher was entitled to have the superintendent answer the questions her counsel had posed, because his answers could have materially affected the decision of the Board. The record tended to show that she had been treated differently than the other teachers and that the termination proceedings were motivated by personal reasons. A statute provided that a contract could not be cancelled for political or personal reasons.[194]

The court also noted that the hearing was not solely for the benefit of the teacher. It also served to enable a board of education to hear both sides of the case and to not have to rely entirely on information furnished them by the superintendent.[195]

A reviewing court may not allow a termination decision to stand if the tribunal has refused to admit evidence offered by the teacher to show that the real reason underlying the proposed termination was his or her exercise of constitutionally protected activities. Bekaris v. Board of Education of City of Modesto[196] involved a California

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[193] Id.

[194] Id.

[195] Id.

[196] 6 Cal. 3d 575, 493 P.2d 480, 100 Cal. Rptr. 16 (1972).

probationary teacher who successfully contested the procedures used at his termination hearing. The notice served on the teacher had accused him of such things as violating school rules, using poor teaching techniques, and failing to cooperate with others. He had contended that the real reason for the recommendation that he not be rehired was dissatisfaction with his political activities.

During the cross-examination of an assistant principal, the teacher had attempted to elicit testimony proving that his contention was true, but counsel for the Board had objected to that line of questioning. The hearing officer had ruled that the motivations of the teacher's superiors in bringing the disciplinary action were not material, provided that the facts were such that disciplinary action for what the teacher had been accused of in the notice would be justified. However, the hearing office had also ruled that testimony regarding the motivations of the teacher's superiors would be material and admissible if it had a direct bearing on the credibility of their testimony. Under that ruling, testimony from several administrators indicating their disapproval of the teacher's political activities had been admitted, but only for impeachment purposes.[197]

The hearing officer had found the evidence insufficient to support the charges made in the accusation, and had recommended that the teacher not be terminated; he had never reached the issue concerning the exercise of constitutional rights. Nevertheless, the Board of Education

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[197] Id.

had concluded that the evidence did support certain of the charges and constituted sufficient cause not to rehire the teacher. Although counsel for the teacher had argued before the Board that the real reason for the dismissal was the dissatisfaction with the teacher's political activities, the Board did not make a finding on that issue.[198]

The superior court had denied the teacher's challenge of the Board's action. However, the supreme court reversed and remanded.[199]

The supreme court held that for a proper judicial review of the Board's decision, it was necessary that the record contain findings concerning the consitutional rights issue so that the court could determine the real reason for the termination. Because the relevant testimony on this point had not been admitted into evidence substantively, but only for impeachment purposes, the administrative record was incomplete because of the ruling on limited admissibility. It was held that when a probationary teacher seeks to present evidence at the administrative hearing tending to show that the dismissal was not for the reasons stated in the notice but for the exercise of constitutional rights, the evidence must be received substantively and findings must be made concerning it. The matter was sent back to the Board of Education, ordering it to so proceed.[200]

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[198] Id..

[199] Id.

[200] Id.

A Fair Decision

Although an unbiased, neutral tribunal is the idealized model, the reality is that in many instances the only tribunal with the authority to act will include some individuals with certain prejudices and predispositions regarding the teacher's continued employment. But this is not to say that such a tribunal cannot be encouraged to function in a reasonably fair and objective manner. There are two fundamental rquirements for teacher termination hearings which, if clearly established and strictly enforced, might do much to promote a fair and objective hearing. First, the decision must be based solely on the evidence produced at the hearing; and second, the findings of fact, the evidence supporting those findings, and the reasons for a decision must be clearly and completely stated by the decision maker.[201] This might be the most effective means of regulating the conduct of a local administrative agency without removing the control of personnel matters from the local board of education.

B. Burden of Proof

If a teacher has acquired substantive employment rights by virtue of either a contract or a statute, then the burden is on the school officials to establish the necessary justification for the

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[201] See Goldberg v. Kelley, 397 U.S. 254, 271 (1970); Staton v. Mayes, 552 F.2d 908, 916 (1977), cert. denied, 434 U.S. 907 (1977); Moran v. Rapid City Area School District. No. 51-4, 281 N.W.2d 595, 601-02 (S.D. 1979).

termination of employment rights. If the teacher exercises his or her right to a hearing, then the burden will be on the school officials to provide evidence at that hearing which will justify termination for cause.[202] It has also been stated that the burden of persuasion at such a hearing is by the preponderance of the evidence.[203]

A probationary teacher generally has no substantive right to the renewal of his or her contract for the ensuing year. However, such nontenured teachers frequently do have certain statutory procedural protections, such as the right to a notice and a hearing. Some courts have viewed these statutory hearings as little more than a forum in which the teacher can confront the board of education and attempt to persuade it to renew the contract.[204] In such a hearing, the school officials might not be required to establish any particular justification for the termination, and the burden may be on the teacher to show why his or her employment should not be termminated.[205]

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[202]Board of Educ. of Fort Madison Com. School Dist. v. Youel, 282 N.W.2d 677, 680 (Iowa 1979); Sutherby v. Board of Educ. of Gobles Public Schools, 73 Mich. App. 506, 508, 252 N.W.2d 503, 504 (1977). See also Ferguson v. Board of Trustees of Bonner County School Dist. No. 82, 98 Idaho 359, 364, 564 P.2d 971, 975 (1977); Huffman v. Board of Educ. of Mobridge Ind. School Dist. No. 13, 265 N.W.2d 262 (S.D. 1978).

