

AN ANALYSIS OF THE LAWS AFFECTING
THE EMPLOYMENT RIGHTS OF PUBLIC SCHOOL EMPLOYEES
IN THE STATE OF WEST VIRGINIA

by

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(ABSTRACT)

The purpose of this study was to examine provisions of the Constitution of West Virginia, enactments of the West Virginia Legislature, decisions of the West Virginia Supreme Court of Appeals, policies of the West Virginia Board of Education, opinions of the Attorney General, and interpretations of the State Superintendent of Schools to ascertain the legal status of West Virginia public school personnel with respect to their employment rights.

Federal Constitutional provisions, statutes, and court cases were also cited when of overriding importance or when West Virginia legal references were found to be inadequate.

Legal research of the employment process and rights of public school employees focused on the following areas: nomination for employment, discrimination, substantive and procedural due process, certification, employee classifications, probationary and continuing contracts, assignment and

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transfer, suspension and dismissal, resignation, employment term, and compensation.

Other legal provisions reviewed in relationship to West Virginia public school personnel included academic freedom, assignment of duties, personal leave, leaves of absence and other absences, workmen's compensation, unemployment compensation, insurance benefits, retirement, seniority, reductions in force, grievance procedures, employee organizations, and collective bargaining.

DEDICATION

To my parents, whose love and encouragement made my career a reality.

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CHAPTER 1

BACKGROUND, PROBLEM, AND METHODOLOGY

Introduction

School law is a subject of vital importance because of its far reaching impact upon students, parents, school personnel, and the general citizenry. School personnel who function on a daily basis within the educational setting must have both a conceptual and an operational knowledge of those laws which govern their employment rights. A myriad of statutory and case law which directly impinge upon the performance of school employees have emerged during this century.

Public education in the United States continues to be primarily the responsibility of individual states. The Federal Constitution does not mention education. The Tenth Amendment reserves this power to the states. All state constitutions except Connecticut's expressly provide for the creation of state educational systems. Federal statutes and regulations, however, do affect educational activity in areas such as individual liberties and funding certain curricular programs. The interaction of federal and state law continues to expand and accounts for many of the complexities of to-

day's school law. Individual rights upheld by court cases also significantly affects the operation of the public schools.¹

As a major governmental entity the development of the public school system has been accompanied by a continuous flow of legal controversies in virtually every state. Consequently, court decisions have to a great degree given form and substance to the philosophical base on which the public schools have been founded.²

In Fogg v. Board of Education the role of the public school is well defined.

The primary purpose of the maintenance of the common school system is the promotion of the general intelligence of the people constituting the body politic and thereby to increase the usefulness and efficiency of the citizens, upon which the government of society depends.³

The laws relating to school personnel administration have numerous ramifications. Issues dealing with certification, contracts, and various aspects of constitutional and administrative law continue to affect the rights of teachers and other school employees. Beyond statute, state and federal constitutions have a profound impact upon employment practices. Federal civil rights legislation have also engendered a substantial amount of litigation. The courts have developed a flexible axiom which clearly provides that the public's interests will be weighed against the individual interests of the employee in each circumstance.⁴

Most school districts have written contracts with their employees. Typically, a contract outlines the employee's and the school board's rights. However, the actual provisions of contracts vary widely among districts. For example, the 1977-79 contract between the Chicago Teachers Union and the Chicago Board of Education was 144 pages in length and listed 49 separate articles. Provisions of this contract included salary schedules for teachers, maximum class sizes, length of school day, employee fringe benefits, transfer policies, grievance procedures and other elements relating to teacher duties and rights. In contrast, the 1979-80 contract between the Greencastle, Indiana, School Board and the Greencastle Classroom Teachers Association was only 28 pages. Although considerably more condensed, this contract also contained many of the same components.⁵

In studying the relationship between law and public education one must realize that there are virtually thousands of laws which either directly or indirectly impact upon public school personnel. Only through the development of a better understanding of the sources of school law, the system of courts, and the legal basis for public education can an effective analysis of these legal principles and provisions be completed.

Sources of School Law

Basically, the American system of law has evolved from the law of the Anglo-Saxons. Valuable legacies from this major source such as the writ of habeas corpus and freedom of speech first appeared as an Act of Parliament in 1689. One of the prime features of English law is that a jury is the sole judge of facts. A judge is the "interpreter of what constitutes law."⁶

The rule of stare decisis--"to stand by decided cases"--has also evolved from Anglo-Saxon law. Under this theory, once a point of law has been decided by the highest court of appeal, it becomes a fixed law and, at least in principle, can only be changed by legislation.⁷ Another inheritance from this source of law is the "reasonable man concept." When a person commits an action, the true test of legal responsibility is what would a reasonably prudent person have done under the same circumstances.⁸ The concept of "due process" requiring that a person be given a notice of charges and an opportunity to defend himself is also an outgrowth of English law.⁹

According to Gauerke, school laws primarily fall into four groups:

1. Federal and state constitutional laws;
2. Federal and state statutory laws;

3. Administrative rules and regulations (including federal, state, and local governmental agencies);
and
4. Judicial law.¹⁰

In West Virginia, opinions of the State Attorney General and interpretations of the State Superintendent of Schools are also significant when studying the school laws of this state.¹¹

Constitutional Law

The Constitution of the United States guarantees fundamental personal, property, and political rights for its citizens. It also gives expressed or implied powers to the Congress and the various states. It is the supreme law of this country:

This Constitution and the laws of the United States which shall be made in pursuance thereof; and all the treaties made or which shall be made, under the authority of the United States shall be the Supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.¹²

The United States Constitution controls the validity of the acts of all governments, local or national, executive or legislative, and is therefore enforceable in the courts of West Virginia.¹³

State constitutions generally contain many of the same rights guaranteed by the federal constitution. For example, the Bill of Rights of the Constitution of West Virginia sets forth in detail the basic rights guaranteed at the federal level.¹⁴

Most state constitutions define the powers of the executive, legislative, and judicial divisions of state government. Unlike the Congress of the United States, state legislatures have broad (plenary) powers and as such may pass any act which is not forbidden by a state's constitution.¹⁵

Statutory Law

Each state has plenary power over its system of education. State statutes contain legislative acts prescribing laws relating to virtually all dimensions of the educational process. Local school districts may exceed these as long as there is no conflict with state statute. State statutes are the most used single source of school law.¹⁶

In West Virginia, the West Virginia Board of Education¹⁷ and county boards of education¹⁸ have the authority to promulgate reasonable rules and regulations for the administration and supervision of the state's schools. These rules are generally considered to be statutory sources of school law as long as they are within the limits prescribed by the state legislature.¹⁹ Administrative codes and directives of

governmental agencies greatly influence the operation of education.²⁰

Judicial Law

According to Gauerke,²¹ "Courts do much more than merely apply the law which legislatures create." The courts interpret the laws to meet the ever-changing needs of society. Although the structure of public education stems primarily from constitutions and statutes, the courts modify and adapt these to the needs of education.²² The esteemed Justice Cardoza said that "judge-make law is one of the existing realities of life."²³

Common law, judicial law, and case law are terms which mean essentially the same. These terms are used to distinguish rules of law which have originated in the courts but have their legal basis in the laws enacted by the legislature or administrative entities. Common law originated in England where the term "common" described customs which were common to all parts of the country. These customs became crystalized into legal principles (precedents) which were used in conjunction with statutes throughout England.²⁴

Common law is based on the doctrine of precedent or the rule of stare decisis meaning "let the decision stand." Past decisions are generally considered to be binding on subsequent cases which have essentially the same facts and

components.²⁵ In the absence of a cogent reason, courts usually follow precedent.²⁶

Opinions of the Attorney General

Opinions of the U. S. Attorney General and attorneys general in the various states have considerable significance in the field of law. These officials render opinions of the law in response to inquiries from governments, officials, and others. Generally, their decisions are advisory and do not have binding authority; however, they are often given considerable weight by the courts in the interpretation of statutes and regulations.²⁷

The West Virginia Constitution provides for an elected Attorney General.²⁸ One of the major duties of this official is to render advice and opinions on legal questions to governmental officials.²⁹

Opinions of the West Virginia Attorney General are not considered precedent by the West Virginia Supreme Courts of Appeals. However, according to McNeel, the Court has said that an opinion may be "persuasive when it is issued contemporaneous with the adoption of a state statute in question."³⁰

Interpretations of the State Superintendent of Schools

In 1866 the West Virginia Legislature assigned the responsibility of interpreting the meaning of school laws and the rules of the West Virginia Board of Education to the State Superintendent of Schools.³¹

At the request in writing of any citizen, teacher, school official, county or state officer, the State Superintendent of Schools shall give his interpretation of the meaning of any part of the school law or of the rules of the state board of education.³²

Many of these interpretations are summarized in the "State Ed," a newsletter for West Virginia school employees published monthly by the State Department of Education. Copies of these interpretations are available to interested individuals from the Office of the State Superintendent of Schools.

A 1974 West Virginia Attorney General's opinion held that the interpretations issued by the State Superintendent of Schools are those of a layman since he is in effect a layman lacking a license to practice law.³³

In Jones v. Board of Education³⁴ the West Virginia Supreme Court of Appeals held that the state superintendent of schools has the authority to review personnel decisions of county boards of education. The legitimacy of these interpretations was further illustrated in Dillon v. Board of Education³⁵ where the West Virginia Supreme Court of Appeals

accorded considerable weight to the State Superintendent's administrative interpretation of a statute.

Presently, the West Virginia State Superintendent of Schools retains two licensed attorneys on his staff. One is employed as an administrative assistant to the superintendent, the other as a legal research assistant. Thus, interpretations related to law and policy for the past several years have been based on detailed legal rationale. Although not binding on school officials, most interpretations are viewed as having a sound legal basis and worthy of examination.

System of Courts

The existence of a dual court structure, state-federal, is a distinguishing characteristic of our American judicial system. The federal courts operate as a part of our federal government, the state courts operate as the judicial branch of state government. All matters except those assigned to the federal courts are handled by state courts. The jurisdiction of the federal courts is limited, however, by the Constitutional provision of federal judicial power as enacted by the legislation of Congress.³⁶ Courts have either general or limited jurisdiction with either original or appellate authority.³⁷

Functions of the Courts

Federal and state constitutions are the supreme law of the respective jurisdiction. A primary function and responsibility of the courts is to rule on the constitutionality of legislative enactments. In making these determinations, the courts first presume an act to be constitutional and anyone asserting the contrary must bear the burden of proof.³⁸ The United States Supreme Court has held that, "Questions of constitutionality are determined only when necessary to decide a case or controversy involving a bona fide dispute between parties asserting adverse legal claims."³⁹

The second primary function of the courts is the interpretation of statutes. State statutes, typically, are a means of regulating the schools. It is the function of the court to interpret these in a consistent and predictable fashion based upon legal principles and reasoning.⁴⁰

Courts must also settle disputes by applying appropriate laws or principles of law to specific facts of a given case.⁴¹ Cases are decided by reviewing constitutional or statutory provisions, and in their absence, analyzing the common law for the rule that best fits the case.⁴² Adherence to the doctrine of Stare decisis et non quieta movere, "let the decision stand," provides for the likelihood of equal treatment for all who come before the courts, contributes to

predictability in future cases, saves time and energy when established principles are followed, and displays respect for the wisdom and experience of previous generations of judges.⁴³

Federal Court System

The federal judicial power was first created under the Articles of Confederation which was submitted to the states in 1777 and later ratified in 1781. This power was quite limited. It gave Congress the authority to appoint courts to deal with the trial and appeal of piracies and felonies on the high seas; it also enabled Congress to act as a last court of appeal in disputes between two or more states. These powers were expanded in 1789 with the final adoption of the United States Constitution which under Article III, Section 1, the "judicial power" of the United States became vested in one Supreme Court with appellate and limited original jurisdiction and inferior courts to be created by Congress. The first Congress enacted the Judiciary Act of 1789 creating one Supreme Court of the United States consisting of a chief justice and five associate justices and a system of inferior federal courts.⁴⁴

The present federal court system includes a nine-member Supreme Court, thirteen Circuit Courts of Appeal, one or more district courts in each state, as well as special courts to

handle special problems or to cover special jurisdictions. Cases litigated by federal courts are those between citizens of different states or cases involving federal statutes or the Constitution of the United States.⁴⁵

In the field of education, the two primary ways of securing federal court jurisdiction are by questioning the validity of a state or federal statute under the Constitution of the United States or by alleging that a constitutionally protected right, privilege, or immunity of an individual has been violated.⁴⁶

Cases may be brought to the Supreme Court by writ of certiorari, appeal, or original jurisdiction of the Court. Most school cases are taken on writs of certiorari, an action whereby a case is appealed from an inferior to a superior court. There is no possible redress beyond the United States Supreme Court since it is the highest court in the land.⁴⁷ If the Supreme Court decides not to review a decision, the parties must likewise accept this decision as final.⁴⁸

West Virginia Court System

The system of courts and government design which existed in Virginia was largely carried over to the new state of West Virginia at its formation in 1863.⁴⁹ The initial West Virginia Constitution in 1863 modified the Virginia judicial

system and retained the Supreme Court of Appeals, Circuit Courts, and Justice of the Peace Courts.⁵⁰

West Virginia's Supreme Court of Appeals was initially comprised of three justices. Justices are elected by the voters of the state for twelve-year terms with no restrictions on the number of times he may succeed himself. One additional justice was added in 1880, and again in 1902, bringing the total to five.⁵¹ The Judicial Reform Amendment of 1974 established a unified court system comprised of a Supreme Court of Appeals, circuit courts, and magistrate courts which are under the supervision of the West Virginia Supreme Court of Appeals.⁵²

The 1974 amendment established professional qualifications for judgeships, created a statewide salary schedule, and permitted the Legislature to assign as many judges as necessary to each circuit.⁵³ Presently, the state is divided into thirty-one judicial circuits, each containing one to four counties.⁵⁴ Circuit judges are elected for eight-year terms on a partisan basis and may succeed themselves indefinitely.⁵⁵

Each county in West Virginia has a magistrate court with two to ten magistrates, depending upon a county's population. These magistrates are elected by the voters of the county for four-year terms. Magistrate courts have original jurisdiction in minor civil and criminal type cases. They may also hold preliminary hearings in felony cases.⁵⁶

West Virginia's state court system has four major functions: (1) hearing civil cases; (2) protecting individual rights guaranteed by the state constitution; (3) determining the guilt or innocence of those accused of violating the state's criminal laws; and (4) acting as a check upon the legislative and executive branches of the state government.⁵⁷

Legal Basis for Public Education

Historically, the federal government has shown an active interest in the educational process. Even before the adoption of the United States Constitution, The Ordinance of 1785 included a provision that the "lot number 16" of every township be reserved for the maintenance of the public schools.⁵⁸

The powers of the United States government are delegated within the Constitution and are specifically limited by the Tenth Amendment which provides that "The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the States respectively or to the people."⁵⁹

In 1936 the Supreme Court adopted the Hamiltonian philosophy that Article I, Section 8 of the Constitution confers upon Congress the power to tax and to spend for purposes which provide for the general welfare of the United States.⁶² In a later case, Helvering v. Davis,⁶³ the Court upheld the

Social Security Act thereby affirming that Congress can tax and spend under the general welfare clause. In this case the Court gave a broad interpretation to the general welfare clause, therefore with this more extensive interpretation education could easily fall within its domain.⁶⁴

Since the early 1950's the United States Supreme Court has been increasingly concerned with litigation involving educational matters.⁶⁵ Increasingly the Court influences educational policy by interpreting the constitutionality of school practices and by defining acceptable day-to-day functions. Congress also has considerable authority to protect these interests by direct regulation and economic incentives.⁶⁶ The policies and procedures of local school districts must meet the requirements of the First and Fourteenth Amendments.⁶⁷ During the past three decades landmark decisions have been handed down on school matters such as desegregation,⁶⁸ religious freedom,⁶⁹ freedom of speech,⁷⁰ school employees,⁷¹ school finance,⁷² due process,⁷³ liability of school employees,⁷⁴ and corporal punishment.⁷⁵

State government through statute regulates and controls education within the limitations of state and federal constitutions. The courts have consistently held that the control over education is an essential characteristic of state sovereignty. In the exercise of this function states have established systems of public schools which operate as extensions of state government.⁷⁶ A state's legislature has

plenary power to implement its system of public education.⁷⁷ Each of the fifty state constitutions, excepting Connecticut's, provides for the establishment of a public school system.⁷⁸ Article XII, Section 1 of the Constitution of West Virginia states: "The legislature shall provide, by general law, for a thorough and efficient system of free schools." Under this section, the West Virginia Legislature has discretionary power to determine what constitutes the "free school" system of the State.⁷⁹

The West Virginia court in Pauley v. Kelly (1979) held that the method of financing its public schools is unconstitutional in terms of Article XII, Section 1 of the State Constitution which mandates that the state shall provide a "thorough and efficient system of free schools" and in terms of the Constitution's equal protection provision, Article III, Sections 10 and 17.⁸⁰ In this case Judge Arthur Recht, Special Judge on assignment from Ohio County to the Circuit Court of Kanawha County, issued a response relative to the "thorough and efficient" section in the Constitution. Since this case originated in the Circuit Court of Kanawha County, the West Virginia Supreme Court ruled that it was the responsibility of that Court to develop standards for a thorough and efficient educational system, and to determine the constitutionality of West Virginia's method of financing schools. In effect, Judge Recht directed the West Virginia Board of Education, the State Department of Education, and

the State Tax Commissioner to develop and implement "a thorough, efficient, and equal educational and property tax system" which is compatible with constitutional and statutory mandates and standards.⁸¹ This was the first time that the plenary authority of the state legislature to implement the state's educational system had been successfully challenged by the West Virginia courts.

The West Virginia Constitution provides for a State Board of Education and a State Superintendent of Schools.⁸² The Legislature has established that each county school district shall be under the control and supervision of a county board of education, comprised of five non-partisan, elected members.⁸³ Such boards are quasi-public corporations⁸⁴ which can exercise power only as expressly conferred or arising from necessary implication and in no manner other than that prescribed or authorized by statute.⁸⁵

Statement of the Problem

The purpose of this study was to examine provisions of the Constitution of West Virginia, enactments of the West Virginia Legislature, decisions of the West Virginia Supreme Court of Appeals, policies of the West Virginia Board of Education, opinions of the Attorney General, and interpretations of the State Superintendent of Schools to determine the current status of the legal rights of West Virginia public

school personnel. Provisions of the Federal Constitution, statutes, and court cases were considered when of superior importance or when West Virginia legal references were less than adequate.

Need for the Study

A legal investigation of this type was needed in West Virginia to provide public school personnel with an up-to-date source of legal information which will assist them to better understand their employment-related rights. A comprehensive study of these issues was completed in 1979 by McNeel.⁸⁶ Prior to McNeel's study a single comprehensive source which integrated these laws into a systematic summary did not exist. In his study McNeel analyzed the major laws, regulations, interpretations, and policies which affected the public school employees of West Virginia at the time that analysis was conducted. Since that time significant changes have occurred in West Virginia Code and other laws which impact upon current interpretations. A tremendous amount of litigation has also occurred over the past nine years which has changed many of his findings. Because of the vast expansion of the original components of his study, this analysis will reexamine only those laws dealing with the employment rights of public school employees. McNeel's study also included a section dealing with tort liability which

will not be discussed in this analysis. Similar studies have been completed by Smith in North Carolina,⁸⁷ Simpson in Ohio,⁸⁸ Alexander in Kentucky,⁸⁹ Garber and Smith in Illinois,⁹⁰ and Burt in Indiana.⁹¹

Delimitation of the Study

This study was delimited to the statutes, State Board of Education policies, attorney general opinions, state superintendent of schools interpretations, and court cases which affect the employment rights of West Virginia public school administrators, teachers, and service personnel. Cases from jurisdictions other than West Virginia were considered only to the extent that these provide a backdrop for developing a better understanding of the issues. Finally, this study examined the law as of January 1988.