[203]Catino v. Board of Educ. of Town of Hamden, 174 Conn. 414, 417, 389 A.2d 754, 755 (1978); Sargent v. Selah School Dist. No. 119, 23 Wash. App. 916, ---, 599 P.2d 25, 28 (1979).

[204]See e.g., Keith v. Community School Dist. of Wilton, 262 N.W.2d 249, 257-58 (Iowa 1978); Schultz v. School Dist. of Dorchester, 192 Neb. 492, 498, 222 N.W.2d 578, 582 (1974). But see Henthorn v. Grand Prairie School Dist. No. 14, 287 Or. 682, ---, 601 P.2d 1243, 1246-48 (1979).

[205]See, e.g., Calhoun County Bd. of Educ. v. Hamblin, 360 So.2d 1236, 1240 (Miss. 1978).

When such statutes are intended to provide nontenured teachers with procedural due process, an informal procedure which meets the minimal requirements of fair play and provides the teacher with a reasonable opportunity to be heard might be deemed adequate compliance. The minimal requirements of due process have been said to include the following: (1) clear and actual notice of the reasons for termination in sufficient detail to enable the teacher to present evidence relating to them; (2) notice of both the names of those who have made allegations against the teacher and the specific nature and factual basis for the charges; (3) a reasonable opportunity for the teacher to present testimony in his or her own defense; and (4) a hearing before an impartial board or tribunal.[206]

Whether a teacher is tenured or nontenured, if the termination action impinges upon a constitutionally protected property or liberty interest, then constitutional due process affords the teacher the right to a hearing.[207] If there is such a hearing pursuant to procedural due process requirements, then substantive due process considerations may come into play.[208] If the termination must be justified on

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[206]Brouillette v. Board of Dir. of Merged Area IX, 519 F.2d 126, 128 (1975).

[207]Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

[208]See McGhee v. Draper, 564 F.2d 902, 912 (1977); Austin v. Board of Educ. of Georgetown Community Unit School Dist. No. 3, 562 F.2d 446, 451-52 (7th Cir. 1977).

substantive due process grounds, then the tribunal must pay attention to the evidence presented and act rationally upon it, and the decision must be adequately supported by the evidence produced at the hearing.[209]

There may be instances when even though a hearing is required by the Constitution, it would not be necessary for the employer to establish any evidentiary justification for a termination. Such a situation might arise if in the course of the termination proceedings school officials may have created and publicized a false and defamatory impression about the teacher.[210] By damaging the teacher's reputation in the community or inflicting some kind of professional stigma, the termination action may have impinged upon a protected liberty interest, and if so, the teacher would be entitled to a hearing.[211] However, the only purpose for such a hearing might be to give the teacher an opportunity to clear his or her name, and if the teacher has no fourteenth amendment property interest in continued employment, the adequacy or even the existence of any reasons for failure to rehire might not be a federal constitutional question.[212]

Even if there are in fact certain statutory or constitutional

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[209] See Buhr v. Buffalo Pub. School Dist. No 38, 509 F.2d 1196, 1203 (8th Cir. 1974); Fisher v. Snyder, 476 F.2d 375, 377 (8th Cir. 1973).

[210] See Bishop v. Wood, 426 U.S. 341, 348-49 (1976).

[211] See Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

[212] See Codd v. Velger, 429 U.S. 624, 628 (1977).

hearings where it might not be necessary for the school administrator or board of education to provide any particular justification for termination, this is not to suggest that the school officials should not provide reasons and produce evidence substantiating the decision. Nor should this be taken as a suggestion that the teacher's evidence should always be restricted to the scope of relevancy as indicated by the notice.

If there is a permissible basis for the termination decision, then the better approach might be to provide that information to the teacher. If the actual basis for the termination is some impermissible reason, then the proceedings should not have been initiated and should be concluded as soon as the situation becomes known.

The teacher may attempt to show that the real basis for the termination is some impermissible reason or that there is bias or prejudice on the part of the board members or administrators. It would seem prudent to allow the teacher a reasonable opportunity to produce evidence or argument to substantiate such a contention.

The very purpose of a meaningful hearing should be to examine the issues, the facts, and the reasons. A fair and open approach should be compatible with both effective school management and the requirements of the law.