Research Methods and Procedures

In the field of law, constitutions, statutes, court decisions, and official interpretations encompass much of basic legal research. The nature of legal authority given to legislation is significantly different from that of case law. Statutes have mandatory authority in the jurisdiction where they are enacted.⁹²

A comprehensive review of the West Virginia Code was completed utilizing the topic method found in the contents section. It was examined to find statutes which were applicable to this study.

A search for relevant case law was made through using the descriptive word method, topic method, and case method. These methods were used to review the following major case law sources:

- American Digest System;
- Virginia-West Virginia Digest;
- Southeastern Reporter;
- National Reporter System;
- Words and Phrases;
- American Jurisprudence;
- Corpus Juris Secundum;
- Michie's Jurisprudence;
- Education Law Review;
- Southern School Law Digest.

Shepard's Citations was used to determine whether cases had been affirmed, reversed, dismissed, modified, or appealed.

In the absence of applicable cases, opinions of the Attorney General, interpretations of the State Superintendent of Schools, and policies of the West Virginia Board of Education as recorded in Policies, Rules, and Regulations were used.

The primary legal sources used in this study were: (a) West Virginia Code, (b) West Virginia Reports, (c) opinions of the Attorney General, (d) Policies, Rules, and Regulations of the West Virginia Board of Education, and (e) interpretations of the State Superintendent of Schools.

Definition of Terms

Professionals in the area of school law utilize a vocabulary which may be unfamiliar to many in the field of general education. A glossary of legal, technical, and other often used relevant terms was included in Appendix B.

Outline of the Chapters

Reflected in the following chapters is the legal structure for the employment rights of public school employees in West Virginia public schools.

Contained in chapter 2 is an analysis of legal provisions such as the employment process, discrimination and employment, due process, certification, classification of service personnel, employment contracts, assignment, transfer, suspension, dismissal, resignation, and compensation.

Described in chapter 3 are other laws which affect employee rights such as academic freedom, assignment of duties, leaves of absence, insurance, retirement, seniority, re-

ductions in force, grievance procedures, employee organizations, and collective bargaining.

Finally, delineated in chapter 4 are conclusions and recommendations which have resulted from the study.

NOTES

¹William D. Valente, Law in the Schools (Columbus: Charles E. Merrill Publishing, 1980), pp. 4-5.

²Kern Alexander, School Law (St. Paul: West Publishing, 1980), pp. 22-23.

³Fogg v. Board of Education, 76 N.H. 296, 82 A. 173 (1912).

⁴Alexander, op. cit., p. 531.

⁵Louis Fischer, Cynthia Kelly, and David Schimmel, Teachers and the Law (New York: Longman, 1981), p. 3.

⁶Warren E. Gauerke, School Law (New York: The Center for Applied Research in Education, 1965), p. 7.

⁷Ibid.

⁸Ibid.

⁹Ibid.

¹⁰Ibid., p. 12.

¹¹William Thomas McNeel, "An Analysis of the Laws Affecting Public School Administrators, Teachers, Service and Auxiliary Personnel in West Virginia," (Ed.D. diss., Virginia Polytechnic Institute and State University, 1979), p. 3.

¹²U. S. Const. art. VI.

¹³Claude J. Davis, et al., West Virginia State and Local Government (Morgantown, W.Va.: Bureau of Governmental Research, West Virginia University, 1963), p. 225.

¹⁴W.Va. Const. art. III, §§1-20.

¹⁵Alexander, op. cit., pp. 71-73.

¹⁶Gauerke, op. cit., p. 13.

¹⁷W.Va. Const. art. III, §2.

¹⁸W.Va. Code, §18-5-1.

¹⁹Hunt v. Board of Education, 321 F. Supp. 1263 (S.D. W. Va. 1971).

²⁰Gauerke, op. cit., p. 14.

²¹Ibid, p. 14.

²²Ibid., p. 15.

²³Ibid.

²⁴Alexander, op. cit., pp. 3-4.

²⁵Ibid., p. 8.

²⁶Ibid.

²⁷Morris L. Cohen, Legal Research in a Nutshell (St. Paul: West Publishing, 1978), p. 234.

²⁸W.Va. Const. art. VII, §1.

²⁹W.Va. Code, §5-3-1.

³⁰McNeel, op. cit., p. 9.

³¹W.Va. Code, §18-3-6.

³²Ibid.

³³Op. Att'y Gen., June 26, 1974.

³⁴Jones v. Board of Education, 294 S.E. 2d 113 (W.Va. 1982).

³⁵Dillon v. Board of Education, 301 S.E. 2d 588 (W.Va. 1983).

³⁶Fannie J. Klein, Federal and State Court Systems--A Guide (Cambridge: Ballinger Publishing, 1977), p. 1.

³⁷Arthur T. Vanderbilt, ed., Studying Law (New York: New York University Press, 1955), pp. 420-421.

³⁸McNeel, op. cit., p. 11.

³⁹United States v. Johnson, 319 U.S. 302 (1943).

⁴⁰Jacob J. Cobb, An Introduction to Educational Law for Administrators and Teachers (Springfield: Charles C. Thomas, Publisher, 1981), p. 8.

⁴¹McNeel, op. cit., p. 11.

⁴²Cobb, loc. cit.

⁴³Ibid.

⁴⁴Klein, op. cit., p. 5.

⁴⁵John C. Hogan, The Schools, The Courts and the Public Interest (Lexington, Mass.: Lexington Books, 1974), p. 8.

⁴⁶McNeel, op. cit., p. 13.

⁴⁷Kern Alexander, Ray Corns, and Walter McCann, Public School Law (St. Paul: West Publishing, 1969), p. 717.

⁴⁸Inge N. Dobelis, ed., Family Legal Guide (Pleasantville, N.Y.: The Readers Digest Association, 1981), p. 258.

⁴⁹Davis, et al., op. cit., p. 7.

⁵⁰W.Va. Const. art. VIII (1894).

⁵¹Davis, op. cit., p. 232.

⁵²William E. Coffey, Carolyn M. Karr, and Frank S. Riddel, West Virginia Government (Charleston, W.Va.: Education Foundation, 1983), p. 51.

⁵³W.Va. Const. art. VIII.

⁵⁴Coffey, op. cit., p. 53.

⁵⁵Ibid.

⁵⁶Ibid., p. 56.

⁵⁷Ibid., p. 51.

⁵⁸Alexander, op. cit., p. 41.

⁵⁹U. S. Const. amend. X.

⁶⁰Alexander, op. cit., p. 44.

⁶¹Ibid.

⁶²United States v. Butler, 297 U.S. 1 (1936).

⁶³Helvering v. Davis, 301 U.S. 619 (1937).

⁶⁴Kern Alexander, School Law (St. Paul: West Publishing, 1980), p. 45.

⁶⁵William Thomas McNeel, "An Analysis of the Laws Affecting Public School Administrators, Teachers, Service, and Auxiliary Personnel in West Virginia," (Ed.D. diss., Virginia Polytechnic Institute and State University, 1979), p. 16.

⁶⁶Valente, op. cit., p. 5.

⁶⁷Ibid.

⁶⁸Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

⁶⁹Abington School District v. Schempp, 374 U.S. 483 (1963); Lemon v. Kurtzman, 403 U.S. 602 (1971); Wisconsin v. Yoder, 406 U.S. 205 (1972).

⁷⁰Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Grayned v. City of Rockford, 408 U.S. 104 (1972); Mt. Healthy City School District Boards of Education v. Doyle, 429 U.S. 274 (1977).

⁷¹Perry v. Sindermann, 408 U.S. 593 (1972); Roth v. Board of Regents, 408 U.S. 564 (1972).

⁷²San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

⁷³Goss v. Lopez, 419 U.S. 565 (1975).

⁷⁴Wood v. Strickland, 420 U.S. 308 (1975).

⁷⁵Baker v. Owen, 423 U.S. 907 (1977); Ingraham v. Wright, 97 S.Ct. 1401 (1977).

⁷⁶Alexander, op. cit., p. 71.

⁷⁷Ibid.

⁷⁸McNeel, op. cit., p. 17.

⁷⁹51 Op. Att'y Gen. 852 (1966).

⁸⁰Pauley et al. v. Kelly, et al., 255 S.E. 2d 859 (1979).

⁸¹Pauley et al. v. Bailey, et al., Civil Action No. 75-1268, Circuit Court of Kanawha County (1982).

⁸²W.Va. Const. art. XII, §§2-3.

⁸³W.Va. Code, §18-5-1.

⁸⁴Herald v. Board of Education, 65 W.Va. 765, 65 S.E. 102 (1909).

⁸⁵Honaker v. Board of Education, 42 W.Va. 170, 24 S.E. 544 (1896).

⁸⁶McNeel, loc. cit.

⁸⁷Michael R. Smith, Law and the North Carolina Teacher (Danville, Ill.: The Interstate Printers and Publishers, 1975).

⁸⁸Robert J. Simpson, Education and the Law in Ohio (Cincinnati: The W. H. Anderson Co., 1968).

⁸⁹Samuel Kern Alexander, Jr., "An Analysis of the Laws Affecting Public School Administrative and Teacher Personnel in Kentucky," (Doctoral diss., Indiana University, 1965).

⁹⁰Lee O. Garber and H. Hayes Smith, The Law and the Teacher in Illinois (Danville, Ill.: The Interstate Printers and Publishers, 1965).

⁹¹Lorin A. Burt, School Law and the Indiana Teacher (Bloomington, Ind.: Beanblossom Publishers, 1967).

⁹²Morris L. Cohen, Legal Research in a Nutshell (St. Paul: West Publishing, 1978), p. 113.

CHAPTER 2

LEGAL PROVISIONS AFFECTING THE EMPLOYMENT OF PUBLIC SCHOOL PERSONNEL

West Virginia statutory, case, and administrative laws are explicit concerning the rights and responsibilities of school personnel. With the exception of county superintendents, who are officers of the school district, all school personnel are public employees who must meet express written contract obligations as well as employment-related conditions which are either expressed or implied by the school laws of West Virginia. School personnel must also abide by state and local board of education policies.¹

In West Virginia there are two categories of school personnel set forth in code. These are professional and service personnel.

School personnel are those personnel employed by county boards of education. Professional personnel are those persons who meet the certification and/or licensing requirements of the State, and includes professional educators and other professional employees.

Professional educator is synonymous with and has the same meaning as teacher. Professional educators are classified in state code by the following definitions.

1. Classroom teacher: This is the professional educator who has direct instructional or counseling relationship with students, spending the majority of his time in this capacity.
2. Principal: This is the professional educator acting as an agent of the county board of education who has the responsibility for the supervision, management and control of a school or schools within the guidelines prescribed by the board. His major area of responsibility is the general supervision of all of the school and school-related activities involving students, teachers and other school personnel.
3. Supervisor: This is a professional educator who, whether by this or some other appropriate title, is responsible for working primarily in the field with professional and/or other personnel in instructional and other areas of school improvement.
4. Central Office Administrator: This is the superintendent, associate superintendent, assistant superintendent, and other professional educators, whether by these or other similar titles, who are charged with administering and supervising the whole or some assigned part of the total program of the county-wide system.

Other professional employees are those who may be from another profession but who are properly licensed and employed to the serve in the public schools and could include registered professional nurses, licensed by the West Virginia Board of Examiners for Registered Professional Nurses.

Service personnel are these employees who serve a school or schools in a nonprofessional capacity including such areas as secretarial, custodial, maintenance, transportation, school lunch, and aides.² Maintenance and transportation supervisors also fall within this category.³ Audio-visual specialists who are not professionally certified in this field are also classified within this category.⁴

The Employment Process

Chapters Eighteen and Eighteen A of the West Virginia Code authorize county boards of education to employ professional and service personnel. Since the employment process is slightly different for each of the categories, each will be described separately.

Steps to Employing Professional Personnel

The employment of professional personnel by the school board shall occur only upon the nomination and recommendation of the county superintendent. In the event the board refuses

to employ any or all of the persons so nominated, the superintendent shall nominate others and submit these names to the board at such time as directed by the board. All professional personnel so nominated and recommended for employment and subsequent assignment shall meet all certification, licensure, training, and other requirements of their respective positions.⁵ In Cochran v. Trussler, the court held that in order for professional personnel to be employed by a county board, the county superintendent of schools must first nominate these individuals to the board for employment.⁶

Generally, the steps leading to the employment of professional personnel throughout West Virginia are as follows:

1. Announcement of vacancy. Boards are required to post and date notices of all openings in established, existing, or newly created positions in conspicuous working places for all employees to observe for at least five working days. Each such notice must include the job description. No vacancy can be filled until after this required posting period.⁷

2. Acceptance of applications.

3. Screening of candidates.

4. Verbal offer of position to selected candidate by superintendent or his designee subject to board confirmation.

5. Verbal acceptance by the candidate.

6. Nomination of the candidate by the county superintendent of schools to the board of education.

7. Approval or rejection of the applicant's employment by the board. If the candidate is rejected, the superintendent may nominate another qualified applicant for the position.⁸

8. Issuance of a written contract by the county board of education and the superintendent. (Both the president of the county board and the county superintendent acting as board secretary are required to sign this contract.)⁹

9. Acceptance of employment by applicant as evidenced by return of signed written contract.¹⁰

Steps to Employing Service Personnel

Local boards of education are authorized to employ such service personnel, including substitutes, as are necessary for meeting the needs of the county school system. County boards of education in West Virginia may employ service personnel without the nomination or recommendation of the county school superintendent.¹¹

Steps leading to the employment of service personnel in West Virginia are, in general, as follows:

1. Announcement of vacancy. (Same as required for professional personnel.)

2. Acceptance of applications. (Same as professional personnel.)

3. Screening of candidates. The following factors must be considered in the following order:

a. Regularly employed service personnel must be given first priority in filling the vacancy;

b. Service personnel whose employment has been discontinued because of lack of need shall be given next priority;

c. Professional personnel who held temporary service personnel jobs prior to the ninth day of June, 1982, and who only apply for temporary jobs;

d. Substitute service personnel in order of accrued seniority; and

e. New service personnel.¹²

If a service personnel employee with the greatest length of service is not given an opportunity for a position in this category, the board upon request from said employee must show why he or she was not awarded the job.¹³

4. Verbal offer of position to the candidate by county superintendent or his designee subject to board confirmation.

5. Verbal acceptance by the candidate.

6. Usually the county superintendent nominates candidate to the board of education for approval; however, as previously indicated the board may employ service personnel without the superintendent's recommendation.

7. Approval or rejection of the applicant's employment by the board.

8. Issuing of the prescribed written contract which has been duly signed by the board president and secretary (superintendent);¹⁴

9. Within thirty days of receipt of the contract, the service employee must return the signed contract to the county board of education secretary.¹⁵

Special Conditions of Employment

All school personnel must have an approved tuberculin test at the time of their initial employment and thereafter once every two years or more frequently if medically indicated. Positive reactors to the skin test must be immediately referred to a physician for evaluation, treatment, or further study. According to state statute, personnel found to have tuberculosis in a communicable stage shall have their employment discontinued or suspended until the disease has been arrested or is no longer communicable. School personnel who have not had the required examination must be suspended from their employment until reports of an examination are confirmed.¹⁶

However, the United States Supreme Court has upheld a decision of the U.S. Court of Appeals, Eleventh Circuit, in Arline v. School Board of Nassau County which ruled that school districts are subject to the provisions of Section 504 of the Rehabilitation Act of 1973. This law provides that

handicapped employees be given "reasonable accommodation" by their employer. The court said that these provisions apply to teachers who have tuberculosis.¹⁷

In the event a physical or medical examination is required by the board of education as a condition of employment, the cost of such an examination must be paid in full by the employer.¹⁸

Before entering the performance of his duties, the county superintendent of schools must file with the president of the board a health certificate from a reputable physician certifying that he is physically fit for the duties of the office and that he has no infectious or contagious disease.¹⁹

All school bus operators must be certified annually by the West Virginia Department of Public Safety and the State Department of Education by passing a comprehensive physical and written examination. Any school bus operator over fifty years of age must also pass semi-annual physical examinations.²⁰

It is not necessary for an applicant for the position of the county superintendent to be a resident of the county at the time of making application for the position. Likewise, there is no residency requirement prior to the appointment. However, during his term of office a superintendent must be a bona fide resident and a qualified voter in the county where he serves.²¹

It is unlawful for any member of a board of education, superintendent, supervisor, principal or teacher to become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service in which he may have any voice, influence, or control.²² The purpose of this section of the code is to prevent a situation where the private interest of a public officer or employee might conflict with his duty to serve the interests of the public.²³

However, it is lawful to employ the spouse of any board member, officer, secretary, supervisor, superintendent, principal, teacher, or service personnel in service employee or professional positions outside the central office.²⁴ In West Virginia Education Association v. Preston County Board of Education, however, the West Virginia Supreme Court of Appeals ruled that a county superintendent who nominates his wife for employment in a central office administrative position in the county where he is serving as superintendent violates criminal statute against self-dealing and nepotism.²⁵

Discrimination and Employment

In recent years, state and federal agencies have attempted to protect employees of school districts from arbitrary, capricious, political, and discriminatory actions against them by boards of education and school officials. This does not imply, however, that school officials and

boards of education are powerless to take actions against school personnel. When actions are taken, these actions must follow prescribed procedures of due process and must be based on provable, education-related circumstances.²⁶

School officials and boards of education are bound by state law in all matters of employment. Additional safeguards are also offered through policies, rules and regulations prescribed by the West Virginia Board of Education and certain federal agencies.²⁷

West Virginia Board of Education Policy 5300 contains many due process rights, both procedural and substantive, which affect school personnel. Among rights granted are to:

1. meet together and form associations;
2. make suggestions to county boards of education;
3. attend board of education meetings without the fear of reprisal;
4. have personnel actions be based upon an honest evaluation of job performance;
5. have procedures available to employees for contesting personnel actions; and
6. have a process available for filing employee grievances.²⁸

In 1985, the West Virginia Legislature enacted a state-wide grievance law which established a procedure that em-

ployees of the board of regents, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers are to follow when seeking the resolution of a grievance.²⁹ A detailed description of this process is contained in chapter 3.