Furthermore, if a teacher whose employment has been terminated decides to sue on the grounds that the termination action was based on impermissible reasons, such as the exercise of constitutionally protected rights, then it would be to the school's advantage if there

was adequate justification in the record for the board's action. In such a law suit the initial burden of proof would be on the teacher to show that some impermissible reason, such as constitutionally protected conduct, was a factor in the board's decision. However, once the teacher has met that burden, the board will then be required to show by a preponderance of the evidence that it would have reached that same decision, even in the absence of the protected conduct.[213] A hearing record which shows that there were adequate and permissible reasons for the termination and that the teacher's defenses had at least been considered would be evidence of the legality of the termination action.

C. Findings and Reasons

As a general rule, a decision to terminate a teacher's employment, made by a board of education after an evidentiary hearing, should contain findings and reasons so that a court can determine if the termination is based on permissible grounds.[214] One of the basic functions of such a hearing is to permit a teacher to make a record upon which to test the board's findings of statutory cause for termination,[215] and there should be a causal or reasonable relation of the

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

[214] See e.g., McGhee v. Draper, 564 F.2d 902, 912 (10th Cir. 1977), Reinhardt v. Board of Educ. of Alton Com. School Dist., 61 Ill. 2d 101, 103, 329 N.E.2d 218, 220 (1975).

[215] Hardy v. Independent School Dist. No. 694, 301 Minn. 373, 378, 223 N.W.2d 124, 127 (1974).

facts found to the grounds for dismissal.[216] However, this is not to say that the courts have always been very demanding in requiring specific findings. There are a number of decisions which have indicated a certain leniency in regard to the findings requirement.[217]

The distinction between ultimate facts, or conclusions of law, and basic facts was discussed in Chapter II. There seem to be at least two reasons why this distinction may be significant.

First of all, there may be a difference in the standards of judicial review which are applied to findings of ultimate fact and findings of basic fact.[218] If the court views a finding of ultimate fact as a conclusion of law, it may exercise a broader scope of review, and perhaps apply the "clearly erroneous" test; if the court treats the finding as one of basic fact, the standard is likely to be the "substantial evidence" test. As was noted in Chapter II, the more closely the findings of an administrative agency approach an

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[216]Fernald v. City of Ellsworth Super. School Com., 342 A.2d 704, 707 (Me. 1975); Board of Trustees of Weston County School Dist. No. 1 v. Holso, 584 P.2d 1009, 1014 (Wyo. 1978).

[217]See e.g., Weissman v. Board of Educ. of Jefferson County School Dist. No. R-1, 190 Colo. 414, 422, 547 P.2d 1267, 1273 (1976); Mavis v. Board of Owensboro Ind. School Dist., 563 S.W.2d 738, 739 (Ky. Ct. App. 1978).

[218]See Sutherby v. Board of Educ. of Gobles Pub. Schools, 73 Mich. App. 506, 509-11, 252 N.W.2d 503, 505-06 (1977); Sargent v. Selah School Dist. No. 119, 23 Wash. App. 916, ---, 599 P.2d 25, 27 (1979). But see Fernald v. City of Ellsworth Super. School Com., 342 A.2d 704, 707 (Me. 1975).

application of the law to the facts, the more likely the court will be to substitute its judgment for that of the agency.

Secondly, if the tribunal makes some distinction between findings of basic fact and findings and ultimate facts, the relationships between the evidence and the basic facts and between the standard for termination and those basic facts are more easily examined. If a board of education would follow a systematic approach which requires the identification of these logical relationships, then more carefully reasoned decisions would be the likely result.

These distinctions and relationships are neither easy to understand nor simple to apply. However, an examination of the following two decisions may serve to illustrate the basic notions involved.

In Blair v. Lovett[219] a tenured Colorado teacher had been dismissed on grounds of incompetency by the Board of Education after a hearing before a three-member panel. The panel had issued certain findings and had recommended that the teacher be retained. The Board had rejected the panel's findings, had examined the hearing transcript, had made its own findings, and had voted to dismiss the teacher. The district court had dismissed the teacher's petition for review; the court of appeals had reversed and remanded with directions. The supreme court affirmed, although it did not fully concur with the court of appeals' analysis.

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[219] 196 Colo. 118, 582 P.2d 668 (1978).

The supreme court pointed out that according to the relevant statutes the principal function of the hearing panel was to hear the evidence, to make findings, and to recommend that the teacher be either dismissed or retained. The court noted that while one purpose of having a hearing panel was to free the board from these time consuming, evidence-gathering functions, another purpose of the act was to protect the teacher by having a neutral panel for the initial fact-finding procedure which is the foundation upon which all later administrative procedure and judicial review much depend.[220]

The court held that the panel's findings of basic or evidential facts, if supported by competent evidence, were binding on the Board of Education, and that if the findings were insufficient, then the Board must remand to the panel for further findings; it could not review the record and issue its own.[221]

However, it also held that the panel's findings of ultimate facts--i.e., whether the statutory standards for dismissal have been establish by the evidence--were not binding on the Board. The court believed that it must be left to the discretion of the Board of Education to determine the limits of such broad statutory grounds as "incompetency," and that this discretion was not to be transferred to the temporary, non-elected hearing panel.[222]

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[220] Id.