Public school employees in West Virginia are also accorded certain protections from discrimination by federal law. Among these laws are:

1. The Civil Rights Act of 1871 (42 United States Code 1983)

This law makes liable persons representing the state (e.g. school board members) who under "color of the law" violate a person's constitutional or statutory rights.³⁰

2. The Civil Rights Act of 1964, Title VII (42 United States Code 2000(e))

This law prohibits discrimination in employment practices. Section 703(a) in part states that:

It shall be an unlawful employment practice for an employer (1) . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, re-

ligion, sex, or national origin. (42 United States Code 2000(e))

This law is enforced by the Equal Opportunity Employment Commission.³¹

3. Education Amendments of 1972, Title IX (20 United States Code 1681)

In general, Title IX prohibits discrimination on the basis of sex as it applies to access to federally funded education programs.³² Section 901 of this law states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." (20 United States Code 1681, Title IX) The United States Department of Education is charged with the responsibility of enforcing these provisions.³³

Most employment discrimination cases are brought under Title VII of the Civil Rights Act of 1964. This law prohibits discrimination in employment based on a person's race, color, religion, sex, or national origin. Discrimination on the basis of age for individuals above the age of forty is prohibited by the federal Age Discrimination in Employment Act and discrimination against otherwise qualified handicapped individuals is prohibited by Section 504 of the Rehabili-

tation Act of 1973. Of the two types of Title VII cases, those alleging discriminatory treatment are more common than those alleging that an action or policy has a discriminatory effect on a protected class of persons.³⁴

West Virginia school administrators are required not only to comply with federal statutes and related court decisions, but also to comply with the provisions of the 1961 West Virginia Human Rights Act. This statute prohibits discrimination in employment, housing, and public accommodations. This act prohibits employer discrimination against an individual with reference to job advertising, pre-employment inquiries, hiring, classification, transfers, promotion, demotion, tenure, salary, and other terms, conditions, and privileges related to employment.³⁵ The West Virginia Human Rights Commission has the responsibility of enforcing the provisions of this law.³⁶

Due Process

No person can be deprived of life, liberty, or property without the due process of law. This right is guaranteed by both the Fifth and Fourteenth Amendments of the United States Constitution.³⁷ The origin of this concept can be traced back to the Magna Carta which contained a promise that "no freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or

prosecute him, except by the lawful judgement of his peers and by the law of the land."³⁸

The Fifth Amendment to the United States Constitution, adopted as a part of the Bill of Rights of 1791, provides, ". . . nor shall any person be . . . deprived of life, liberty, or property without due process of law."³⁹ Section One of the Fourteenth Amendment, passed in 1868, extends these due process requirements to each of the states:

[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.⁴⁰

Actions of public school authorities in their official capacity are considered in law to be as actions of the state. Since these are actions of the state, they are controlled by the Fourteenth Amendment.⁴¹

Comparable rights are also guaranteed by the Constitution of West Virginia to all of its citizens: "No person shall be deprived of life, liberty, or property, without due process of law and the judgement of his peers."⁴²

Due process is generally comprised of two separate but related legal principles. These are substantive due process and procedural due process. Before a person is entitled to procedural due process, he must have a substantive right to due process.⁴³

Substantive Due Process

Substantive due process provides for broad protections for individuals to preclude the government's infringement on individual rights. The Supreme Court has relied on such broad applications to hold that substantive due process provisions of the Fifth Amendment apply the same restrictions to the federal government as the "equal protection clause" places on state government.⁴⁴

Under substantive due process, a statute, policy, or regulation must not deprive an employee of a fundamental liberty or property right. A statute, policy, or regulation must have a clear purpose which is within the scope of the power of the government to pursue.⁴⁵

In 1923 the Supreme Court defined due process of law as possessing "substantive" protections in Adkins v. Children's Hospital. In Adkins, the Court held that the right to contract is part of the "liberty" that is protected by Amendment V of the United States Constitution. Statutes, regulations, or policies which are contrary to the provisions of the Constitution will be deemed invalid and struck down.⁴⁶

During this same year in Meyer v. Nebraska, the Supreme Court related the substantive protection to education when it held unconstitutional a Nebraska statute forbidding the teaching of foreign language in public or private schools below the eighth grade. The court held that restriction of

a teacher's right to teach a foreign language was an interference with a property right and the liberty right of the parents to engage the teacher to instruct their children.⁴⁷ With this decision, the Supreme Court acknowledged the substantive protections covering life, liberty and property as well as extending these protections to a person's right of education, travel, and appearance. Substantive due process rights generally involve the First Amendment freedoms of religion, speech, press, and assembly.⁴⁸

A frequently cited Supreme Court case dealing with free speech and employee substantive due process rights is Pickering v. Board of Education, 1968. Pickering argued that his exercise of freedom of speech had been abridged when he was dismissed for sending a local newspaper a letter which was critical of the way the school superintendent and the board had handled previous proposals to raise revenue for the school system. In holding for the teacher, the high court stated that Pickering had made erroneous public statements which were critical of his employer, but

. . . which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teacher opportunities to contribute to the public debate is not significantly greater than its interests in limiting a similar contribution by any member of the general public.⁴⁹

The problem, according to the Court, is to arrive at a balance between the rights of the teacher, as a citizen, and the interests of the state, as an employer, in promoting the efficiency of the services it performs through its employees. In Connick v. Myers the United States Supreme Court held that when employee freedom of speech cannot be considered as relating to matters of political, social, or other legitimate concerns to the community, government officials may exercise wide latitude in managing their offices or organizations without fear of intrusive oversight by the courts in the name of the First Amendment.⁵⁰

A 1979 Supreme Court case, Givhan v. Western Line Consolidated School District, involving a teacher who had been dismissed for allegedly making "petty and unreasonable" demands during a private conversation with her supervising principal also illustrates the "freedom of speech" right of employees. In reversing the judgment of the Court of Appeals of the Fifth Circuit, the Supreme Court stated:

The First Amendment forbids abridgement of 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than spread his views before the public.⁵¹

In a West Virginia case, Gooden v. Board of Appeals of the West Virginia Department of Public Safety, a state trooper was discharged following a public speech in which he was critical of the administration of the Department of Pub-

lic Safety. The West Virginia Supreme Court of Appeals held that Gooden had a constitutionally protected right to "free speech." The court ruled that the regulations of the Department of Public Safety which prohibited disrespect, public criticism of members of the Department, and public speeches concerning policies of the Department were unconstitutionally vague and overbroad in their restriction of constitutionally protected speech and were therefore in violation of the First and Fourteenth Amendments to the United States Constitution. Any regulation pertaining to public employees must recognize such rights and strike a happy balance between the interests of such employees, as citizens commenting on matters and issues of public concern, and the interests of the state in promoting efficiency in its affairs.⁵²

Procedural Due Process

The due process clause of the Fourteenth Amendment provides: "nor shall any [s]tate deprive any person of life, liberty, or property without due process of law."⁵³ This clause depends upon the identification of a "liberty" or "property" interest that is being infringed upon. Due process requires that neither of these rights can be deprived without procedural fairness and substantive rationality.⁵⁴

In 1972, in Board of Regents of State College v. Roth, the Supreme Court rejected the argument that an individual's

employment with government is per se a "property" or "liberty" right. Property rights are not created by the United States Constitution. They are created and defined by rules and understandings that arise from an independent source such as state laws. Until an employee has a legally protectable interest under state law, a school district may discharge the employee without violating individual procedural due process rights.⁵⁵

With respect to "liberty rights" the Court in Roth stated:

Without doubt, it denotes not mere freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.⁵⁶

To establish a liberty interest an employee must show that his governmental employer has brought untrue charges against him that could seriously damage his standing and associations in his community, or cause a stigma or other disability that precludes freedom to take advantage of other employment opportunities. The employee must show that the employer has made, or is likely to make, the stigmatizing charges public, without giving him an opportunity to clear his name.⁵⁷

In Perry v. Sindermann, the Court ruled that a non-tenured faculty member who was not reemployed had a property interest since the college where he was employed had a policy

statement indicating that "The administration of the college wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory. . . ." By showing an implied property interest, Sindermann was entitled to procedural due process.⁵⁸

In Waite v. Civil Service Commission, the suspension of a civil service classified employee was examined with respect to the general rule for due process protection. The West Virginia Supreme Court of Appeals in this case enunciated the following standards for considering the extent to which due process protection is afforded where a deprivation of property interest is sought includes:

1. the private interests that will be affected by the official action;
2. the risk of an erroneous deprivation of a property interest by the procedures used, and the potential value of additional or substitute procedural safeguards; and,
3. the government's interest, including the fiscal and financial burdens that the additional or substitute procedural requirement would entail.⁵⁹

The United States Supreme Court has held that procedural due process is a matter of "fair play" which encompasses different rules in different factual situations and different

kinds of proceedings.⁶⁰ Likewise, the West Virginia Supreme Court of Appeals, in a 1977 decision, set forth three basic principles of procedural due process:

First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.⁶¹

In North v. Board of Regents, 1977, the same West Virginia Court held that standard due process procedures require the following:

. . . a formal written notice of charges; sufficient opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence in his own behalf; an unbiased tribunal; and an adequate record of the proceedings.⁶²

According to McNeel, "most authorities include only four primary elements of procedural due process: proper notice, opportunity to be heard, judgment by an impartial tribunal, and opportunity for appeal."⁶³

Proper notice. In order to comply with the Constitution's procedural due process requirement, it is essential that those against whom adverse employment decisions are being contemplated receive actual notice of the charges.⁶⁴ The notice must be sufficiently explicit to allow for preparation of a defense.⁶⁵

In Greene v. Board of Education, the West Virginia Supreme Court of Appeals held that a teacher could not be dis-

missed without the filing of written charges of sufficient detail to inform him of the particulars upon which the charges were based.⁶⁶

West Virginia school law requires different methods of notification for the various kinds of adverse actions. Some sections of the state code simply require that the employee be notified in writing a prescribed number of days in advance of a hearing or opportunity for a hearing. Other sections require that written notification be sent by certified mail, return receipt requested. According to McNeel, most suspension and dismissal proceeding notices must be "served" upon the employee.⁶⁷ The State Superintendent of Schools has advised that "served" generally means that the notice should be delivered by an officer who is authorized by law to serve legal papers within the county where the employee resides. This function is usually performed by the county sheriff's office.⁶⁸

A reasonable amount of time should be provided between receipt of the notice by the employee and the actual hearing. In cases involving hearings concerning transfers or nonrenewal of employment contract, ten days notice must be given. Where issues of suspension or dismissal are involved, a two-day notice is required prior to presenting the charges to the board. The affected employee then has five days to request a Level IV hearing and appeal.⁶⁹

In cases involving a dispute or controversy between the county board of education and any county board employee, with the exception of the superintendent, associate superintendent, or assistant superintendent, which involve transfer, suspension, dismissal, assignment, grievance, salary, termination of contract, job classification, or any other like matter, the employee is entitled to the reimbursement for attorney fees and court reporter costs as described by code.⁷⁰

When the controversy involves issues of assignment, transfer, or nonrenewal of an employment contract, the employee has the right to request a hearing before the board. Such hearing must be held at the next regularly scheduled board meeting or at a special meeting to be held within thirty days of the request.⁷¹ In issues involving suspension or dismissal, the affected employee may within five days of receipt of the written charges request in writing a Level IV hearing and appeal.⁷²

In disputes involving grievance, salary, job classification, or similar issues, the employee must utilize the employee grievance procedure. When an employee institutes a proceeding against the board or appeals the decision of a hearings examiner in circuit court or the supreme court of appeals and substantially prevails, the board shall be liable for court costs and reasonable attorney fees not to exceed one thousand dollars for administrative hearings and circuit

court proceedings and an additional one thousand dollars for the supreme court proceedings.⁷³

Opportunity to be heard. In Grannis v. Ordean, the United States Supreme Court stated, "The fundamental requisite of due process of law is the opportunity to be heard."⁷⁴ Such a hearing is the fundamental core of procedural due process since it provides the employee with an opportunity to refute charges or to show that they do not constitute grounds for the pending action.⁷⁵

A 1985 case, Cleveland Board of Education v. Loudermill, the Supreme Court made clear that "the 'root requirement' of the [d]ue [p]rocess [c]lause" involves giving an individual an opportunity for a hearing before he is deprived of any significant property interest.⁷⁶

In a 1984 case, Vail v. Board of Education, the United States Supreme Court affirmed a Seventh Circuit opinion holding that a nontenured athletic director who had been given a promise of a two-year employment contract was deprived of his property without due process of law when the school board did not renew his contract for the second year without giving him notice of the reasons or an opportunity to have a hearing."⁷⁷

In West Virginia, however, school boards usually conduct employee hearings. An exception would be a Level II employee grievance which would be heard by the Superintendent or his

designee. If the issue is not solved to the satisfaction of the parties involved, a Level III hearing is held by the local board. Hearings involving possible assignment, transfer, or promotion skip Level II and go directly to a Level III board hearing. Hearings at Level III are usually conducted by the president of the board in closed session unless an open hearing is requested by the employee. Issues involving suspension or dismissal, another exception, are appealed directly to a Level IV Hearing Examiner.⁷⁹

In Goldberg v. Kelly, the United States Supreme Court set forth some procedural safeguards to provide an employee with an adequate opportunity to state his case. The employee has the right to:

1. personally appear and to have adequate counsel present.
2. adequate opportunity to defend himself, including a chance to present oral evidence, witnesses, and arguments.
3. sufficient opportunity to confront and cross-examine witnesses.
4. only evidence which pertains to the charges being presented.
5. a decision based solely on the evidence presented during the hearing.

6. a decision rendered in writing, stating reasons for the decision and the evidence upon which it is based.⁸⁰

Impartial tribunal. West Virginia school law allows school boards to conduct hearings, bring charges, hear evidence, and pass judgment in personnel matters.⁸¹ In Hortonville, the United States Supreme Court held that the due process clause of the Fourteenth Amendment does not preclude boards of education from hearing cases and making decisions on such issues as personnel termination or dismissal for cause.⁸²

It is seldom possible for an employee to show that a school board member prejudged the defending party. However, instances where board members have been personally involved in the elements of an issue or other unique aspects of a case, where there has been ample opportunity to predispose the judgment of a board or individual members, these could place the decision at risk.⁸³

Administrative and judicial review. In West Virginia an employee grievance process was established by an act of the state legislature in 1985. The purpose for this procedure is to provide employees of the board of regents, state board of education, regional educational service agencies and multi-county vocational centers and employer(s) or agents with an avenue to resolve problems which arise during the

performance of their duties. "This procedure is intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level. . . ."

⁸⁴ This process involves basically four procedural levels: Level I, the employee's immediate supervisor; Level II, the county superintendent or his designee; Level III, the county board of education; and finally, Level IV, a regional hearing examiner. In levels II, III, and IV formal hearings are conducted to provide the parties involved an opportunity to present evidence, take testimony, and present other information germane to the resolution of the grievance. Parties who wish to appeal the decision of the Level IV examiner may do so through circuit court and ultimately the State Supreme Court of Appeals. In the absence of an appeal of a Level IV decision within thirty days of receipt of the decision, the decision of the hearing examiner is final and binding upon the parties and is enforceable in circuit court.⁸⁵ Board actions involving suspension or dismissal of school personnel may be appealed directly to Level IV.⁸⁶ Notice and hearing requirements demand strict compliance with laws safeguarding employee rights.⁸⁷ County Boards of Education must also comply with all aspects of West Virginia Board of Education Policy 5300(6)(a) regarding employee evaluation and due process.⁸⁸

If federal constitutional issues are involved, the employee, after exhausting other available remedies, may seek redress in the federal courts.⁸⁹

Certification of Professional Personnel

A certificate is a license granted by the state to pursue the profession of teaching. Each state has plenary power over teaching certificates. A teacher's certificate is not a property right; it is a document which indicates that the holder has met all the legal requirements to practice the profession of teaching within the state where he holds certification. A teaching certificate is a privilege conferred by the state and is subject to any laws in force at the time of its issuance or any future law which provides for its forfeiture.⁹⁰ In order to enter into a contractual relationship with a board of education in the state of West Virginia a prospective professional staff member must hold valid West Virginia certification in the area(s) required by the position.⁹¹

A teaching certificate will not be granted to any person who is not a citizen of the United States, is not of good moral character and physically, mentally or emotionally qualified to perform the duties of a teacher and has not attained the age of 18 years of age on or before the first day of October of the year in which his certificate is to be is-

sued. But, an exchange teacher from a foreign country, or an alien who meets the requirements to teach and who has filed a declaration of intention to become a naturalized citizen of this country may be granted a permit to teach.⁹²

The authority to issue certificates in West Virginia is vested with the State Superintendent of Schools in accordance with standards and requirements approved by the State Board of Education. Certificates authorized to be issued include:

1. Professional teaching certificate. A professional certificate for teaching in the public schools may be issued to a person who has completed the requirements for a bachelor's degree from an accredited institution of higher education. The certificate shall be endorsed to indicate the grade levels or areas of specialization in which the person is licensed to teach or serve in the schools. The initial professional certificate is a provisional one valid for a three year period. This certificate may be converted to a valid five year certificate provided (1) the applicant completes three years of appropriate teaching experience; (2) is recommended as a successful teacher by the employing county superintendent; (3) completes six semester hours of appropriate certificate renewal credit. The holder of a five-year certificate may be issued a permanent one at the expiration of the second renewal or the completion of a master's degree and five years of teaching experience.⁹³

2. Professional administrative certificate. A professional administrative certificate endorsed for serving as an administrator in the West Virginia public schools may be issued to a person who has completed requirements for a master's degree in an institution of higher education accredited to offer such a degree. The initial three-year certificate may be converted to a five-year certificate after three years of successful experience as an administrator in the area of endorsement (principal, supervisor of instruction, superintendent) and the completion of six semester hours of approved course work. A permanent professional administrators certificate may be issued after the completion of an additional approved program of study beyond the master's degree and the completion of at least three years of successful administrative experience in the area of endorsement.⁹⁴

3. Other certificates and permits. Other certificates and permits may be issued, subject to state board requirements and approval, to persons who do not qualify for a professional certificate.⁹⁵

In three separate opinions, the West Virginia Attorney General has held that only the Legislature has the authority to increase the requirements beyond a bachelor's degree for the initial teaching certificate or the master's degree for the initial professional administrative certificate.⁹⁶ A county board of education may, however, establish additional requirements that may be used in the selection of its pro-

fessional staff.⁹⁷ Under authority granted by state statute, the State Board of Education also issues a "professional service certificate" for social workers, audiologists, psychologists, and specialists in communications disorders.

In West Virginia, if a teacher is employed in good faith with the anticipation that he is eligible for certification and it is later ascertained that he is not eligible, the State Superintendent of Schools may authorize the payment by the county board of education of up to three school months salary or the date of notification of ineligibility, whichever comes first.⁹⁸

Interstate Reciprocity. West Virginia participates in the Interstate Certification Compact organized to ". . . facilitate the movement of teachers and other professional educational personnel among the states party to it, and to authorize specific interstate educational personnel contracts to achieve that end."⁹⁹ The West Virginia State Superintendent of Schools is authorized to enter into a contract only with states in which he finds programs of education, certification standards, or other acceptable qualifications which are comparable to those currently prevailing in West Virginia.¹⁰⁰

West Virginia has the following certification reciprocity agreements:

1. Teaching Certificates. Reciprocity agreements for teaching certificates now exist with Alabama, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, District of Columbia, and Overseas Dependent Schools.

2. Administrative Certificates. Agreements for reciprocity of experienced administrators presently exist with Alabama, Connecticut, Delaware, Hawaii, Massachusetts, New Hampshire, New York, North Carolina, Rhode Island, South Carolina, South Dakota, Utah, Vermont, and Overseas Dependent Schools.

3. Support Personnel Certificates. Contracts of reciprocity for experienced support personnel currently are in effect with the same states covered by the administrative certificate (item 2).

4. Vocational Teaching Certificates. Reciprocity agreements for experienced teachers holding vocational teacher certification are in effect with Connecticut, Hawaii, New Hampshire, New York, North Carolina, Rhode Island, South Carolina, Utah, Vermont, and Overseas Dependent Schools.¹⁰¹

Revocation of Certificates. Most state statutes provide for the revocation and suspension of certificates by the author-

ity which issues them.¹⁰² In West Virginia the State Superintendent of Schools has the authority to revoke teaching certificates for drunkenness, untruthfulness, immorality, or for any physical, mental or moral defect which would render the teacher unfit for the performance of his duties, or for neglect of duty or refusal to perform this duty, or for using fraudulent, unapproved, or insufficient credit, or for any other cause which would have justified the withholding of a certificate.¹⁰³ It is the duty of any county superintendent of schools who knows of any such immorality or neglect of duty to report this to the state superintendent of schools.¹⁰⁴

It is generally agreed that when a state statute authorizes revocation of certificates for stated causes, a certificate cannot be revoked for any other reason.¹⁰⁵ In West Virginia during the past five years, only six teaching certificates have been revoked: one for immorality, one for welfare fraud, and four for other reasons stated as cause by statute.¹⁰⁶

Classification of Service Personnel

Enactments of the 1975 and 1977 West Virginia Legislature require that all non-certified county board of education employees be classified with an appropriate class title. A total of seventy-five class titles with appropriate job de-

scriptions have been established by the Legislature including accountants, aides, carpenters, bus operators, cooks, secretaries, maintenance positions, mechanics, supervisors of food service, transportation, and several other similar miscellaneous titles.¹⁰⁷ West Virginia statute also authorizes the State Board of Education to establish class titles with job descriptions for other service personnel positions not listed in this section.¹⁰⁸

All service personnel employed by a county board of education are to be classified and paid in accordance with this law regardless of the source of the funds from which they are paid.¹⁰⁹ A complete listing of all approved class title and job descriptions of service personnel is contained in Section 18A-4-8 of the West Virginia Code.