[221] Id.

[222] Id.

The court also noted that an ultimate fact is generally stated in terms of a statutory standard. In this case, where the charge was incompetency, the ultimate fact to be determined was whether the teacher was or was not incompetent. Basic or evidentiary facts were described as those on which the ultimate findings rests--i.e., those particular facts which would substantiate the finding of incompetence.[223]

The court did not lay out any precise form for the findings to be made by the panel on remand. It did indicate that they should be such that the board, and the court on judicial review, could fairly and reasonably determine whether the facts justify dismissal on the charged statutory grounds.[224]

Powell v. Board of Trustees of Crook County School District No. 1,[225] a decision discussed supra, also made the distinction between findings of fact and conclusions of law. A tenured Wyoming teacher had been terminated on charges that he had been unable to establish rapport with the students. The district court had denied the teacher's action for reinstatement, but the supreme court reversed.

The teacher had been charged with "neglect of duty," "failure to follow district policy," "the inability to establish rapport with students," and "insubordination." Of the four charges, only "neglect

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[223] Id.

[224] Id.

[225] 550 P.2d 1112 (Wyo. 1976).

of duty" and "insubordination" were specific statutory grounds for dismissal; "failure to follow district policy" and "inability to establish rapport with students" would have been grounds for termination only if they could have been included in the statutory phrase, "other good or just cause."[226]

After a hearing the Board voted to terminate the teacher's contract on grounds of "failure to establish rapport with students." The only relevant purported "finding of fact" had been that the teacher had been "unable to control the conduct of his students as evidenced by the unusual amount of disciplinary problems that had developed in his classroom." The only applicable purported "conclusion of law" made by the Board had been that the teacher "failed to establish rapport with his students." The court noted that this latter finding was not a conclusion of law, and in the decision it was treated as a finding of fact. The court also pointed out that both the purported "finding" and "conclusion" were mere non-factual conclusions and did not qualify as legitimate findings of fact.[227]

The court delineated the only issue for decision to be whether or not a failure to establish rapport with the students was ground for dismissal. It held that it was not. The court observed that the "good or just cause" required by the statute could not be just any reason that the Board deemed sufficient, but that the facts must bear a reasonable

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[226] Id.

[227] Id.

relationship to the teacher's fitness or ability to perform the duties of a teaching position.[228]

The court excluded the question of whether or not the teacher was unable to control the conduct of the students. It was held that the teacher had not been properly notified of that charge, and therefore no evidence or testimony relative to that "finding" could be considered.[229]

The court went on to state that it reversed for another reason. The only finding of fact which had been made by the Board was that the teacher had been unable to control the conduct of his students. It was emphasized that this was a conclusion and not a finding, and that such a rank conclusion did not even purport to contain the factual aspects required by the state administrative procedure act and the prior decisions of the court. The court explained that it was insufficient for an agency to state only an ultimate fact or conclusion, but rather that each ultimate fact or conclusion must be thoroughly explained in order for a reviewing court to determine upon what basic facts each ultimate fact or conclusion was based.[230]

A lengthy dissenting opinion[231] contended that the majority had reversed on technicalities and intruded upon school board prerogatives. The dissenting justices believed that the teacher had been given adequate

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[228] Id.

[229] Id.

[230] Id.

[231] Id. at 1121.

notice that the primary thrust of the hearing would be his problems with discipline, and furthermore, that the failure to establish rapport was in itself good cause for termination.

The dissent conceded that the Board of Education had erred in its misarrangement of findings of fact and conclusions of law, but believed that to be of only minor consequence. It was pointed out that there was no precise formula as to how underlying facts are to be set out. Underlying facts were said to be the basic forms from which the ultimate facts in terms of the statutory criteria are inferred, and were seen to represent the meaning of the evidence as seen by the agency. It was also acknowledged that it would have been insufficient for the Board to merely cite the words "good cause" as its reasons for terminating, and that it was the duty of an agency to point out in its decision how it arrived at the final facts and conclusions. However, the dissent believed that, although its order had not been put into a completely clear syllogistic form, the Board had nevertheless given clear and sufficient reasons for the termination.[232]

These two decisions do indicate the distinction between finding basic facts from the evidence presented and reaching conclusions of law by applying the statutory standard to those basic facts. There would seem to be merit in requiring a board of education to explain the gist of its reasoning in a written decision, although adhering to a pure syllogistic form and making fine distinctions between findings of

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[232] Id.

fact and conclusion of law might not always be possible or appropriate.

V. SOME PERTINENT NEBRASKA LAW

At the time this report was written (October 1980) the Nebraska law regarding the two basic issues considered in this study had not been clearly established. Although the statutes[233] (which are set out in Appendix B) give some indication of what evidence should be produced at the hearing, there is no suggestion of any rules of exclusion. Neither is there any indication of what evidence that is produced may be used to support a finding. The supreme court has yet to construe the evidentiary provisions in these statutes.

In contrast to the other sections of this chapter, the following discussion includes certain statutes and cases which are not specifically involved with public school matters. However, these enactments and decisions are concerned with some of the basic concepts of administrative law and judicial review which must be considered to more fully develop the Nebraska law on the general topic of the study.

A. General Administrative Evidence Law

For the purpose of developing the general background, the "rules of evidence" in the state administrative procedures act might

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[233] See Neb. Rev. Stat. §§ 79-1254 to -1259 (Reissue 1976).

be noted. The Nebraska Rules of Administrative Agencies[234] provide that in contested cases:

> An agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence; Provided, that any party to a formal hearing before such agency, from which a decision may be appealed to the courts of this state, may request that such agency be bound by the rules of evidence applicable in district court . . . .[235]

There is also a requirement in the judicial review section of the Rules of Administrative Agencies that agency decision in contested cases must be supported "by competent, material, and substantial evidence. . . ."[236]

Contrary to the situation in a number of other states, it would appear that Nebraska school boards are not subject to the state administrative procedures act. In Harnett v. City of Omaha,[237] a decision which reversed the district court and upheld the discharge of a city patrolman by the personnel board, the court noted that "[t]he statute is applicable only to agencies of the state."[238] There is also dictum in Braesch v. DePasquale[239] which clearly states that school

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[234]Neb. Rev. Stat. §§ 84-901 to -919 (Reissue 1976 & Supp. 1980)

[235]Neb. Rev. Stat. § 84-914 (Reissue 1976).

[236]Neb. Rev. Stat. § 84-917(6)(e) (Reissue 1976).

[237]188 Neb. 449, 197 N.W.2d 375 (1972).

[238]Id. at 451, 197 N.W.2d at 377.

[239]200 Neb. 726, 265 N.W.2d 842 (1978), cert. denied, 439 U.S. 1068 (1978).

boards are not subject to the administrative procedures act.[240] This decision reversed the district court's issuance of an injunction. The school officials had been enjoined on due process grounds from preventing a number of students who had violated training rules from participating on the interscholastic basketball teams.

The question of what evidence may be used to support the findings of a board of education is also unanswered. It appears that Nebraska may be among those states which follow the residuum rule in the judicial review of administrative agency action.

Application of Midwest Livestock Commission Company, Inc. v. Tri-State Livestock Commission Company[241] was a case involving a license application to the Nebraska Livestock Auction Market Board. The Board had issued a license, but the district court had held that the evidence did not sustain the action. The supreme court reversed, finding evidence in the record to sustain the grant of the license by the Board.

The board did make a clear statement regarding administrative evidence law.

> But here we are dealing with a hearing before an an administrative board that is not bound by the strict rules of evidence. . . . While an administrative agency may relax the strict rules of evidence in affording a full and fair hearing, it must in every

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[240] Id. at 734, 265 N.W.2d at 847.

[241] 182 Neb. 41, 151 N.W.2d 908 (1967).

> instance require any action taken by it to be supported by competent and relevant evidence.[242]

The language in this opinion, which obviously deals with much different circumstances at an earlier point in time, should not be considered authoritative for teacher termination hearings. Nevertheless, it does indicate a view that the court has expressed regarding administrative evidence law.

Another decision which may be of some value in understanding Nebraska administrative evidence law is Shepard v. City of Omaha.[243] A city policeman had been discharged on the grounds of having committed fraud or misrepresentation by his answer to a question on his original employment application. The district court affirmed the action of the personnel board. The supreme court reversed on appeal, finding that there was no competent evidence in the record to support the findings and order of the agency.

In this opinion, the court did provide a definition of competent evidence.

> "Competent evidence" means evidence that tends to establish the fact in issue. Or, stated otherwise, evidence that is admissible and relevant on the point in issue. Black's Law Dictionary (4th Ed.), p. 355, defines it as: "That which the very nature of the thing to be proven requires, ..."[244]

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[242] Id. at 47, 151 N.W.2d at 913.

[243] 194 Neb. 813, 235 N.W.2d 873 (1975).

[244] Id. at 817, 235 N.W.2d at 875.

It is somewhat difficult to determine from this defintion whether the legal residuum rules actually applies. There is a reference to admissibility, but the general tendency seems to be one of emphasizing that competent evidence is relevant evidence.

It should also be noted that the new Nebraska Evidence Rules[245] were enacted and became effective in 1975. What the implications of that code might be for administrative evidence law is also unclear.

B. Evidence Law for Teacher Termination Hearings

The continuing contract law[246] for Class I, II, III, and VI school districts provides for written notice to the teacher of any conditions which may be just cause to either terminate or amend the contract for the ensuing year and for a hearing upon proper request. The section also provides that:

> At the hearing evidence shall be presented in support of the reasons given for considering termination or amendment of the contract, and the teacher or administrator shall be permitted to produce evidence relating thereto. The board shall render the decision to amend or terminate a contract based on the evidence produced at the hearing.[247]

The tenure law[248] for Class IV and V school districts has a

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[245]Neb. Rev. Stat. §§ 27-101 to -1103 (Reissue 1979).