Employment Contracts

County boards of education in the State of West Virginia are quasi-public corporations¹¹⁰ which may sue and be sued, plead and be impleaded, be contracted with and contract.¹¹¹ A board of education is a continuing corporate entity which does not change as its members change; once valid contracts are made, they are binding upon the board even though its succeeding officers may disapprove or attempt to nullify them.¹¹² Thus, as stated in an early West Virginia case, ". . . the contracts made by the board are corporate in charac-

ter, not the contracts of individuals who then constituted the board."¹¹³

In West Virginia the use of a contract formalizes the relationship between an employee and the board of education. Before entering their duties, all teachers and service personnel must execute a written contract with their board of education.¹¹⁴

Contractual obligations are considered of paramount significance as evidenced by Article I, Section 10 of the Constitution of the United States which states, "No state shall . . . pass any bill . . . or law impairing the obligation of contracts."¹¹⁵ This is of particular importance since employee contracts are governed by the general rules of contract law, except where modified by statute or limited by constitutional mandates.¹¹⁶

A contract is "a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."¹¹⁷ Contracts may be either unilateral or bilateral. A unilateral contract is "one in which there is a promise on one side only, the consideration on the other side being executed."¹¹⁸ A bilateral or two-sided contract is "one where each party is both a promisor as to his own promise and a promisee as to the other's promise."¹¹⁹ Contracts between boards of education and their employees are bilateral because the contract agreement consists of mutual promises made in exchange for some service

or consideration by each of the contracting parties. The employee's employment contract is an agreement whereby the services of the employee are stipulated to be given over a specified period of time in return for consideration (salary and fringe benefits).¹²⁰

Under common law, contracts contain five essential elements, the absence of any one of which renders the contract null and void. These elements are:

1. The contract must be between competent parties.
2. The contract must be based on mutual assent.
3. The contract must contain valid consideration.
4. The contract must contain rights and liabilities sufficiently definite enough to be enforceable.
5. The contract must be in a form required by law and not contain any components which are prohibited by common law or statute.¹²¹

In order to meet the requirements of legal competency, neither party can be prohibited by law from making the contract and must likewise be eligible to contract.¹²² In West Virginia, public school employees must meet the requirements as to citizenship, age, training, degree, certification, etc., which have been imposed by statute and/or local board of education policy.¹²³

Before a contract can result there must be a "meeting of the minds" resulting in mutual assent on the bargain at the same time on the same terms. In contract law this is called an offer and acceptance.¹²⁴

In order for a contract to be valid it must provide for consideration on the part of both parties, being either a benefit of some kind to the promisor, or a detriment to the promisee.¹²⁵ In an early West Virginia case it was noted that the cash value of the benefit or detriment is irrelevant to the courts, but a fixed sum must be written in the contract. Thus, a contract between a board of education and an employee must contain a fixed salary in order to be enforceable.¹²⁶

A contract in order to be enforceable must be written in definite terms. For example, a teaching contract which does not expressly state components such as salary or the nature of the services to be provided is too indefinite to be legally valid.¹²⁷ Contracts for school personnel in West Virginia should include such details as length of contract, job assignment, and job title/classification.¹²⁸

In West Virginia, contracts with professional¹²⁹ and service personnel¹³⁰ must be in writing and be a matter of the official board record. Professional personnel contracts must be in a form prescribed by the State Superintendent of Schools.¹³¹ Contracts with service personnel must be in the form prescribed by West Virginia Code.¹³²

In 1977 the West Virginia Supreme Court of Appeals in Powell v. Brown first acknowledged that the rules and regulations of the State Board of Education have the authority of law. The court cited that the state constitution and legislative enactments have vested the authority in the State Board of Education to provide "general supervision" of the state's free school system.¹³³ It was further declared that an administrative body must abide by the remedies and procedures that it legally establishes to conduct its affairs. The fact that these may at times be beyond statutory or constitutional requirements does not preclude an employee from availing himself of the rights provided by these regulations.¹³⁴

In West Virginia, there are basically two types of employment contracts: probationary and continuing. Since similar statutes govern contracts for both professional and service personnel, both of these will be discussed together.

Probationary Contracts

In West Virginia both professional and service personnel are issued one-year probationary contracts during their first three years of service within a county school system. Annual reemployment during this three year period is based upon an employee's satisfactory performance of his duties.¹³⁵ After three consecutive years of satisfactory probationary employ-

ment, professional personnel holding a professional certificate based upon at least a bachelor's degree are granted a continuing contract. Professional personnel who previously held a continuing contract with another county within the state will receive a continuing contract after one year of satisfactory probationary service if such employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year.¹³⁶ Service personnel employees are likewise granted a continuing contract after three consecutive years of acceptable probationary employment within the county or one year of acceptable employment if he previously held a continuing contract in another county within the state as provided by statute.¹³⁷ Substitute professional and service personnel are not issued probationary contracts. Rather, they are issued a contract that covers only the period of time in which they will serve in this temporary capacity.¹³⁸

All probationary school employees in West Virginia are afforded substantive and procedural due process protections in cases of nonreemployment. The West Virginia Code provides that:

The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall at this same meeting also act upon the retention of other probationary employees. . . . Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified

in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their not having been recommended for rehiring.

Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.¹³⁹

Reasons for nonreemployment shown by the board must not be arbitrary, capricious, or unreasonable.¹⁴⁰ Further, policy of the West Virginia Board of Education as affirmed in numerous court cases such as Jawa v. Board of Education, Lipan v. Board of Education, Wilt v. Flanigan, and Wren v. Board of Education provides specific guidelines which must be followed:

Every employee is entitled to know how well he/she is performing his/her job, and should be offered the opportunity of open and honest evaluation of his/her performance on a regular basis. Any decision concerning promotion, demotion, transfer, or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his/her job performance, prior to the terminating or transferring of his/her services, and can only do so with the assistance of regular evaluation. It is recognized that every employee is entitled to due process in matters affecting his/her employment, transfer, demotion or promotion.¹⁴¹

In Wilt v. Flanigan, the West Virginia Supreme Court of Appeals held that a county board of education's policy entitling every employee to the right to know how well he has

performed in his job and to be given the opportunity to an open and honest evaluation of job performance must be strictly observed. In this case, Wilt, a probationary teacher had not been afforded this opportunity; consequently, the court ruled that she was to be reinstated to her former position and be given an open and fair opportunity to prove her competence as a teacher. Thus, boards of education must have valid reasons for discharging an employee.¹⁴²

In Wren v. Board of Education, a McDowell County school psychologist was not rehired after three years of employment in the schools of that county. During his first two years of employment, Wren had not been given evaluations of his performance. During his third year of employment he received three negative evaluations. The State Supreme Court of Appeals ruled that Wren could not be dismissed since he had not been given sufficient opportunity to improve his performance during the course of his employment.¹⁴³

It should be noted that probationary employees have essentially the same rights as do persons holding continuing contracts. In matters of transfer, assignment, demotion, suspension, dismissal, and other employment practices, probationary personnel cannot be treated differently than tenured employees.¹⁴⁴

Continuing Contracts and Tenure

Tenure is often called the most familiar of teachers' rights. It is the main guarantor of job security. Its primary purpose is to protect teachers from arbitrary harassment by the public or the board of education. Tenure is a means for insulating the teacher from gross forms of political pressure and other unfair treatment.¹⁴⁵

Tenure laws protect teachers by specifying the legal causes for dismissal of staff with continuing appointments and by specifying the procedures that govern the dismissal process.¹⁴⁶

A tenure law has been defined by Nolte and Linn as a statute that provides for continuing employment of a teacher or employee who has acquired tenure status, provided the service being rendered remains satisfactory, and which also contains a specified procedure to be followed in the event of just cause for dismissal.¹⁴⁷

Although the term tenure does not appear in West Virginia statutes, school personnel do acquire tenure. State law provides that after completion of three years of acceptable employment, a continuing contract will be issued to the employee. In order to be eligible to receive a continuing contract, teachers must hold a bachelor's degree and a valid professional teaching certificate. A continuing contract shall remain in full force and effect until modified by mu-

tual consent of the school board and the employee or until terminated for just cause as provided by statute.¹⁴⁸

In order to receive a continuing contract, an employee must have satisfactorily served a probationary period of three consecutive years in the county where he is employed. Except, an employee who was previously granted a continuing contract in any county within the state shall be granted a continuing contract after one year of satisfactory employment in any other county if such employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year.¹⁴⁹

County boards of education may provide released time to a teacher for any special professional or governmental assignment without jeopardizing any contractual rights, privileges, or benefits of the teacher.¹⁵⁰ Further, a board may grant unpaid leaves of absence for extended illnesses, maternity purposes, professional training and development, or for other causes authorized or approved by the board.¹⁵¹ Any teacher who is returning from an approved leave of absence of less than one year shall be restored to the same position or duties held prior to the approved absence. Such teacher shall retain all seniority, rights and privileges which the employee had accrued at the time the leave was approved and shall also have all the rights and privileges accorded teachers at the time of reemployment.¹⁵² Present state law

does not provide for paid sabbatical leaves for public school employees.

A county board of education may approve the attendance of employees at educational conventions, conferences, and other professional meetings on school days. Attendance at such meetings may be substituted for an equal amount of employment and personnel attending these approved meetings shall not suffer any loss of pay. The board is also authorized to pay any or all expenses related to these approved activities.¹⁵³

Employees who hold a continuing contract do not need to be reemployed annually. In West Virginia the tenured public school employee is entitled to a continuing contract which is subject to termination only for causes contained in the state code.¹⁵⁴

Administrative Tenure Rights

The West Virginia Code does not grant school administrators such as principals, supervisors, directors, and assistant superintendents tenure. However, West Virginia Board of Education Policy 5300 states that

. . . every employee is entitled to the opportunity of improving his/her job performance prior to terminating or transferring of his/her services and can only do so with the assistance of regular evaluation. It is recognized that every employee is entitled to due process in matters affecting his/her employment, transfer, demotion or promotion.¹⁵⁵

The West Virginia Supreme Court of Appeals has repeatedly reiterated that every school system employee is entitled to these protections.

In Trimboli v. Board of Education, this court held that a central office Director of Federal Programs could not be demoted to a classroom teaching position without first being given regular performance evaluations and an adequate opportunity to improve prior to his demotion. In effect, the Court stated that all employees regardless of their statutory classification are given protection against arbitrary demotion, transfer, or discharge. Further, county boards of education are compelled to follow state board of education policies which prescribe these safeguards for all public school employees.¹⁵⁶

The State Supreme Court reaffirmed the Trimboli position in Morgan v. Board of Education. In this case four Wyoming County central office administrators were placed on the transfer and reassignment list without first being given notice and an opportunity for a hearing before the board of education as required by state law. The justification for this action given by the superintendent was that the federal Title I Project for the next fiscal year had not yet been approved by the state department of education and that he wished to reorganize his administrative staff to provide greater emphasis on the area of elementary education. The evidence presented in the case showed that the transfer list

containing these reassignments had already been officially acted upon by the county board of education prior to any notice of such pending action to the employees. A hearing was held subsequent to the board action. The court held that "school personnel laws are to be strictly construed in favor of personnel, and regulations and statutes for their protection, carefully complied with." In effect, the court ruled that since these employees had not received proper notice and an opportunity to have a hearing before the board prior to the transfer action, a hearing after board action was not in compliance with the statutory requirement.¹⁵⁷

In a 1981 case, Mason County Board of Education v. State Superintendent of Schools, involving a high school principal who had been dismissed for incompetency, the West Virginia State Supreme Court of Appeals ruled that the board of education had acted illegally by taking such action prior to giving the employee an opportunity to improve his job performance as required by State Board of Education Policy 5300 (5)(a).¹⁵⁸

Again in 1983, the State Supreme Court held that a Mingo County high school principal whose job performance had never been evaluated could not be dismissed on the grounds of insubordination and willful neglect of duty for giving students their grade cards two days in advance of the end of the school term. The court ruled that an error of judgment is not cause

for dismissal or suspension of an employee and that the board had been arbitrary and capricious in its actions.¹⁵⁹

In 1985 the State Supreme Court reaffirmed the importance of performance evaluations and proper due process for all school employees. In Smith v. Board of Education, a Logan County football coach had been dismissed from his coaching duties and reassigned to a teaching position without being given the required evaluations of his coaching performance and an opportunity to improve. The Court held that all public school employees, including coaches and other holders of extracurricular contracts, are afforded the protections against improper transfer, demotion, or dismissal contained in the West Virginia Code and state board of education policies.¹⁶⁰

In summary, the information reviewed appears to support the principle that administrators in West Virginia do have a form of "tenure." Although they may be reassigned to lesser positions at a lower salary, there must be just cause for this action. Administrators are accorded the same protections against arbitrary and capricious personnel actions as teachers and other school employees.

Extraduty Contracts

Extracurricular contracts, often called extraduty contracts, are made with employees in separate written agree-

ments. Generally, the law defines extracurricular activities "as school activities which occur at times other than regularly scheduled school hours." In order for this contract to be valid, the terms and conditions must be agreed to by the employee and approved by the board.¹⁶¹ In other words, an extraduty contract covers those activities or duties that a school employee agrees to perform which are above and beyond those covered by his regular contract and, in general, his regular working hours.¹⁶²

An opinion issued by the West Virginia Attorney General's Office in 1983 clearly reiterated that an employee cannot be forced to accept an extraduty contract as a condition to receiving his regular contract. Further, both positions must be advertised separately.¹⁶³

In Smith v. The Board of Education of Logan County, the West Virginia Supreme Court of Appeals ruled that before a coach can be relieved of his extracurricular position, he must be evaluated and given an improvement plan which is appropriate. In effect, state statutes and state and local personnel policies must be followed with respect to both holders of regular and extracurricular contracts.¹⁶⁴ "School personnel regulations and laws are to be strictly construed in favor of the employee."¹⁶⁵ In Hosaflook v. Nestor, this principle of law was again upheld.¹⁶⁶ Further, unsatisfactory performance in the duties of an extracurricular contract does

not have any effect upon one's continued employment under his regular contract.¹⁶⁷

Assignment and Transfer

The power to assign, transfer, promote, and demote public school personnel in West Virginia is given to the county superintendent of schools, subject to the approval of the county board of education.¹⁶⁸ However, in a McDowell County case involving the reassignment of a school psychologist, the Supreme Court held that such power must be exercised in the best interests of the efficient functioning of the school system and must not be of an arbitrary or capricious nature.¹⁶⁹

West Virginia school law is very specific in regard to the assignment of public school employees.

[A]n employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred. Any teacher or other employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May. At the hearing, the reasons for the proposed transfer must be shown.¹⁷⁰

As cited in Morgan v. Pizzino, this section requires notice and an opportunity for a hearing before the board prior to an employee's placement on a transfer or reassignment list is approved by a board of education.¹⁷¹

In addition, the county school superintendent shall, on or before the first Monday in May each year, furnish the local board with a list of teachers and other personnel to be considered for transfer and subsequent assignment for the next school year. All employees on the transfer list shall, within ten days following said board meeting, be notified by certified mail, return receipt requested, of the recommendations for transfer and his subsequent assignment, and the reasons therefore. All employees not listed on the approved transfer list shall be considered to be reassigned to the positions held at the time of this official meeting.¹⁷²

The provisions of the section of the West Virginia Code which requires a hearing upon notice of a transfer do not apply, however, where a school building becomes damaged beyond its use or destroyed through an unforeseeable act which necessitates a transfer of school personnel in order to continue the educational services to students.¹⁷³

Only the county superintendent of schools is empowered to place the name of an employee on the proposed personnel transfer list. Official board of education approval of this list is required before the proposed transfers can be effected.¹⁷⁴

A county board of education may not take action on the recommendations of the county superintendent of schools until an employee has been given the opportunity of a hearing before the board. In Linger, supra, the West Virginia Supreme Court of Appeals held that an employee must be given an opportunity to be heard before the board is legally authorized to accept the superintendent's recommendation and effectuate the transfer.¹⁷⁵

According to the State Superintendent of Schools a single hearing may meet both the statutory requirements and Linger, supra, if all of the essential issues involved in the employee's transfer are considered at the hearing. Generally, these would include removal from one's current assignment, the proposed transfer, and any other relevant matter. However, if this procedure is not followed, the employee must be given the opportunity for a separate hearing on each issue in the proposed transfer.¹⁷⁶

Public school employees in West Virginia do not have a vested right to teach or work in a particular assignment. In a case involving the transfer of a Tyler County teacher, the West Virginia State Supreme Court of Appeals said

. . . West Virginia Code . . . vests great discretion in the county superintendent and the county board of education to transfer and assign teachers to designated schools and this Court will not interfere with the exercise of that discretion where such action is taken in good faith for the benefit of the school system and is not arbitrary . . . the power of the county superintendent to transfer teachers must be exercised in a reasonable manner and in the best interests of the

schools. Arbitrary and capricious use of the power will not be permitted.¹⁷⁷

The State Superintendent of Schools recently issued an interpretation stating that a teacher can be rescheduled by the school principal from one position to another position within his school if the teacher is certified to teach in the licensure area of the other position, and if the teacher's assignment to the school is stated generally enough to allow him to teach in the other position. This interpretation further notes that this is a matter of rescheduling existing staff rather than a transfer of position; consequently, statutory requirements such as notification timelines and rights to hearings do not apply.¹⁷⁸

Three cases, Neal v. Board of Education, White v. Board of Education and Hawkins v. Board of Education clearly illustrate the kinds of actions which will not be tolerated by the courts relative to personnel transfers.