[246]Neb. Rev. Stat. § 79-1254 (Reissue 1976).

[247]Id.

[248]Neb. Rev. Stat. § 79-1255 to-1262 (Reissue 1976).

somewhat similar provision. Upon notification that contract cancellation is to be considered, the teacher is entitled to a written statement of reasons and a hearing upon proper request. At the hearing the "teacher shall have the right to respond to the reasons for the proposed cancellation of his contract. . . ."[249]

There is also a section in the statutes pertaining to reduction in force that may have some implications.

> Before a reduction in force shall occur, it shall be the responsibility of the board of education and school district administration to present competent evidence demonstrating that a change in circumstances has occurred necessitating a reduction in force.[250] [Emphasis added.]

Although the more significant issue may be whether it is appropriate for such a policy decision to be made as the result of an evidentiary hearing, at least it can be noted at this point that a specific requirement of "competent" evidence is included in this statute. An examination of the legislative history of LB 375 was of no assistance in ascertaining the implication of this language. There is no indication of any legislative intent or even of any recognition that the language might be of some significance.

The decisions of the Nebraska Supreme Court which have specifically involved the terminations of public school teachers under these statutory provisions provide very few clues as to how the court would rule on a specific evidentiary issue. There is a reference to

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[249] Id. at § 79-1259.

[250] Neb. Rev. Stat. § 79-1254.06 (Supp. 1980).

"competent" evidence in Davis v. Board of Education of the School District of Callaway,[251] a decision which affirmed a district court affirmation of the termination of a tenured teacher's employment by the Board of Education. The court stated that:

> In an error proceeding conflicting evidence will not be weighed and the order of an administrative tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is sufficient competent evidence, as a matter of law, to sustain its finding and order. . . . In the case before us there is ample competent evidence, including expert testimony, to sustain the findings and order of the board of education.[252] [Emphasis added.]

There are two other decisions in which the standard of review for contract terminations has been set out, Sanders v. Board of Education of the South Sioux City Community School District No. 11[253] and Moser v. Board of Education of the School District of Humphrey.[254] It is interesting to note that there is no reference to "competent" evidence in either of these opinions.

In any event, it would seem to be the prudent course for a board of education to exclude at least the obviously irrelevant and incompetent evidence from the hearing so that the record does not become unnecessarily confused and "contaminated." Furthermore, it would seem to be especially important for a board of education to base any

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[251] 203 Neb. 1, 277 N.W.2d 414 (1979).

[252] Id. at 3-4, 277 N.W.2d at 415-16.

[253] 200 Neb. 282, 263 N.W.2d 461 (1978).

[254] 204 Neb. 561, 283 N.W.2d 391 (1979).

termination decision on evidence that would be admissible under the formal rules, and to clearly relate its findings to such evidence in the record.

C. Judicial Review

Judicial review of a termination decision made by a Nebraska board of education is by Petition in Error to the district court.[255] The decision of the district court may then be appealed to the Nebraska Supreme Court.[256]

Judicial review by Petition in Error should be distinguished from those law suits that are originally filed in either federal or state court. The review by Petition in Error would be the proper proceeding only where there has been a hearing before the board of education. The review is solely upon the record made by the board tribunal whose action is being reviewed, and no new evidence is considered by the court.[257]

A teacher whose employment has been allegedly terminated, either with or without a hearing, might sue the employer board of education or school district, usually either to establish the right to continued employment or to recover damages. Civil rights actions based upon alleged violations of constitutional rights are generally

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[255]Neb. Rev. Stat. § 25-1901 (Reissue 1979).

[256]Neb. Rev. Stat. § 25-1911 (Reissue 1979).

[257]Harnett v. City of Omaha, 188 Neb. 449, 451, 197 N.W.2d 375, 377 (1972).

filed in federal district court. Suits based upon alleged violations of state statutes or contract rights are usually filed in state courts. In these original actions, the hearing or trial with the presentation of evidence is before the court.

Tenured Teachers

The Nebraska Supreme Court has quite explicitly set out the standard of review to be applied in teacher termination cases.

> The standard of review in an error proceeding from an order terminating the contract of a tenured teacher is whether there has been sufficient evidence adduced at the proceeding before the inferior tribunal, as a matter of law, to support the determination reached.[258]

The "sufficient evidence" standard which is applicable to teacher terminations which are on review by Petition in Error would appear to differ, at least on its face, from the "substantial evidence" standard which has been applied to other administrative agency actions. The substantial evidence standard is specified by the administrative procedure act for the review of state agency actions,[259] and it has also been established as the appropriate standard for the review of decisions of the Commission of Industrial Relations.[260]

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[258]Moser v. Board of Educ. of School Dist. of Humphrey, 204 Neb. 561, 563, 283 N.W.2d 391, 393 (1979): Davis v. Board of Educ. of School Dist. of Calloway, 203 Neb. 1, 2, 277 N.W.2d 414, 415 (1979).

[259]Neb. Rev. Stat. § 84-917(6)(e) (Reissue 1976).

[260]American Ass'n of Univ. Prof. v. Board of Regents of the Univ. of Neb., 198 Neb. 243, 272, 253 N.W.2d 1, 16 (1977).

However, an analysis of these teacher termination decisions seems to indicate that this "sufficient evidence" standard has been applied to what might be categorized as findings of ultimate facts rather than as findings of basic facts.

Sanders v. Board of Education of the South Sioux City Community School District No. 11[261] was an error proceeding to challenge the action of the Board of Education which had terminated a tenured teacher's contract of employment on charges of incompetency and neglect of duty. The district court found that there was not substantial evidence sufficient to establish just cause, and that the termination was arbitrary and unreasonable. The termination was set aside and the Board appealed. The supreme court affirmed.

The question in this decision was not whether specific instances of teacher conduct had occurred, but whether those instances which had occurred constituted such incompetence or neglect of duty to be just cause for termination. The court categorized the conduct complained of as being minimal rather than substantial evidence of incompetence or neglect of duty. There was no evidence that the teacher's performance was below the standard of performance required of others performing the same or similar duties, nor was there any expert testimony that the teacher's conduct was sufficient evidence of incompetency or neglect of duty to constitute just cause for

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[261] 200 Neb. 283, 263 N.W.2d 461 (1978).

termination.[262]

In Davis v. Board of Education of the School District of Callaway,[263] a tenured teacher had been terminated by the Board for "just cause." The testimony of the expert witnesses, who were the superintendent and the principal charged with the duty of evaluating the performance of the teacher, had been that her performance did not meet the appropriate standard. The court found that the evidence, including the expert testimony, was sufficient, as a matter of law, to support the action of the Board in terminating the teacher's employment. Again, the sufficient evidence related to the findings of ultimate fact (just cause for termination) rather than to findings of basic facts (specific instances of teacher performance).

Moser v. Board of Education of the School District of Humphrey[264] was a reduction-in-force case. The Board had notified two teachers that it was considering the termination of one of them for reasons of reduction in force. Both teachers requested a hearing, and on the basis of the evidence presented at those hearings the Board terminated the contract of the teacher who happened to be tenured and retained the probationary teacher. The district court sustained this action, but the supreme court reversed. It was held that under the statutory reduction in force provision, a tenured

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[262] Id.

[263] 203 Neb. 1, 277 N.W.2d 414 (1979).

[264] 204 Neb. 561, 283 N.W.2d 391 (1979).

teacher could not be terminated while a probationary teacher was retained. The court noted that there had been sufficient evidence to support the action by the Board to reduce the teaching force. Here again, the sufficient evidence standard of review was related to an ultimate statutory standard for termination.

Because the "sufficient evidence" standard of review has been applied to findings of ultimate fact in these teacher termination cases, it might be inferred that a somewhat more intensive scrutiny is involved. The court may simply be acknowledging that a finding of just cause for dismissal is more like a question of law than a question of fact and indicating a certain willingness to substitute its judgment for that of a board of education on such an issue. What standard the court might apply to the review of a finding of basic fact in a teacher termination case remains to be seen.

None of these decisions involved a termination of a tenured teacher from a Class IV or Class V school district, for which there are separate statutory provisions. However, it would seem reasonable to assume that the same "sufficient evidence" standard would apply, since the same statutory review procedures would seem to be applicable.[265]

Probationary Teachers

It is unclear what standard of review might be applied by the Nebraska courts in the instance of the termination of a probationary

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[265] See Neb. Rev. Stat. § 25-1901, -1911 (Reissue 1979).

teacher. The tenure laws applicable for Class IV and V school districts do not provide for termination hearings for probationary teachers;[266] it is unclear from the school laws whether probationary teachers in Class I, II, III, or VI districts are entitled to termination hearings,[267] although perhaps the better view is that they are.

There is dictum in Wang v. Board of Education of Chase County High School District[268] which refers to legislative indication of the concept of providing a probational hearing before the "just cause" protections if the continuing contract law became effective. Also, one state district court has found that Section 79-1254 as amended does entitle probationary teachers to a hearing upon demand.[269]

Nor is it clear what implication the reduction in force statutes may have on the availability of hearings for probationary teachers in Nebraska. One section provides that "[a]ny alleged change in circumstances must be specifically related to the teacher or teachers to be reduced in force, and the board, based upon the evidence produced at the hearing required by section 79-1254 to 79-1262, shall be required to specifically find that there are no other vacancies on the staff for which the employee to be reduced is qualified by

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[266] See Neb. Rev. Stat. § 79-1256 (Reissue 1976).

[267] See Neb. Rev. Stat. § 79-1254 (Reissue 1976).

[268] 199 Neb. 564, 568, 260 N.W.2d 475, 478 (1977).