In the Neal case, the plaintiff had been reappointed to the position of principal at an elementary school in Putnam County. In mid-August he and forty-six other teachers and principals were transferred to other positions within the county. Although the transfers had been recommended by the county superintendent, one board member publicly stated that he was responsible for these transfers. In holding for the plaintiff, the court said:

The wholesale shifting of teachers on August twentieth is alone sufficient to shake the presumption

of good faith which is ordinarily accorded an official act . . . arbitrary or capricious use of this power will not be tolerated.¹⁷⁹

The White case provides a similar scenario. In this case when a new board of education took office on July one, a new county superintendent was employed and subsequently seventy-two teachers were transferred to different teaching positions. White and seven others brought charges in protest of their transfers, alleging that their contractual rights had been violated. In holding for the teachers, the court said that an employee ". . . cannot be transferred as a mere matter of expediency . . . for therein solemn contract rights have been intervened."¹⁸⁰

In the Hawkins case, the plaintiff, a tenured high school teacher, was transferred to another high school within Tyler County as a result of her refusing to continue to coach three sports in addition to her regular teaching duties for the upcoming school term. Hawkins alleged that her duties as a coach are extracurricular and should have no effect upon her primary contract as a teacher. The court held that the Tyler County Board of Education had been arbitrary and capricious in its actions by expecting a teacher to perform duties beyond her regular contract which place such an inordinate demand upon her stamina and planning time to the extent that her teaching performance could be impaired.¹⁸¹

It is also important to note that transfers agreed to by the employee, recommended by the superintendent, and ap-

proved by the county board of education may be made at any time. This option is provided by state code.¹⁸²

Suspension and Dismissal

Administrators have the right and responsibility to evaluate the performance and conduct of all school employees. All school personnel, however, have certain basic and contractual rights which must be safeguarded throughout the evaluation process. In order to balance the need to maintain an efficient and productive school system with the rights of individual employees, states have enacted laws which provide for the suspension or dismissal of school personnel based upon specific reasons. Although both tenured and nontenured personnel enjoy protections provided by state and federal laws, this does not eliminate the possibility of the suspension or termination of their services based upon "just cause."¹⁸³

The county superintendent of schools, subject to approval of the county board, has the authority to suspend school personnel and to recommend their dismissal; however, his right to suspend

. . . shall be temporary only pending a hearing upon charges filed by the superintendent with the county board of education and such period of suspension shall not exceed thirty days unless extended by order of the board.¹⁸⁴

Although the superintendent may recommend dismissal, the authority to dismiss personnel is vested in the county board of education. The board itself may, however, bring charges against employees for the purposes of suspension and dismissal.¹⁸⁵

According to state statute, any employee who may become subject to suspension or dismissal must be served in writing a statement of the charges within two days of presentation of said charges to the board. The employee who is so affected has five days within receiving such notice to request in writing a Level IV hearing before a hearing examiner.¹⁸⁶ Although in 1983 the West Virginia Legislature deleted the requirement of a hearing before the county board of education, the United States Supreme Court in Cleveland Board of Education v. Loudermill (1985), held that public employees must be given notice and an opportunity for a hearing before they may be dismissed for cause. Therefore, the State Superintendent of Schools recommends that school superintendents implement the following procedure:

1. prepare written recommendations and a statement of the charges and file these with the county board of education.
2. serve or give written charges to the employee within two days after presentation of charges to the board, and obtain a signed receipt.

3. the county board conducts a hearing upon proposed dismissal, at which time the reasons for dismissal must be proven.
4. the board approves or rejects dismissal.
5. the employee is notified of board action.

As previously stated, the employee may elect a hearing before an Education Employees Grievance Board Level IV examiner in lieu of one with the county board of education.¹⁸⁷

West Virginia, in addition to most other states, has enacted legislation which specifies the causes for which an employee may be suspended or dismissed.

Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for immorality, incompetency, cruelty, insubordination, intemperance, or willful neglect of duty. . .¹⁸⁸

County boards of education may also, under other sections of West Virginia Code, dismiss an employee for lack of need.¹⁸⁹

Immorality

The term immorality is generally defined as that which is "contrary to good morals; inconsistent with the rules and principles of morality; or inimical to public welfare according to the standards of a given community. . .¹⁹⁰ Essentially, immorality is not confined to a deviation from culturally defined sexual morality; it may be a course of

conduct which offends the morals of the community and constitutes a bad example to the youth whose ideals a teacher has the responsibility to foster and elevate.¹⁹¹

In Golden v. Board of Education, the West Virginia Supreme Court of Appeals declared that "immorality" as used in state statute which authorizes the dismissal of county board of education employees refers to conduct which is not in conformity with the accepted principles of right and wrong behavior, which is contrary to the moral code of a community, which is wicked, and which is not in conformity with acceptable standards or proper sexual behavior.¹⁹²

A recent State Attorney General opinion states that "while the noncriminal nature of behavior can be a partial defense of it, it nevertheless clearly appears that 'immoral' behavior or behavior otherwise dismissible in a teacher, is not limited to strictly illegal behavior or conviction of a crime."¹⁹³ For a dismissal to take place for reasons of immoral conduct there must, in fact, have been such immoral conduct. The conduct complained of cannot have existed only in the mind of the accuser or the board of education.¹⁹⁴

In Golden, the court held that a county board of education cannot discharge an employee for engaging in activities which the board felt were "immoral." These acts must comply with the definition provided by the court. Further, if an act or acts were committed away from one's place of employment, a rational nexus must exist between the conduct com-

plained of and the duties to be performed by the employee. The court in this case cited two circumstances where such a "rational nexus" could exist:

1. If the conduct directly affects the performance of the job responsibilities of the teacher, or
2. If, without contribution on the part of school officials, the conduct has become the subject of notoriety to the extent that the teacher's capability to discharge the responsibilities of the teaching position has been significantly and reasonably impaired.¹⁹⁵

The court applied these criteria in a case involving a Fayette County teacher who was arrested for possessing a small amount of marijuana. The State Supreme Court of Appeals ruled that the circumstances of the case did not make the teacher such a subject of notoriety in the community to impair, directly or indirectly, his ability to function as a teacher. Further, the incident took place in private away from his place of employment. Thus, his dismissal was reversed.¹⁹⁶

Incompetency

Generally, incompetency is a relative term which may be employed as meaning disqualification, inability or incapacity, or lack of qualifications or fitness to discharge one's required duties.¹⁹⁷ The following cases illustrate the application of this concept.

In Green v. Board of Education, the court ruled that the term "inefficiency" was synonymous with "incompetency." In this case a teacher holding a continuing contract could not be discharged for inefficiency by a mere written notice without a hearing and the opportunity to be heard as prescribed by state law.¹⁹⁸

Legally, incompetence often means what the courts say it means in specific situations. Often courts tend to define this term in light of the facts unique to a particular case. Many courts have held incompetence to include unfitness to meet the general demands of one's position.¹⁹⁹

For school board members and administrators one of the best definitions of an incompetent teacher is provided by Chester Nolte. An incompetent teacher is "one the courts find to be performing at a sub-acceptable level after having been warned, helped, counseled, cajoled, threatened and/or urged to resign."²⁰⁰

In Lipan v. Board of Education, the West Virginia Supreme Court of Appeals held that a third-year probationary

teacher dismissed by the Hancock County Board of Education was entitled to reinstatement since she was never openly and honestly evaluated and given an opportunity to improve her performance as required by state board of education policy.²⁰¹

In a North Carolina case a black teacher dismissed for incompetence sued his school board claiming the dismissal was racially motivated. The evidence showed that his black principal, as well as a racially mixed advisory committee, had recommended his dismissal. Additional evidence showed the teacher's lack of general performance in the classroom and an inability to properly administer classroom discipline. The U.S. Court of Appeals, Fourth Circuit, upheld the dismissal stating that the facts presented in the case supported this action and that there was no evidence of this being racially motivated.²⁰²

The Appellate Court of Illinois upheld the dismissal of a tenured home economics teacher based on evidence presented during the trial which documented that the teacher was not in control of her classroom and adequate pupil instruction was not taking place. Additionally, the evidence showed that the teacher had been properly advised of these weaknesses and given sufficient opportunity to correct them over a three-year period of time.²⁰³

The following West Virginia cases illustrate what the courts often require before the dismissal of an employee on

the grounds of incompetency will be affirmed. Each case applies this concept to a school related situation.

In Robertson v. Truby, a probationary custodian employed by Kanawha County Schools filed a petition for a writ of certiorari from a decision of the State Superintendent of Schools affirming the school board's decision not to renew his contract of employment based on incompetency and nonperformance of assigned duties. The Supreme Court of Appeals held that the evidence presented during the hearing sustained the finding that the custodian did not adequately perform the tasks assigned to him. The court further found that all required procedures had been followed by the school board, State Superintendent of Schools, and the circuit court. Therefore, the court affirmed his dismissal.²⁰⁴

The West Virginia Supreme Court of Appeals in Wilt v. Flanigan reversed a circuit court decision upholding the dismissal of a probationary teacher based on the grounds of incompetency. The Court held that the teacher had not been evaluated in accordance with state and local policy and given sufficient opportunity to improve her performance prior to dismissal.²⁰⁵

In Wren v. Board of Education, a McDowell county school psychologist was not rehired after three years of employment in the schools of that county. The School Supreme Court of Appeals held that since the school psychologist had not been given a performance evaluation during his first two years of

employment and his only evaluations had occurred during his third year of employment, he had not been afforded adequate opportunity to improve his performance. Therefore, he could not be discharged.²⁰⁶

The proving of incompetence is usually sufficient reason to dismiss an employee provided proper procedures have been followed.²⁰⁷ When a teacher is dismissed for incompetency, the responsibility of the burden of proof is placed upon the board of education. Since a teacher's certificate is prima facie evidence of meeting basic qualifications for the position, substantial evidence to the contrary must be presented to support the dismissal action.²⁰⁸ In general, however, the courts appear reluctant to second-guess school authorities in their evaluation of teacher competence provided required procedural safeguards have been met and the connection between incompetence and proper instruction can be shown.²⁰⁹

Cruelty

Black defines cruelty as ". . . the wanton, malicious, and unnecessary infliction of pain upon the body, or the feelings or emotions; abusive treatment; inhumanity; outrage."²¹⁰ A thorough search of West Virginia cases reveals no appellate level court decisions of record related to the suspension or dismissal of school personnel for this cause.

However, recent cases from other jurisdictions provide insight into the nature of these offenses.

The Washington Supreme Court recently upheld the dismissal of a teacher for striking a student in the genitals. The court stated "that the striking of a student in the genitals, for whatever reason, is . . . patently unacceptable."²¹¹

The U.S. Court of Appeals, Seventh Circuit, upheld the dismissal of a school bus driver for alleged harassment of school children who rode his bus. The overwhelming evidence presented by the parents of children was sufficient to support this action. The court further determined that the bus driver had been afforded a hearing which was constitutionally adequate.²¹²

It should be pointed out, however, that acts which are purely accidental, though they may cause pain, are not "cruel" as the term is used in statutes. Such acts cannot result in the dismissal of personnel.²¹³

Insubordination

Insubordination consists of an "unwillingness to submit to authority." According to Cobb, it has become the most frequently cited reason for dismissing errant teachers.²¹⁴

Public school personnel are bound to obey all reasonable rules and regulations of the board that employs them. It

makes no difference whether the rules were in force at the date of initial employment or were promulgated at a later time. Rules and regulations governing the relations of a school board with its personnel which are in force at the time of employment are, by implication, read into the contract. All contracts are made in contemplation of the law, and an employee implicitly agrees to obey all rules which a board may legally make.²¹⁵ According to Burt, disobedience of an unreasonable rule does not, however, constitute an act of insubordination.²¹⁶

In a West Virginia case, Beverlin v. Board of Education, a Lewis County high school teacher was suspended by the county superintendent and subsequently dismissed by the county board for willful neglect of duty and insubordination. The plaintiff, without permission from his school principal or county superintendent, was absent the greater part of the opening day of the school term in order to enroll in graduate school. He had, however, attempted to contact both of these superiors in advance of his absence and was unable to do so. The Supreme Court of Appeals held that the superintendent and the school board had been arbitrary and capricious in its action and therefore ordered Beverlin reinstated to his position with back pay.²¹⁷

A recent West Virginia case further illustrates the thorough way in which courts examine the actions of county boards of education with respect to employee dismissal or

transfer based on insubordination. In Holland v. Board of Education, four Raleigh County teachers appealed their disciplinary transfers to other schools within the county. The teachers had apparently been placed on the transfer list as a result of filing a grievance against their principal. The superintendent stated at the hearings that the four teachers were insubordinate and that it was essential to the climate of the school for them to be transferred. The Supreme Court of Appeals held that the charges were related to prior misconduct which had not been called to the attention of the employees and that the school system failed to provide any other acceptable reasons for the transfers. Therefore, the transfers were ruled invalid by the court.²¹⁸

In a previously referred to case, Totten v. Board of Education, the West Virginia Supreme Court of Appeals overturned the decision of the Circuit Court of Mingo County in holding that Totten, a high school principal, could not be dismissed from his position due to a decision to distribute report cards to students two days in advance of the last day of school which resulted in the attendance of only a small number of students the final two days of the term. The county board of education contended that this action constituted insubordination and neglect of duty. The court stated that "an error of judgment is not cause for dismissal or suspension of a school employee."²¹⁹

Courts will generally uphold the dismissal of school personnel if insubordination can be proven. However, where a charge of insubordination is based upon an employee's spoken words or writings, a school system must be careful to avoid disciplining the employee for speaking on matters which are of "public concern." These matters are protected by the First Amendment's free speech guarantees.²²⁰

A federal court recently held that a tenured Arkansas teacher had been wrongly dismissed for speaking out against school board policies regarding the ability grouping of students, the use of school telephones during working hours, and other issues. The court ruled that speaking out against employment policies of the school system was not protected by the First Amendment, but the right to criticize the ability grouping of students and the poor management style of the principal were protected. Holding that the dismissal was an attempt to inhibit the right of the teacher to criticize the public school system, the court found the board action illegal.²²¹

The Supreme Court of Utah upheld the dismissal of a tenured teacher for insubordination when he refused to accept a transfer to another school within the district. This transfer had been recommended by the superintendent due to friction which had arisen between the teacher and other certified personnel.²²² However, in Givhan v. Western Line Consolidated School District, the United States Supreme Court

held that freedom of speech is guaranteed to a teacher in private communication with his employer.²²³

Intemperance

The conduct of an employee while at his place of employment is not the sole basis for determining one's fitness as a public school employee. Outside activities may also be used in determining fitness. The courts, however, have generally held that these activities must be a material and substantial source of interference with efficiency and discipline in the operation of the schools.²²⁴

In its usual legal connotation, intemperance is the use of intoxicating beverages which disqualifies a person a great portion of the time from properly attending to business ". . . habitual or excessive use of liquor."²²⁵ Since there are no appellate level West Virginia cases of record for dismissal for intemperance, cases from other states have been cited.

The Missouri Court of Appeals upheld the dismissal of a tenured teacher as a result of problems stemming from his habitual abuse of alcohol. At the dismissal hearing conducted by the local board of education, the evidence showed that the teacher had a serious alcoholic condition which had been present for several years. On many occasions the teacher had been in the presence of students while

intoxicated, and on at least one occasion he was discovered by other school personnel on school grounds while in a state of intoxication. A substitute teacher had discovered a part of a bottle of vodka in his desk drawer, which he admitted to consuming on school premises. He was involved in two alcohol-related automobile accidents, one of which occurred only a half hour after he had left school. Tests conducted immediately subsequent to this accident showed a blood alcohol content of .25 percent. The court held that the evidence warranted the school board's conclusion that the teacher was unfit to instruct or associate with children because of this condition.²²⁶

The Colorado Court of Appeals upheld the dismissal of a high school teacher who was also the sponsor of the cheerleading squad because she allowed students to consume alcoholic beverages and to become intoxicated at a party which took place at an "away" ballgame. At the party the teacher drank beer with the cheerleaders, including those who were under age.²²⁷

The West Virginia Supreme Court of Appeals has repeatedly stated that before an employee's "offduty" behavior can affect his employment. However, the board of education must demonstrate a "rational nexus" between the conduct outside of the job and the duties that employee performs in his employment.²²⁸

Willful Neglect of Duty

In Fox v. Board of Education, the West Virginia Supreme Court of Appeals defined willful neglect in general.

We don't attempt to formulate a comprehensive definition of 'willful neglect of duty' that would reasonably support a teacher's permanent dismissal. A continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient, and we may envision a single act of malfeasance whereby severe consequences are generated, that mandate dismissal.²²⁹

Fox, a tenured teacher with twenty-three years of teaching experience in Doddridge County, had been suspended by the superintendent and dismissed by the board for being absent from an evening parent-teacher conference which all teachers were scheduled to attend. The court held that although his absence had caused some inconveniences to the parents and was embarrassing to the school officials, the damage caused was of such a small magnitude that Fox's subsequent dismissal for willful neglect of duty was an unreasonable and arbitrary punishment. His reinstatement with back pay, with the exception of twenty days, was ordered by the court. The court held that the twenty days without pay would have been a proper period of suspension for such an action.²³⁰

In DeVito v. Board of Education, DeVito, a tenured art teacher with eighteen years teaching experience in Marion County, was dismissed from her employment on the grounds of willful neglect of duty. This action was a result of her

distributing some questionable cartoons to her eighth grade students to use as a guide for their work. DeVito contended that the distribution of these materials was unintentional since she had failed to fully examine the materials before giving them to the students; consequently, she was not fully aware of the contents. The court ruled that she could be dismissed only if she had been aware of the undesirable nature of the materials prior to distributing these to her students.²³¹

An Alabama court recently upheld a lower court decision involving a tenured teacher with five years experience who failed to report to work when the new school year began. After the teacher was absent for ten consecutive work days, the school board cancelled his contract. The teacher maintained that his failure to report to work was not intentional since the school board had failed to notify him of the date when the school term was to begin. Evidence entered into the record noted that school had started on the same day in the school district for the past five years. The court held that the teacher had willfully neglected to perform his duties.²³²

Lack of Need

State law in West Virginia provides that professional and service personnel may be terminated for just cause, including lack of need.²³³ In 1981 the West Virginia Legisla-

ture enacted into law provisions dealing with the reduction of force for both professional and service personnel. A 1983 revision of this section of the code more clearly delineated its provisions. In general, when a board of education determines the need to reduce staff it must do so primarily on the basis of seniority within the school system. For professional personnel, seniority accrues in each area of certification. The seniority of service personnel is determined on the basis of the length of time the employee has been employed by the county board of education within a particular job classification.²³⁴ A more extensive discussion of the provisions of this section of the code is provided under the topic of seniority which is included in Chapter 3.

The burden of showing reasons for the lack of need for the services of certain employees rests with the school board. Generally, acceptable reasons would include decreases in student enrollment, financial exigency, budget cutbacks, and program changes.²³⁵

Generally, in West Virginia an employee does not have to hold tenure in order to enjoy the benefits of seniority during a reduction in force.²³⁶ However, an exception to this could exist if an employee's position is funded by a federal project grant such as CETA or JTPA. In this situation, the Supreme Court of Appeals has held the determining factor is whether the employee has been granted a continuing contract. Such employees holding a continuing contract enjoy

the same benefits and privileges, including seniority, as do all other employees of the school system.²³⁷

In Bates v. Board of Education, a teacher attempted to compel the county board of education to allow him to carry out his continuing contract after his dismissal for lack of need. In holding for the board, the court said:

. . . where the need for the services of a teacher has ended; and the absence of gross abuse of discretion, lack of good faith, or arbitrary or fraudulent conduct on the part of the board, mandamus does not lie to control its actions in the premises.²³⁸

All county board of education employees whose seniority with the county board is insufficient to allow their retention during a reduction in force shall be placed upon a preferred recall list and shall be recalled to employment on the basis of seniority.²³⁹ Employees placed upon the preferred list shall be recalled to any position openings with the county board of education within the classification(s) where they had previously been employed, or to any lateral position for which the employee is qualified or to any lateral area for which an employee holds certification and/or licensure.²⁴⁰

In a recent case, State ex rel. Board of Education of Kanawha County v. Casey, the West Virginia Supreme Court of Appeals held that the least senior secondary high school principal in that system could be "bumped" by a more senior high school principal when the more senior principal's position was eliminated due to the closing of school.²⁴¹

Generally, the courts will support the actions of boards of education relative to suspension and dismissal issues provided these actions are not unreasonable, arbitrary, capricious, or unlawful.²⁴² The Attorney General of West Virginia has ruled that an employee is not legally entitled to any salary or wage during a period of suspension if the dismissal charges are upheld.²⁴³

Resignation

Since public school personnel in West Virginia are employed by contract, both the employee and the employer have an obligation to fulfill the terms and conditions thereof. Although a contract can be altered, amended, or cancelled by mutual consent at any time, boards have the right to refuse to accept the resignation of an employee for the next school year if tendered after the first day of April. Resignations should be tendered in writing to the secretary of the board and become effective only when approved by official board action.²⁴⁴

If a teacher does not fulfill the obligations of his contract, he may be disqualified to teach in any other school in the state for a period of one school year. The State Department of Education may also hold all papers and credentials of such teacher for a period of one year for such

violation. Personal illness and other just causes, including marriage, shall be exceptions to this obligation.²⁴⁵

Employment Term

The minimum employment term for public school personnel is defined by statute in West Virginia. All full-time West Virginia public school employees are employed for a minimum of ten school months, a school month being defined as twenty employment days exclusive of Saturdays and Sundays. At least one hundred eighty but no more than one hundred eighty-five days of the two hundred day term must be designated as an instructional term for pupils and teachers. The instructional term shall commence no earlier than the first day of September and shall terminate no later than the eighth day of June each year. The board may extend the instructional term beyond one hundred eighty-five instructional days; however, the employment term for personnel must be extended an equal number of days.²⁴⁶

Noninstructional days contained in the employment term may be used for making up canceled instructional days such as those lost due to inclement weather or other uncontrollable factors, curriculum development, preparation for the opening and closing of the instructional term, in-service and professional development for teachers, parent-teacher conferences, professional meetings and other related activities.

Employees cannot be required to work on Saturdays or other days which are not a part of their regular employment term in order to make up days lost as a result of weather conditions or other calamitous cause over which the board has no control. Personnel receive full pay for days not worked as a result of such reasons. In addition, each board may designate and schedule for service personnel and teachers a maximum of four days within the two hundred day employment term to be used by the employee outside the school environment. These days are basically vacation days to be used by these employees.²⁴⁷ The State Board of Education is empowered to withhold funds from any county board of education which refuses to comply with the legal requirements relating to the instructional term.²⁴⁸

A county board of education may contract with any of its employees for a longer employment term. Generally, if an employee is performing comparable duties, he is entitled to his same daily rate of pay.²⁴⁹

Schools and county board of education offices in West Virginia are required to be closed on the following days: Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, New Year's Day, Memorial Day and any day on which a primary election, general election or special election is held throughout the State or the school district and any day appointed and set apart by the President or Governor as a holiday of special observance by the people of the

State. When any holiday falls within the regular employment term, it shall be considered as a day of the employment term and the full-time employee shall receive pay for this day. When any of the designated holidays, except a special election, falls on Saturday, the schools shall be closed on the preceding Friday. When any such holiday falls on Sunday, the schools shall be closed on the following Monday.²⁵⁰

Special classes may be held on Saturdays, provided they are conducted on a voluntary basis. Employees who work on this day must be remunerated at their regular rate of pay.²⁵¹

Compensation

In West Virginia, minimum salaries for professional and service personnel are established by state statute. County boards of education, however, may establish salary schedules in excess of the required state minimum. Such schedules must also be uniform for all personnel who hold like classification, experience, or job titles.²⁵² The minimum statewide salary schedule for public school teachers established by the West Virginia Legislature is based upon the number of years of teaching experience and the educator's level of collegiate training.²⁵³

"Years of experience" is defined as the number of years in which the teacher has been employed at least one hundred thirty-three days in the teaching profession or in a related

educational position outside the public schools. If a teacher who is under contract is inducted into the armed services, the time spent therein also counts. For registered professional nurses employed by boards of education, years of experience means the number of years the nurse has been employed as a public school health nurse, including work in a nursing position related to education, and years spent in the armed forces if the nurse was under contract with a board of education at the time of entry into the armed services. Salary increments for professional experience are given for up to thirteen years with a Bachelor's degree, sixteen years with a Master's degree, and nineteen years for the Master's plus thirty hours and for the Doctorate classifications. In addition each classroom teacher who has at least twenty years of teaching experience receives an additional six hundred dollars annually.²⁵⁴

Present training classification levels are: Bachelor's degree, Bachelor's plus fifteen hours, Master's degree, Master's plus fifteen hours, Master's plus thirty hours, and the Doctorate. Salary classifications also exist for some few nondegreed teachers hired by county boards of education many years ago when there was a teacher shortage. These individuals are allowed to continue to teach at a lower pay scale on second, third, and fourth class certificates.²⁵⁵

County boards of education may fix higher salaries for teachers placed in special instructional assignments, for

those assigned to or employed for duties other than regular instructional duties, and for teachers of one-teacher schools. Boards may also provide additional compensation to any teacher assigned duties in addition to his regular instructional duties if such noninstructional duties are not a part of the scheduled hours of the regular school day. However, all persons within the county who perform like duties and assignments must receive a uniform level of compensation.²⁵⁶

Under West Virginia Board of Education policy, teachers may not be required to work more than eight hours per day or forty hours per week. Boards of Education may, however, pay for additional services performed beyond this requirement. If teachers perform duties such as ticket collection at school activities or attend parent-teacher meetings on a regular basis, they must be compensated since these are not a part of their regular work schedule.²⁵⁷

Nominal supplementary salary schedules have been established by the West Virginia Legislature and the West Virginia Board of Education which provide monthly increments for school principals and assistant principals.²⁵⁸ Essentially, these schedules are based on the number of teachers supervised and level of training and certification held by the principal or assistant principal. The percentage rate used for assistant principals shall be fifty percent of that used for principals.²⁵⁹ Additional increments may be established

by the local board of education as long as these are applied uniformly throughout the county. In Payne v. Board of Education, the West Virginia Supreme Court of Appeals held that it is within the discretionary rights of a county board to set supplemental salary schedules for principals having extra responsibilities and duties. The Court said that such salary schedules could be based upon factors such as the number of teachers supervised, experience of the employee, hours of work, or other objective criteria.²⁶⁰

Salaries for supervisors, directors, coordinators, assistant superintendents, and other administrative personnel are established by local board of education policy. Uniformity in salary schedules is mandated for all persons who are performing like assignments and duties.²⁶¹

A minimum monthly salary schedule with accompanying class titles and pay grades for service personnel, as enacted by the West Virginia Legislature, is contained in state statute. These personnel are employed under contract with a designated class title and specified pay grade. There are eight different pay grades, each having experience increments up to twenty-five years of service with a board of education. As with teachers, a year of service is defined as a minimum of one hundred thirty-three days. Active duty in the Armed Forces of the United States is also counted if the person was employed by a board of education at the time of induction.²⁶² County boards of education may also establish salary sched-

ules for service personnel in excess of the state prescribed minimums. Such salary supplements must be uniform throughout the county in each affected classification.²⁶³

Service personnel employed in the same classification for more than a two hundred day minimum term of employment must be paid for the additional employment at a daily rate of not less than the daily rate paid during the regular two hundred-day employment term.²⁶⁴ No service employee, without his agreement, can be required to report for work more than five days per week and no part of any working day may be accumulated by his employer for future work assignments.²⁶⁵

In the event a service employee agrees to work on a Saturday or Sunday, he must be paid for at least one-half day for each day he reports to work. If the employee works more than three and one-half hours on either of these days, he must be paid a full day's wages for each such day.²⁶⁶ Custodians who are required to work a daily schedule that is interrupted, a "split shift," must be paid additional compensation equal to at least one-eighth of their regular salary, payable entirely from county funds.²⁶⁷ Any service employee who is required to work on any legal school holiday must be paid at a rate one and one-half times his usual hourly rate.²⁶⁸

A full-time service employee who is required to work in excess of his normal working day during any week which contains a paid school holiday must be paid for such additional

hours at a rate of one and one-half times his usual hourly rate, payable entirely from local funds.²⁶⁹ No service employee may have his daily work schedule changed during the school year without his written consent. Further, his daily work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee.²⁷⁰ Service employees who work a daily schedule less than three and one-half hours must be paid one-half their regular daily rate; those who work in excess of three and one-half hours daily must be paid the full daily rate.²⁷¹

County boards of education are required by state statute to determine the number of pay periods each year for the various classes of employees. Local boards may allow employees who work less than twelve school months to be paid their annual salary over a period of twelve months, extending into July and August of the next fiscal year.²⁷²

Summary

Legal provisions affecting the employment of teachers, administrators and service personnel in West Virginia are primarily established by the federal and state constitutions, statutes, and case law. Policies of the West Virginia Board of Education, opinions of the Attorney General, and interpretations of the State Superintendent of Schools are also of additional importance.

Public school personnel in West Virginia accrue many state sponsored benefits and privileges. They are, however, employed, supervised, and paid through county boards of education.

The county superintendent of schools is charged with the foremost responsibility and authority in the employment of public school employees in West Virginia. The superintendent, subject to board approval, is responsible for the employment, placement, transfer, demotion, and suspension of school personnel. Only in the employment of service personnel and in suspension, dismissal, and nonrenewal cases can the county board of education act independently of the superintendent. At no time during the pre-employment process or the terms of employment can the superintendent, board, or any supervisory employee of the school system discriminate against any person on the basis of race, color, national origin, sex, handicap, or age.

In West Virginia professional educators are required to hold a valid teaching certificate which licenses them to teach specified subjects at designated grade levels. Upon completion of an approved graduate program and satisfactory experience as a classroom teacher, an employee may also qualify for a professional administrative certificate which allows him to serve as a principal, supervisor, or county superintendent in accordance with the position and/or grade level endorsements on the certificate.

Service personnel are not required to hold certificates or licenses. However, each such employee must be classified by the superintendent and county board with a state approved job title.

Public school personnel in West Virginia are accorded due process rights by both the United States Constitution and the Constitution of West Virginia. Therefore, they must be treated fairly in all matters relating to employment. If an employee can demonstrate that he has a liberty or property interest related to employment, he then accrues substantive due process rights which cannot be removed by statute, state board policy, county board policy, or administrative rules or regulations without due process. He would then be entitled to procedural due process which provides for proper notice, an opportunity to be heard, judgment by an impartial tribunal, and the opportunity to appeal. Under West Virginia statute, he would also be given specific rights in cases involving nonrenewal of contract, reassignment, demotion, suspension, and dismissal.

All West Virginia public schools employees are required to execute a written contract with their board of education at the time of employment. For professional personnel, written probationary contracts ranging from one to three years in length are issued. Service personnel contracts are issued on an annual basis during the first three years of employment. After a satisfactory three-year probationary

period with the county board of education both professional and service personnel are issued a continuing contract. If either a professional or service employee held a continuing contract with another county board of education in West Virginia during the school year immediately prior to his employment with another county board of education, said employee is entitled to a continuing contract after one year of satisfactory employment in the new county. Employees who are granted continuing contracts become "tenured" within the county school system where they are employed.

Public school personnel in West Virginia may be transferred to different positions, demoted, dismissed, or suspended only if the superintendent and school board follow precise statutory procedural due process requirements and state and local board of education policies. Employees being considered for transfer must be notified in writing by the county superintendent prior to the first Monday in April. Any employee so notified shall have the right to request a statement of reasons for the proposed action and an opportunity for a hearing with the board prior to any official board action on the transfer. The county superintendent of schools must furnish in writing to the board by the first Monday in May a list of teachers and other employees who are being considered for transfer and subsequent assignment for the ensuing school year. All other employees not so listed shall be considered reassigned to the positions or jobs held at the

time of the board meeting. State law does, however, provide for exceptions to this procedure if emergency or regulatory conditions exist.

Any school employee may be dismissed for lack of need when the superintendent and school board determine that there is no longer a need for his position. However, employee seniority with the school system must be considered in determining the employee who actually loses his employment. State statute prescribes the procedure for reducing force for both professional and service employees. Employees so dismissed are placed on a preferred recall list. Employees may also be dismissed or suspended at any time for immorality, incompetency, cruelty, insubordination, intemperance, or willful neglect of duty. In instances where the reasons for such actions involving a setting apart from one's employment, the school board must show a rational nexus between the employee's actions and his employment responsibilities.

The minimum annual employment term for school personnel in West Virginia is two hundred days which is defined as ten school months consisting of twenty days each. Boards of education may, however, contract with an employee for a longer term of employment.

State code prescribes minimum salary schedules for West Virginia teachers and service employees. County boards of education may, however, compensate employees at a rate higher than the mandated schedule, provided all such payments and

schedules are uniform for personnel with like classification, experience, assignment, and duties.

NOTES

¹Richard F. Meckley, Handbook of West Virginia School Law (St. Albans, W.Va.: National Learning Productions, 1987), p. 30.

²W.Va. Code, §18A-1-1.

³Op. Att'y Gen., August 28, 1969.

⁴Op. Att'y Gen., January 22, 1975.

⁵W.Va. Code, §18A-2-1.

⁶Cochran v. Trussler, 141 W.Va. 130, 89 S.E.2d 306 (1955).

⁷W.Va. Code, §18A-4-8b.

⁸W.Va. Code, §18A-2-1.

⁹W.Va. Code, §18A-2-2; see also Knotts v. Board of Education, 113 W.Va. 56, 166 S.E. 703 (1932); Mason County Board of Education v. State Superintendent of Schools, 234 S.E.2d 321 (W.Va. 1977).

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¹²W.Va. Code, §18A-4-8b.

¹³Ibid.

¹⁴W.Va. Code, §18A-2-5.

¹⁵Ibid.

¹⁶W.Va. Code, §16-3-4a.

¹⁷Arline v. School Board of Nassau County, 772 F.2d 759 (11th Cir. 1985).

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¹⁹W.Va. Code, §18-4-2.

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³⁸Magna Carta, Thirty-Ninth Chapter, approved by King John, 15 June, 1215.

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⁴⁰U.S. Const. amend. XIV, §1.

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⁴²W.Va. Const. art. III, §10.

⁴³McNeel, op. cit., p. 40.

⁴⁴Alexander and Solomon, op. cit., p. 431.

⁴⁵McNeel, loc. cit.

⁴⁶Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394 (1923).

⁴⁷Meyer v. Nebraska, 262 U.S. 390 (1923).

⁴⁸Kern Alexander, School Law (St. Paul, Minn.: West Publishing, 1980), p. 344.

⁴⁹Pickering v. Board of Education, 391 U.S. 563 (1968).

⁵⁰Ibid.; see also Connick v. Myers, 461 U.S. 138 (1983).

⁵¹Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

⁵²Gooden v. Board of Appeals of the West Virginia Department of Public Safety, 234 S.E.2d 893 (W.Va. 1977).

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⁵⁵Ibid., p. 30.

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⁵⁷Ibid.

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⁵⁹Waite v. Civil Service Commission, 241 S.E.2d 164 (1978).

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⁶¹North v. Board of Regents, 233 S.E.2d 411 (W.Va. 1977).

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⁶⁷McNeel, op. cit., p. 50.

⁶⁸Memorandum from Rex. M. Smith, State Superintendent of Schools, to county school superintendents, 20 October, 1969.

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⁷⁰W.Va. Code, §18A-2-11.

⁷¹W.Va. Code, §§18A-2-7,-8a.

⁷²W.Va. Code, §18A-2-8; see also Interpretation, State Superintendent of Schools, "Employee" April 21, 1986 (5).

⁷³W.Va. Code, §18A-2-11.

⁷⁴Grannis v. Ordean, 234 U.S.385 (1914).

⁷⁵McNeel, loc. cit.

⁷⁶Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985).

⁷⁷Vail v. Board of Education, 104 S.Ct. 2144 (1984).

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⁸⁷Lavender v. McDowell County Board of Education, 327 S.E.2d 691 (W.Va. 1985).

⁸⁸Holland v. Board of Education, 327 S.E.2d 155 (W.Va. 1985).

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⁹⁰Jacob J. Cobb, An Introduction to Educational Law for Administrators and Teachers (Springfield: Charles E. Thomas, 1981), p. 67.

⁹¹Richard F. Meckley, Handbook of West Virginia School Law (St. Albans, W.Va.: National Learning Productions, 1987), p. 31; see also W.Va. Code, §18A-3-1.

⁹²W.Va. Code, §18A-3-1.

⁹³W.Va. Code, §18A-3-2; see also West Virginia Board of Education, Minimum Requirements for the Licensure of Educational Personnel (Charleston, W.Va.: W.Va. Board of Education, 1983), pp. 18-21.

⁹⁴W.Va. Code, §18A-3-2; see also Ibid., p. 60, and West Virginia Board of Education, Standards for the Approval of Teacher Education Programs in West Virginia: Supplement--Educational Personnel Preparation Programs (Charleston, W.Va.: W.Va. Board of Education, 1983).

⁹⁵Ibid., pp. 41-60; see also W.Va. Code, §18A-3-2.

⁹⁶51 Op. Att'y Gen. 622 (1965); 51 Op. Att'y Gen. 676 (1966); 51 Op. Att'y Gen. 803 (1966).

⁹⁷Interpretation, State Superintendent of Schools, "Certification" October 28, 1977 (30).

⁹⁸W.Va. Code, §§18A-3-1,-2.

⁹⁹W.Va. Code, §18-10E-1.

¹⁰⁰Ibid.

¹⁰¹Data provided by Mrs. Barbara Brazeau, Unit Coordinator, Division of Teacher Certification, West Virginia Department of Education, in personal interview on 16 June, 1987.

¹⁰²Cobb, op. cit., p. 68.

¹⁰³W.Va. Code, §18A-3-6.

¹⁰⁴Ibid.

¹⁰⁵Stone v. Fritts, 169 Ind. 361, 82 N.E. 792, 15 L.R.A. (N.S.) 1147, 14 Ann. Cas. 295.

¹⁰⁶Statements by Brentz Thompson, Research Assistant to the State Superintendent of Schools, in a personal interview on 16 June 1987. (State Superintendent's Office would not release names or transcripts for the revocation cases.)

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¹⁰⁸Ibid.

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¹¹¹W.Va. Code, §18-5-5.

¹¹²State ex. rel. Campe v. Board of Education, 94 W.Va. 408, 118 S.E. 877 (1923).

¹¹³State ex. rel. Rhodes v. Board of Education, 95 W.Va. 57, 120 S.E. 183 (1925).

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¹³⁵W.Va. Code, §§18A-2-2,-5,-6.

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¹³⁹W.Va. Code, §18A-2-8a.

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²⁴⁹Interpretation, State Superintendent of Schools, "Salary" December 20, 1976 (22); see also Interpretation, State Superintendent of Schools, "Salary" March 3, 1986 (3).

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²⁷²W.Va. Code, §18A-4-9.

CHAPTER 3

OTHER LEGAL PROVISIONS AFFECTING SCHOOL PERSONNEL

This chapter addresses the legal rights of West Virginia school personnel relating to academic freedom, assignment of duties, personal leave, leaves of absence and other absences, workmen's compensation, unemployment compensation, insurance, retirement, seniority, reductions in force, grievance procedures, employee organizations, and collective bargaining/negotiations. These rights are described in this chapter.

Academic Freedom

To impose an intellectual straitjacket on educators, wrote Chief Justice Warren, "would be to imperil the future of our nation.¹ Teachers and students must always remain free to inquire, to study, and to evaluate to gain new maturity and understanding; otherwise our civilization will stagnate and die."²

Academic freedom is based on the First Amendment and on the necessity, in a democratic society, to protect the freedom of educators.³ Like other constitutional rights, however, this freedom is not absolute; it must be balanced against the

rights of a community to determine educational goals and to maintain reasonable discipline and order.⁴ Likewise, it does not protect teaching or performance that is incompetent or irrelevant nor does it provide protection for political or religious indoctrination.⁵

Generally, courts utilize a "balancing test" involving a case-by-case analysis which reviews the teacher's rights to academic freedom against the compelling interests of the local community. In most instances, a teacher's use of controversial methods, materials, or language will be protected unless school officials can show that (1) it caused a significant disruption; (2) it was not relevant; or (3) it was not appropriate to the age and maturity of the students.⁶

According to Nolte, there are five well-established principles of law which govern the academic freedom of public school teachers:

1. Teachers may not use their classrooms as forums for imposing their idiosyncratic ideas on a captive school audience.

2. The age, size, and maturity level of the students being taught dictates some limits on what can and cannot be introduced.

3. The local school board can set reasonable restrictions on the parameters of the curriculum thereby restricting the freedom to go outside those limits.