[269] State of Nebraska ex rel. Jackson v. Board of Educ. of School Dist. of Spencer, Case No. 4206 (Dist. Ct. of Boyd County, Aug. 1, 1977) (issuing Writ of Mandamus to grant a hearing).

endorsement or professional training to perform."[270] It could at least be argued that to give this section meaning it would be necessary to provide a hearing for a probationary teacher in any class of Nebraska school district if the termination might appear to be based upon a reduction in force.

In Schultz v. School District of Dorchester[271] it was made clear that under the version of Section 79-1254 which existed prior to the 1975 amendments which added the "just cause" protection, there was no limitation upon boards as to the reasons for which they could terminate teacher contracts in Class I, II, III, and VI districts. The teacher had sought a declaratory judgment to the effect that the statute created a substantive right to continued employment requiring a determination that just cause existed for termination. The district court held that it did not, and the supreme court affirmed.

The court stated that such contracts could be terminated for any cause whatsoever, or for no cause at all. The purpose of the statutory hearing was to provide the teacher with an opportunity to convince the board not to terminate, but the provision for a hearing and the taking of evidence was not necessarily related to or for the purpose of establishing just cause.[272]

However, among the 1975 "just cause" amendments was the addition

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[270] Neb. Rev. Stat. § 79-1254.06 (Supp. 1980).

[271] 192 Neb. 492, 222 N.W.2d 578 (1974).

[272] Id.

of the provision that "[t]he board shall render the decision to amend or terminate a contract based on the evidence produced at the hearing."[273] Assuming that a probationary teacher in a Class I, II, III, or VI district is entitled to a termination hearing, it would seem that this provision should then apply, and that at least some minimal evidentiary showing would then be required. If some evidentiary showing is in fact required, and if the requirement is to have any meaning, then some standard of review would seem appropriate, even if it would be less stringent than "sufficient evidence."

Implications

There is significance in all of this in regard to the development of evidence and to its admissibility and use at a termination hearing. Both the administrators and the teachers who are preparing a record in anticipation of possible termination proceedings and those actually involved in a hearing if one does in fact occur need to be aware of the varying considerations.

If no hearing is required, then there would seem to be little potential for raising legal questions involving evidence. If a hearing is required by statute, but no evidentiary support is required for the board's decision, then it is also unlikely that any evidence law questions would occur. However, if an evidentiary hearing is required, and the board's decision must be based upon the evidence produced

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[273] Neb. Rev. Stat. § 79-1254 (Reissue 1976).

at that hearing, then certain evidentiary considerations must be taken into account.

Whether only some minimal evidentiary support is required or whether the school officials must carry the burden of establishing just cause, if a termination decision must be based upon the evidence adduced at the hearing, then it follows that such evidence should be relevant and competent. The notice to the teacher should indicate the nature of the evidence that will be presented on behalf of the school district; only such evidence should be produced by school officials, admitted at the hearing, and considered by the board; and the decision as based upon only that evidence should be clearly explained by the board's findings.

It does appear that, whatever standard and scope of review is employed, the courts are somewhat reluctant to substitute their judgment for that of a board of education in regard to teacher termination decisions.

In Davis the district court had held that "the decision of the board of education must be affirmed if any set of facts can be constructed from the evidence before the board that would support the finding."[274] The supreme court suggested that such a standard of review was arguably erroneous, and stated that "[i]n an error proceeding conflicting evidence will not be weighed and the order of an

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[274]Davis v. Board of Educ. of School Dist. of Callaway, 203 Neb. 1, 2, 277 N.W.2d 414, 415 (1979).

administrative tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is sufficient competent evidence, as a matter of law, to sustain its findings and order."[275]

A question that is raised by the language in Davis is whether the record is to be reviewed as a whole, taking into account whatever in the record detracts from the evidentiary support for the findings, or whether only that evidence which tends to support the findings is necessary to establish "sufficiency."

The better rule would surely be for the reviewing court to examine the record taken as a whole. The statement that "conflicting evidence will not be weighed and the order . . . must be affirmed if . . . there is sufficient competent evidence . . ."[276] could have a number of different meanings. If it means that the court will not substitute its judgment for that of the board and will sustain those findings that could reasonably have been made based on all the evidence in the record, then a meaningful hearing is a possibility. It may mean that when there is conflicting testimony, then questions of credibility of the witnesses are for the tribunal which observes the witnesses as they testify, and that would also seem appropriate.[277] However, if the statement that "conflicting evidence will not be weighed" is applied literally than a hearing is little more than a pointless

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[275] Id. at 3-4, 277 N.W.2d at 415.

[276] Id.

[277] See Harnett v. City of Omaha, 188 Neb. 449, 451, 197 N.W.2d 375, 377 (1972).

formality insofar as the teacher's attempt to contest the adverse evidence is concerned. Under such circumstances almost any presentation of evidence by the school officials that would establish a prima facie case would be "sufficient" to establish just cause for termination. Surely the legislature intended more when the substantive protections for Nebraska teachers were enacted.[278]

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[278] See Neb. Rev. Stat. §§ 79-1254 to -1262 (Reissue 1976)