4. The teacher can be restricted to his own areas of expertise.

5. Local boards may prescribe other prohibitions by policy or prescribe acceptable methods of teaching controversial subjects.⁷

In a West Virginia case, DeVito v. Board of Education, a veteran art teacher with eighteen years of teaching experience was dismissed for willful neglect of duty. It was the teacher's practice to pass out samples of art work to her students to be used as guides for their own work. On one occasion, she distributed to her eighth grade class cartoons depicting a character known as "Fritz the Cat." These figures were in various stages of undress. The teacher claimed that this action was unintentional and that she had failed to examine the cartoons prior to passing them out to the class. The superintendent contended that the teacher was fully aware of the contents of the materials. The West Virginia Supreme Court of Appeals held that the dismissal was unwarranted. However, the court found that a nine-month suspension of the teacher was appropriate in light of her failure to exercise reasonable care.⁸

In determining whether a classroom activity is within the scope of academic freedom, the courts consider whether such activity has a valid educational purpose. For example, in Webb a teacher was discharged as a high school drama coach for choosing plays which contained vulgarity and drinking

scenes. The court said that a public high school teacher has a substantive right to choose a teaching method which serves a demonstrated educational purpose which is appropriate and a procedural right not to be discharged from employment for the use of a teaching method which was not proscribed by policy or regulation.⁹

In a Louisiana case, the State Court of Appeals upheld the discharge of a black high school teacher who had made several "irrelevant" statements during his World History classes concerning sex activities between black and white races. The court concluded in this case that the statements "served no serious educational purpose" and therefore were not entitled to protection under the principle of academic freedom.¹⁰ The United States Supreme Court has also held that current community standards relating to obscene language should be interpreted by local rather than by national norms.¹¹

A recent Court of Appeals decision noted that educators cannot be made to read from a script prepared or approved by the school board: "Censorship or suppression of expression of opinion even in the classroom should be tolerated only when there is a legitimate interest in the state which can be said to require priority."¹² A teacher does not, however, have a constitutional right to persist in using teaching methods which have been disapproved by the principal and the school board.¹³ A U.S. district court ruled that a Texas

high school teacher who had been discharged for using a Masculinity Survey in her class which later resulted in a widespread community controversy was entitled to the protection of academic freedom. In ruling in favor of the teacher, the Court stated that the First Amendment protects a teacher's right to use teaching methods of his own choosing so long as these do not promote disruptive student conduct or interfere with school discipline.¹⁴ In Epperson, the United States Supreme Court held that "A State's right to prescribe public school curriculum does not include the right to prohibit teaching a scientific theory or doctrine for reasons that run counter to the principles of the First Amendment."¹⁵

It appears clear that public school teachers have the right to assemble, think, speak, and believe as they wish. However, they must comply with reasonable rules and regulations which relate to their employment and acceptable community norms. They do not have the right to unilaterally prescribe their parameters.

Assignment of Duties

Although most school employees are fully aware of their primary responsibilities, questions about extra assignments and related duties often arise. In West Virginia, a written contract in the form prescribed by the State Superintendent

of Schools must be entered into by the teacher and the county board of education.¹⁶ That contract states in part:

. . . [T]he teacher agrees to faithfully perform all the duties of said position and employment, and agrees faithfully to observe and enforce the regulations lawfully prescribed by legally constituted school authorities insofar as these rules and regulations may be applicable to said county.

The services to be performed by the Teacher shall be such services as are required by law, by the lawful rules and regulations of the State Board of Education and by the lawful rules and regulations of the County Board of Education.¹⁷

Reutter and Hamilton have stated that, "No teacher may be compelled to perform duties such as janitor service, traffic duty, and school bus driving."¹⁸

West Virginia teachers are often required to participate in daytime, regularly scheduled, parent-teacher conferences and educational in-service programs which are a paid part of the employment term as provided for by the Legislature:

Noninstructional days in the employment term may be used for making up canceled instructional days, curriculum development, preparation for opening and closing of the instructional term, in-service and professional training of teachers, teacher-pupil-parent conferences, professional meetings and other related activities.¹⁹

These are days in the contracted employment term which are in excess of those days required for student instruction but not in excess of a teacher's scheduled work week or employment contract.

Two recent West Virginia cases illustrate how problems can occur relating to these activities. In Fox, a Doddridge

County teacher was dismissed when he failed to participate in a parent-teacher conference. Although the West Virginia Supreme Court of Appeals ordered his reinstatement, the Court did impose a twenty-day suspension without pay as a penalty for the teacher's willful absence.²⁰ Likewise, in Beverlin, a Lewis County teacher who had been dismissed for insubordination and willful neglect of duty as a result of having missed the greater portion of the opening day of school for the purpose of enrolling in a graduate course was ordered to be reinstated to his position by this same court.²¹

In West Virginia, the content and form of the written contract executed between a county board of education and a service employee is specified in state code. In part, this contract provides that:

The service to be performed by the employee shall be such services as are prescribed for the job classification set out in the contract and as defined by Section 8, Article 4, Chapter 18A of the Code of West Virginia.²²

The assignment of teachers and service personnel to extracurricular assignments may be made only by mutual agreement between the employee and superintendent, or designated representative, subject to approval by the local board. Extracurricular duties generally means those activities which occur at times other than regularly scheduled working hours, which may include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.

Parent-teacher meetings are not generally considered to be extracurricular unless attendance is required on a regularly scheduled basis outside of the employee's contracted employment term or work week. However, teachers cannot be required to attend parent-teacher meetings which occur outside the regular workday.²³

The employee and the superintendent, or a designated representative, subject to local board approval, must mutually agree on the maximum number of hours of extracurricular assignment in each respective school year for each extracurricular assignment. The terms and conditions of each agreement must be in writing and signed by both parties.²⁴ An employee's regular employment contract must be separate from the extracurricular assignment agreement and cannot be conditioned upon the employee's acceptance or continuance of any extracurricular assignment.²⁵

In a recent written opinion, the State Superintendent of Schools stated that teachers cannot be required to attend staff development meetings which are held after regular working hours. However, teachers may elect to attend these meetings and receive compensatory time.²⁶ They may, however, be required to meet with parents during their duty-free planning period.²⁷

In the absence of a mutually agreed upon extracurricular contract, a teacher cannot be required to sell tickets at an athletic event. This work occurs outside his regularly

scheduled work day and the activity occurs on a regular basis from year to year thus meeting the definition of an extra-curricular duty as defined in the West Virginia Code.²⁸

Service personnel who perform weekend duties beyond the regular forty hour work week must be paid at the rate of one and one-half times their regular hourly wage for all hours above the forty hour weekly base.²⁹ Recent enactments of the West Virginia Legislature provide a minimum salary schedule for service personnel. This legislation provides that service personnel working less than three and one-half hours daily shall be paid one-half of the full salary for said position. Likewise, service employees working in excess of three and one-half hours daily must receive full compensation.³⁰ West Virginia labor laws applicable to school service personnel provide that:

. . . No employer shall employ any of his employees for a workweek longer than forty hours, unless such employee receive compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.³¹

With respect to the daily and weekly schedule for teachers, West Virginia Board of Education policy provides:

'Regular school day' shall not exceed eight hours of school duty in one day nor more than forty hours of school duty each week. Assignment to school duty is considered to be the interval a teacher is required to be present to perform curriculum or co-curriculum services.³²

A teacher may not be required to work more than this time; however, he may agree to do so for compensation at the

regular rate. Further, once the school year has begun, the teacher's work day or workweek may not be unilaterally increased by the county board. Teachers who choose to perform duties beyond those required by a regular contract are issued an extracurricular contract which covers these services.³³

Also, it is the responsibility of every school employee in West Virginia to properly maintain such records and make such reports as may be required by the county board of education or the State Superintendent of Schools. An employee's pay may be withheld by a county board until all reports have been properly submitted.³⁴

Personal Leave

Public school employees are expected to fulfill their daily contractual responsibilities to local boards of education. In West Virginia, absences from work which are not covered by personal leave policies or law may result in a reduction in pay commensurate with the length of the absence.

At the beginning of the employment term, all full-time employees of a county board of education are entitled to annually receive at least one and one-half days personal leave for each employment month or major fraction of the employee's employment term. Personal leave includes absences due to accident, sickness, death in the immediate family, or other cause authorized or approved by the local board of education.

Each employee is permitted to take three personal leave days annually without regard to reason for such absences. Unused personal leave accumulates without limitation and is transferable within the state.³⁵

As previously noted, county boards of education in West Virginia are given considerable latitude in implementing the personal leave policy established by the Legislature.

A regular full-time employee who is absent from assigned duties due to accident, sickness, death in the immediate family, or other cause authorized or as approved by the board, shall be paid the full salary from his regular budgeted salary appropriation during the period which such employee is absent, but not to exceed the total amount of leave to which such employee is entitled. Provided, that each such employee shall be permitted three days of such leave annually, which may be taken without regard to the cause for the absence, except that personal leave without cause may not be taken on consecutive work days unless authorized or approved by the employee's principal or immediate supervisor, as the case may be, at least twenty-four hours in advance, except that in case of sudden and unexpected circumstances, such notice shall be given as soon as reasonably practicable; however, the use of such day may be denied if, at the time notice is given, either fifteen percent of the employees or three employees, whichever is greater, under the supervision of the principal or immediate supervisor, as the case may be, have previously notified the principal or immediate supervisor of their intention to use that day for such leave: Provided further, that such leave shall not be used in connection with a concerted work stoppage or strike.³⁶

County boards of education may establish reasonable regulations for reporting and verification of absences for cause.³⁷ The State Superintendent of Schools has held that a county board of education may impose regulations regarding personal leave due to sickness which include a requirement

calling for a statement from a licensed physician; however, a board may not require that the nature of the employee's illness be specified.³⁸ State Superintendent of Schools interpretations have defined "sickness" to include medical and dental appointments on school time,³⁹ infectious diseases resulting in the employee being quarantined,⁴⁰ and when a female employee is physically unable to perform her duties due to the effects or after-effects of pregnancy.⁴¹

By enacting Public Law 95-555, Congress in October 1978 amended Title VII of the Civil Rights Act of 1964 by adding the following subsection:

The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703 (h) of this title shall be interpreted to permit otherwise.⁴²

Consequently, county boards of education must grant personal leave for illness relating to pregnancy in the same manner as for any other cause. A county board of education may also establish a personal leave bank or banks to which its employees may contribute no more than two days of personal leave each school year.⁴³

It should be noted that "a regular full-time employee" is defined as "any person employed by a county board of edu-

cation who has a regular position or job throughout his employment term, without regard to hours or method of pay."⁴⁴

Any board of education has the authority to supplement leave provisions in any manner which is in accordance with the rules and regulations of the State Board and West Virginia Code.⁴⁵ West Virginia school employees are entitled to their regular rate of pay when absent from work under the provisions of state and county personal leave policies. School principals, band directors, coaches, and others who are entitled to receive supplemental pay for extracurricular duties have a legal right to receive full remuneration for days missed under personal leave policy.⁴⁶

The State Superintendent has ruled that legal holidays which fall within the period of personal leave are not to be charged against the employee's personal leave entitlement.⁴⁷ State law provides that when a holiday falls within the regular school employee's employment term, he shall receive his normal pay for that day.⁴⁸ Thus, the employee is entitled to the paid holiday even if he may be absent for personal leave prior to and following the holiday.⁴⁹ Similar application of the law applies when schools are closed because of inclement weather or conditions beyond the control of the local board, unless "appropriate alternate work schedules" such as reporting to the employee's regular work station or a centralized location are required. In the event employees are unable to work such alternate schedules, available per-

sonal leave, if applicable, is chargeable against their personal leave entitlement.⁵⁰

Substitute school personnel who are not "regular full-time employees" are not entitled to personal leave benefits.⁵¹ Neither would they receive compensation for legal holidays nor when schools are closed because of inclement weather nor because of other emergency.⁵² However, a substitute who is employed under a regular written contract is considered a "regular full-time employee" and as such is eligible for full benefits.⁵³

County boards of education are authorized to pay their employees, for purposes of reducing absenteeism, a bonus at the end of an employment term for each unused day of personal leave accumulated by an employee within an employment term. This is allowed under state code.⁵⁴

Leaves of Absence and Other Absences

Although paid sabbatical leave is not available to West Virginia public school employees, county boards of education may grant unpaid leaves of absences for periods up to one year for purposes it deems proper. Generally, leaves are granted for medical, maternity, educational, or professional reasons; however, any reason may be found proper in the view of the local board.⁵⁵ Yearly extensions of unpaid leave may also be granted at the discretion of the local board.⁵⁶

Under current state law, any teacher who is returning from an approved leave of absence that has extended for a period of less than one year must be reemployed by the board with the right to be restored to the same position or duties held prior to such absence. Such teacher retains all seniority, rights and privileges which had accrued at the time of the approved leave of absence, and shall also have all rights and privileges generally accorded teachers at the time of the reemployment.⁵⁷ West Virginia teachers serving under a continuing contract may, also, with board approval, be provided released time for special professional or governmental assignments without jeopardizing their contractual rights or any other rights, privileges or benefits.⁵⁸

A county board of education may approve the attendance of any of its employees at educational conventions, conferences, or professional meetings of teachers, or service meetings of service personnel when in the judgment of the superintendent it is necessary and desirable. Attendance at such meetings may be substituted for an equal amount of employment and employees attending will not suffer loss of pay. The board may pay all or any part of the employee's expenses incurred as a result of attending such meetings or in visitation to another school system.⁵⁹ When the employment term overlaps a teacher's or service employee's participation at a summer institute or institution of higher learning for the purpose of career advancement or professional growth,

such employee may substitute, with the county superintendent's approval, such participation for not more than five of the noninstructional days of the employment term.⁶⁰

Unless excused by the judge of the court, school personnel in West Virginia are required to serve when called to jury duty during their employment term. The local board of education must pay the difference in pay between that allowed for jury service and the amount of salary or wage due the employee for such period of time.⁶¹

Any school employee who is subpoenaed to appear as a witness but not as a defendant in any criminal proceeding in any court of law may do so without any loss of pay. The board will pay to the employee the difference between the witness fee, exclusive of travel allowances, payable for such appearance by the court and the amount of salary or wage due to the person for the time such employee is absent from his employment as a result of answering the subpoena.⁶²

County school board employees who are members of the West Virginia National Guard or any military reserve unit of the United States Armed Services are entitled to a leave of absence without any loss of pay, status or efficiency rating on the days during which they are engaged in drills, parades, or other duty. The maximum period for such service is thirty days in any one calendar year. The term "without loss of pay" means that the officer or employee shall continue to receive his normal salary or compensation, even though he may be re-

ceiving other compensation for his military service. These benefits, however, will not accrue to individuals ordered or called to active duty by the President during a national emergency.⁶³

Workmen's Compensation

All school districts in West Virginia are required by statute to subscribe to and pay premiums into the West Virginia Workmen's Compensation Fund. All employees, professional and service, are afforded protection under this program.⁶⁴

The primary function of this program, as it applies to governmental employees, is to protect these employees through compensation benefits when they are injured while performing duties in the course of their employment.⁶⁵ It provides for medical treatment, hospitalization and temporary and total disability benefits for any compensable injuries. Up to five thousand dollars of funeral expenses are also available for compensable personal injury which results in death.⁶⁶ Coverage includes injuries which may be sustained during employment-related travel or at an alternate duty station if in the performance of duties which are required by the employer.⁶⁷

Upon sustaining an on-the-job injury, the employee is required to notify the local board of education and the

Workmen's Compensation Commissioner of the time, place, nature, and cause of the injury and whether any disability has arisen therefrom. Notice to the board may be given by registered mail or in person.⁶⁸

Unemployment Compensation

In order to comply with the Federal Unemployment Tax Act, as amended by Public Law 94-566, the West Virginia Legislature, in 1978, extended the federal-state unemployment compensation program to agencies of the state and local governments, including county boards of education.⁶⁹ School employees are now eligible for the same coverage as persons who are employees in the private sector.⁷⁰

Benefits under this program are to be denied to a school employee between school terms, provided he was employed by a county board of education during the previous school term and has reasonable assurance of, or a contract for, such employment for the next term. Similar prohibitions apply to periods of vacation and holidays. However, employees who become unemployed (or dismissed) as a result of a reduction in force are eligible to receive benefits provided such unemployment is not a result of employee willful misconduct.⁷¹

Insurance

The State of West Virginia provides a comprehensive group insurance program for all of its employees, including personnel employed by county boards of education. Benefits of this voluntary program, administered by the West Virginia Public Employees Insurance Board, include comprehensive hospitalization and health care insurance, life insurance, accidental death and dismemberment insurance, and major medical insurance. Additional group life and dismemberment insurance are also available on an optional basis.⁷²

Employees who work at least twenty hours per week or one thousand four hours per year are eligible to participate in this insurance plan. Those employees who do not enroll during their first two months of employment will not be able to begin coverage until after the first four months of employment have elapsed. Certain limitations relating to pre-existing conditions apply to these late enrollees and their dependents.⁷³

Participants are required to pay thirty percent of the cost of their insurance program coverage during the first year of their employment. After that, the full premium cost of the basic life and health care program for the employee, his spouse, and dependents is paid by the State.⁷⁴

Retired board of education employees are eligible to participate in this program. However, they must individually pay the cost of the monthly premiums.⁷⁵

In addition to the State Insurance Plan, the Legislature has authorized the participation of school employees in local group insurance programs for life, health and accident, hospitalization or surgery, death benefit, and automotive.⁷⁶ Only those companies whose plan or plans have been approved by the majority vote of the employees may participate in payroll deductions.⁷⁷

A county board of education is also authorized to enter into a tax-sheltered annuity agreement with its employees and insurance agents licensed to do business in the State. Under such agreements, the employee may authorize the withholding of a portion of his salary to be deposited in a tax deferred annuity plan.⁷⁸

Retirement

Established in 1941, the West Virginia State Teachers Retirement System provides an independent retirement program for all regularly employed public school personnel in the public schools of the State, in the State Department of Education, or in the State colleges and universities.⁷⁹ "Regularly employed" means employment in a regular position or job

throughout the employment term regardless of the number of hours worked or the method of remuneration.⁸⁰

Membership in the State Teachers Retirement System is mandatory for all employees of county boards of education, the State Department of Education, and Board of Regents, except that state college and university employees may elect alternate membership in their own retirement system.⁸¹ County board of education personnel who are employed under the various federally funded programs are required to participate in the State Teachers Retirement System; however, the federal program is responsible for the full employer matching contribution.⁸² An employee's membership in the State Teachers Retirement System continues until he dies, retires, withdraws upon cessation of service, or when service credit amounts to less than five years in any period of ten consecutive years.⁸³

Presently, each member is required to contribute six percent of his monthly earnings to the retirement board.⁸⁴ Member contributions are deducted by the employer and credited to the employee's account. Employer contributions of an equal amount are derived from Legislative appropriations.⁸⁵

Retirement credit is granted for military service in the armed forces of the United States during any period of national emergency within which a Federal Selective Service Act was in effect.⁸⁶ Credit awarded for such service cannot ex-

ceed ten years or twenty-five percent of the employee's total service at the time of retirement.⁸⁷ Full credit is given for prior participation in the West Virginia Public Employees Retirement System. Service credit may also be purchased by an employee who was employed as a teacher by the federal government or a state or territory of the United States.⁸⁸

Eligibility for retirement allowances is based upon age, years of service, and in certain instances employee disability. Presently, a member is eligible for full retirement benefits at age sixty; after thirty-five years of service, regardless of age; after thirty years of service and attaining age fifty-five; or is terminated from employment because of disability after having accumulated at least ten years of service. Members under age fifty-five who have at least thirty years of service are eligible for a reduced annuity. In no event is an employee with less than five years of credited service eligible for an annuity.⁸⁹

Members who leave the retirement system with twenty years of established West Virginia service are fully vested to receive benefits at age sixty. Those who leave the system after attaining age fifty-five with five or more years of West Virginia service are vested at age sixty. Any member leaving the system with at least five but less than twenty years of service and is under fifty-five years of age will be eligible for benefits at age sixty-two.⁹⁰

Service credit is granted for each year, month, and day that the employee is paid and made contributions to the system. A member cannot acquire more than one year of service credit in any one fiscal school year. A minimum of ten school months of service equal a year of credit.⁹¹ Also, federal code has recently been amended to remove compulsory retirement at age seventy.⁹²

Seniority

By state law, in West Virginia public school employees are accorded the following seniority rights:

1. A county board of education must make decisions affecting promotion and the filling of classroom teaching positions on the basis of qualifications. However, if the applicant with the most seniority is not selected for the position, he must be given a written statement of reasons for the nonselection including suggestions for improving the applicant's qualifications.

2. Whenever a county board of education is required to reduce the number of professional employees in its employment, the employee with the least seniority is released from employment. (This will be explained in greater detail under the section dealing with reductions in force.) The seniority of professional employees is determined on the basis of the length of time the individual has been professionally em-

ployed by the county board of education. When an employee holds a valid certificate or license in one or more areas, the seniority shall accrue in each area of certification or licensure.

3. County boards of education must make decisions affecting the promotion or filling of any service personnel positions on the basis of seniority, qualifications and evaluations of past service. In the event the most senior applicant is not selected for the position, the board must, if requested by the employee, show valid cause in writing why the most senior employee was not selected for the position. A promotion is defined as any change in the applicant's employment that the employee deems to improve his working circumstances within his classification category and shall include a transfer to another classification category or place of employment if such position is not filled by an employee who holds a title within that classification category of employment. For purposes of determining seniority for service personnel, an employee's seniority begins on the date that he enters his assigned duties within each particular job classification. (Seniority rights for service employees with respect to reductions in force will be discussed under the section dealing with this topic.)

4. Applicants for service personnel positions must be considered in the following order:

- a. Regularly employed service personnel;

b. Service personnel whose employment has been discontinued as a result of a reduction in force;

c. Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply for temporary jobs or positions;

d. Substitute service personnel; and

e. New service personnel.

5. With respect to extraduty assignments for service personnel, these assignments must be made in the following manner: A service employee with the greatest length of service time in a particular employment category must be given priority in accepting such assignment, followed by other fellow employees on a rotating basis in accordance to the length of their respective service until all such employees have been given an opportunity to perform similar assignments. The cycle is then repeated unless an alternative procedure for making such assignments has been approved by both the county board of education and an affirmative vote of two thirds of the employees within that respective classification category of employment. Extraduty assignments are defined as irregular jobs which occur periodically or occasionally such as field trips, athletic events, proms, banquets, and band festival trips.⁹³

6. Professional and service personnel employed in multi-county vocational centers are accorded seniority rights

which are essentially the same as those given to employees of individual county boards of education.⁹⁴

Reductions in Force

Many changes have occurred during the past decade which have significantly impacted upon the job security of public school employees. Factors such as declining school enrollments, school consolidations, and reduced revenues have focused increased concern among personnel on the issue of reductions of staff.

According to Phay, the major causes of staff reductions in school systems are usually reduced student enrollments, reduced turnover among professional staff, program changes, reduced school budgets due to inflation or loss of tax revenues, and the unexpected loss of federal or other types of school funding.⁹⁵ When reducing force, considerable care must be taken to follow the specific requirements of state statutes, and local and state board of education policies and regulations. These often contain specific steps that must be carefully followed.⁹⁶

The first issue that must be dealt with is the determination of the need to reduce staff. The burden of proof rests with the governing board when challenged by a laid off employee. A provable need for this action must exist. The importance of this is compounded if the dismissed individual

is tenured since state laws often distinguish between tenured and nontenured staff. Quite often the need to RIF is difficult to establish if it is not directly tied to the loss of enrollment or funds.⁹⁷

A second critical issue involves which position is to be eliminated. Abolishing a position does not, in most cases, determine the staff member who will be laid off. The person whose position is eliminated may have seniority or other rights which are greater than others who hold positions which have not been eliminated. The courts have generally held that the decision as to the specific position that is to be done away with rests with the local school board as long as the decision is not made in an arbitrary manner. This action, however, may not be in retribution against the constitutionally protected rights of the affected employees.⁹⁸

An assistant superintendent for business and finance in a New York school district was discharged from his position due allegedly to declining enrollments and a lack of need for these services. In fact, the superintendent had gradually reduced the duties of this individual hoping that he would eventually resign. The New York Supreme Court held that the superintendent sought to remove the assistant for reasons other than financial and that his tenure could not be eliminated in this manner.⁹⁹

A group of Illinois tenured teachers were dismissed on the basis of declining student enrollment. Within a year, a

number of new untenured teachers were hired. The dismissed tenured teachers sued for reinstatement. The Appellate Court of Illinois held that the dismissed tenured teachers must be given priority when positions were reinstated.¹⁰⁰

Most formally adopted school district RIF plans are based upon a strict seniority rule or give great weight to seniority in determining who will be retained. Thus, the most junior person in the area from which a person is being eliminated is the one who is to be laid off. Both the National Education Association and the American Federation of Teachers strongly support the principle of seniority.¹⁰¹ Some courts have even required school boards to realign staff in order to effectuate a statutory seniority provision.¹⁰² Seniority must be determined by either the provisions of state statute or state or local board of education policy. If not provided by statute, the method or principle used to calculate it should be expressly stated in board policies or regulations.¹⁰³

During the 1981 session of the West Virginia Legislature, a law was passed which granted professional and service personnel in West Virginia specific seniority rights.¹⁰⁴

West Virginia statute sets forth the provisions relative to reduction in force in the state's public schools.¹⁰⁵ Major components of these laws include the following:

1. Employee seniority is the basis for determining who will be laid off during a reduction in force.

2. The seniority of professional personnel is determined on the basis of the length of time that the employee has been professionally employed by the county board of education. When a professional employee holds valid certification or licensure in one or more areas, the seniority accrues in each area.

3. A random selection system established and approved by the local board must be used to determine priority if two or more professional employees accumulate identical seniority.

4. When a county board is required to reduce its number of employed professional personnel, the employee with the least seniority is notified and released. Provided, however, such employee must be employed in any other professional position where he had previously been employed or to any lateral area for which he is certified and/or licensed if his seniority is greater than the seniority of any other employee in that particular area of certification or licensure. Thus, more senior professional employees may "bump" professional employees who are less senior in their respective areas of certification.

5. Professional personnel whose seniority is insufficient to allow retention by the county board during a reduction in force must be placed upon a preferred recall list. Recall of these individuals must be on the basis of seniority by area of certification or licensure. Vacancies may be

filled by other applicants only after all laid off professional staff have been given an opportunity for employment. Boards of education are required to notify all laid off employees of vacancies and employment opportunities as these occur. A laid off employee does not forfeit his right to recall to employment by refusal to accept appointment to a particular position.

6. Decisions of a county board of education concerning a reduction in the work force of service personnel must be made on the basis of seniority. Seniority of such service personnel is determined on the basis of the length of time the employee has been employed by the local board within a particular job classification. When a county board of education is required to reduce the number of service employees, the employee with the least amount of seniority within that classification or grades of classification must be released and employed in a different grade of that classification if such a job vacancy exists. If no such vacancy exists, he must be employed in any other job classification which he previously held with the county board if there is a vacancy and retains any seniority accrued in such job classification or grade of classification.

7. If two or more service employees accumulate identical seniority, priority must be determined by a random system of selection established by the employees and approved by the county board.

8. All service employees whose seniority with the county board is insufficient to allow their retention during a reduction in the work force must be placed on a preferred recall list. Such employees placed upon this recall list must be recalled to any position openings within the classifications where they had previously been employed, or to any lateral position for which the employee is qualified. Laid off service employees must be given first opportunity to employment in any such vacancy or newly created position before applicants from outside the system. Service employees on the recall list who decline employment in a particular position do not forfeit their right to future recall. County boards of education must notify all service employees whose names appear on the preferred recall list of any and all vacancies as these occur.

9. Any board of education which fails to follow the statutory provisions relating to reductions in force and employee recall may be compelled to do so by mandamus and shall be liable to any prevailing party for his reasonable attorney fees and court costs.

10. Professional and service personnel employed in West Virginia multi-county vocational centers have essentially the same rights during reductions in force as those employed by individual county boards of education.¹⁰⁶

When employees, both professional and service, are terminated in a reduction in force, the section of West Virginia

Code which prescribes procedures and employee due process rights related to termination for cause must be carefully followed.¹⁰⁷ These procedures were explained in detail in chapter 2.

For professional instructional and professional support staff such as counselors, etc., seniority begins to accrue on the date the employee begins his employment in each area of certification or licensure held at the time of employment. In the event other areas of certification are added at a later date, seniority in these additional areas begins to accrue on the effective date of the additional certification.¹⁰⁸

During a reduction in force, a teacher, counselor, or other non-administrative professional employee who holds certification in an administrative area cannot "bump" an administrator who has been certified for a shorter period of time. Administrative and supervisory personnel, however, may "bump" other less senior administrators and supervisors as well as teachers in their respective areas of certification. Generally, administrators and supervisors must have first served as classroom teachers; therefore, they have a valid claim to such accrued seniority. However, one's right to "bump" another employee is restricted to the specific teaching fields, endorsements, or areas of administrative and supervisory certification which are listed on his professional teaching or administrative certificate.¹⁰⁹ A service employee

whose full-time position is eliminated during a reduction in force may displace, "bump," the least senior employee within the same job classification.¹¹⁰

A thorough search of West Virginia cases of record revealed only one case dealing with a reduction in force issues. This case dealt with a "reduction in force" of secondary principals in Kanawha County as a result of the closing of a high school in that county. The West Virginia Supreme Court of Appeals held that the county board of education must release from its employment the least senior secondary principal and replace him with the more senior principal whose school had been closed. The court further indicated that county boards of education must comply with all applicable statutory requirements (timeliness, notices, rights to hearing, etc.) relative to employee terminations and transfers in all such matters.¹¹¹

Grievance Procedure

In 1972 the West Virginia State Board of Education enacted policy requiring local boards of education to adopt formal written grievance procedures "that clearly provide for the resolution of differences between employees and employer."¹¹² County boards of education were at that time permitted to adopt such grievance procedures as deemed appropriate and effective; however, the State Board required

that such procedures must contain at least the following provisions:

1. Terms used in the adopted procedure must be fully defined.

2. No reprisals of any kind may be taken by either party as a result of utilizing the procedure.

3. The adopted procedure must be as clear and unambiguous as possible, and must be made available to all employees.

4. All differences must be resolved as quickly as possible.

5. Any employee must be permitted to have assistance if he so wishes in utilizing the procedure.¹¹³

In 1977 the West Virginia Supreme Court of Appeals held that when a county board of education establishes an employee grievance procedure which extends an employee's rights beyond those guaranteed by statute and Constitution, the superintendent and the board must ". . . abide by the remedies and procedures it properly establishes to conduct its affairs."¹¹⁴

In 1985 the West Virginia Legislature created a state-wide employee grievance procedure. This enactment created a comprehensive grievance procedure for employees of the State Board of Education, county boards of education, regional education service agencies, multi-county vocational centers, the Board of Regents, and state institutions of higher

learning.¹¹⁵ Further, an Education Employees Grievance Board to be appointed by the Governor was established by this law to conduct Level IV grievance hearings and make decisions. Previously, the State Superintendent of Schools was authorized by law to function in this capacity.¹¹⁶

Full-time regional hearing examiners were employed by this State Grievance Board to conduct hearings in the various regions of the state. The decisions of these hearing examiners are binding upon the parties of the grievance and enforceable in circuit court. However, either party may within thirty days of an examiner's decision appeal to the Circuit Court of Kanawha County or the circuit court of the county in which the grievance occurred. The court's ruling must be made upon the entire record made before the examiner and may also require oral arguments and written briefs. Such court may affirm, reverse, vacate, or modify the decision of the hearing examiner or may remand the grievance to the chief administrator of the institution or county board of education for further proceedings. Any institution or board failing to comply with the court's decision may be compelled to do so by mandamus.¹¹⁷

State statute specifies the following levels of the employee grievance process:

1. Level I is an appeal to the immediate supervisor.

2. Level II is an appeal to the chief administrator (county superintendent, etc.).
3. Level III is an appeal to the governing board (board of education, etc.).
4. Level IV is an appeal to a regional hearings examiner.

Specified timelines prevail at each level for both employee appeals and decisions resulting from the hearings. A Level III hearing may be waived by a local governing body such as a board of education and the grievant may appeal directly from Level II to Level IV.¹¹⁸ A detailed outline of the grievance procedure is located in the appendix section of this study.

As a result of the prescriptive nature of these state-wide mandated procedures, state and local boards of education policies prescribing employee grievance procedures must not conflict with any aspect of the state statute. It must also contain all of the requirements of this law.¹¹⁹

Employee Organizations

The right of public school employees in the state of West Virginia to join and participate in employee organizations is based upon both federal and state constitutional provisions.¹²⁰ The First Amendment to the Constitution of

the United States which was made applicable to the states by the Fourteenth Amendment forbids any law abridging ". . . the right of people to peacefully assemble, and to petition the government for a redress of grievances."¹²¹ Section Sixteen of Article III of the West Virginia Constitution also has a similar provision:

The right of the people to assemble in a peaceful manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate.¹²²

These constitutional provisions give public school employees, as citizens, the right to peacefully assemble and to petition the government.¹²³ Denial of these rights would be to deny employees equal protections of the law.¹²⁴ The United States Supreme Court has confirmed these rights in three landmark decisions over the past thirty-five years.¹²⁵

The West Virginia Attorney General has indicated that public school employees may join and participate in the activities of labor unions and employee organizations since the rights of freedom of expression, assembly, and petition are guaranteed by both the State and federal constitutions.¹²⁶ Similarly, West Virginia State Board of Education policy provides that

School Employees are entitled to meet together, form associations and work in concert in order to improve their circumstances or the circumstances of the public schools. However, the right to strike does not exist for any public employee in the State of West Virginia, including school employees.¹²⁷

State Board of Education policy and common law also provide that employees may petition the administration and local boards of education on matters of concern without fear of reprisal. Employees are encouraged to make suggestions, proposals and recommendations. Official meetings of boards of education are public meetings and employees are encouraged to attend and participate in such meetings.¹²⁸

Collective Bargaining/Negotiations

West Virginia public school employees may meet and discuss the conditions of their employment with their board of education either individually or collectively through or with the assistance of an employee organization. State board of education policy states that "School employees are entitled to meet together to form associations and work in concert to improve their circumstances or the circumstances of the schools. However, the right to strike does not exist for any public employee in the State of West Virginia, including school employees."¹²⁹ Further, the employment contract for public school personnel states that the employee shall abide by the laws of the State and the duly adopted regulations of the State Board of Education.¹³⁰

A recent opinion issued by the Office of the Attorney General cites the common law origin of the illegality of public employee strikes,

. . . (1) The Fact that the law of this State has its origin in the common law (Article II, Section 21, Constitution of West Virginia), which prohibits public employees from exercising the right to bargain collectively, the right to strike, closed shops and other related activities normally associated with and approved by the courts as rights belonging to such organizations and groups in the private section of our society; and (2) the absence of legislation or a definitive decision by the Supreme Court of Appeals of West Virginia permitting or directing county school boards (or any other public agencies) to enter into such 'collective bargaining' contracts with designated groups, labor unions or other representatives of public employees.¹³¹

The State Attorney General has declared "negotiations" to be lawful under the following definition:

The terms 'negotiate' and 'negotiation' as used in this opinion are defined herein to include the process or procedure between public employers and public employees or their duly authorized representative or representatives by which an agreement--oral and written--is attempted to be reached regarding wages, hours of employment, grievances, etc., affecting the total conditions of employment and the relationship between the public employer and the public employee.¹³²

Collective bargaining, however, is illegal since it implies the right to strike, compulsory or binding arbitration, compulsory or binding fact-finding by a third party, etc.¹³³

The U.S. Supreme Court has upheld the authority and propriety of the local school district's right to dismiss teachers who have gone on strike in direct violation of state law and who remained on strike after being repeatedly encouraged to return to work. The Court held that federal due process requirements do not demand that the decision to dismiss be made by some other "impartial" body since the local board is duly responsible to the voters for such a decision

and the local board is the sole body vested by state law with the authority to dismiss its employees.¹³⁴

During a strike of state highway workers employed by the West Virginia State Road Commission in March, 1963, several hundred employees who refused a directive to return to work were dismissed from their jobs by order of the Governor. The dismissed employees (plaintiffs) brought suit through their union for reinstatement and damages in the United States District Court for the Southern District of West Virginia. Chief Judge Field granted the state's motion for summary judgment and dismissal of the action, pursuant to Article VIII, Section 21, of the West Virginia Constitution, which adopts current common law as the law of the state, except as changed by the constitution and subsequent acts of the Legislature. The court stated ". . . that a strike by public employees for any purpose is illegal under the common law, and no statutory declaration of their illegality is necessary."¹³⁵ This decision was upheld by the Fourth Circuit Court of Appeals in 1970¹³⁶ and a writ of certiorari to the U.S. Supreme Court was denied in 1971.¹³⁷

A thorough review of recent case law and opinions of the Office of the Attorney General makes it quite clear that public school employees in West Virginia do have a right to negotiate with local boards of education. Strikes, however, continue to be illegal.¹³⁸

Summary

West Virginia statute, federal laws and regulations, state board of education policy, and related case law provide certain legal rights and benefits to public school employees beyond those described in chapter 2. These were described in chapter 3.

Public school teachers in West Virginia have basically the same rights to academic freedom as is accorded to members of the profession in other states. Their activities must stay within the reasonable parameters determined by local boards and community norms. Instructional methods utilized by a teacher must be relevant to the topic being presented, be appropriate to the age and maturity of the students, and not be significantly disruptive to the functioning of the school or school system.

In West Virginia, professional and service employees may only be assigned extra duties which are consistent with their job functions and responsibilities. Teachers who perform extracurricular duties must be willing to perform these duties and must likewise receive compensation at their regular rate of pay for these services. Service personnel who agree to perform duties beyond the regular workday or workweek must be paid at a rate that is one and one-half times their regular hourly rate.

At the beginning of each employment term, all full-time employees of a county board of education are entitled to annually receive at least one and one-half days personal leave for each employment month or major fraction of the employee's employment term. Unused personal leave accumulates without limitation and is transferable within the state. An employee who is absent from assigned duties due to accident, sickness, death in the immediate family or other cause authorized or approved by the local board of education is entitled to utilize accumulated personal leave. With administrative permission, employees may use up to three days of such leave annually without regard to the reason for such absence. But these days may not be used in connection with a concerted work stoppage or strike.

Although paid sabbatical leave is not available to West Virginia public school personnel, county boards may grant unpaid leaves of absence for periods up to one year for purposes it deems proper. Any professional educator who is returning from such a leave of absence must be returned to the same position or duties he held prior to the absence. A county board of education may approve the attendance of any of its employees at educational conferences or meetings when in the judgment of the superintendent it is necessary and desirable. The superintendent may also grant paid leave for up to five non-instructional days at the end of a school term for the purpose of an employee attending summer school at an

institution of higher learning if such term overlaps with the employee's employment term. County board employees who are members of the West Virginia National Guard or any United States Military Reserve unit are entitled to up to thirty days paid leave annually to engage in drills, parades or other duty. Board employees who are called to jury duty or, under certain circumstances, are subpoenaed to appear as a witness in court may do so without loss of pay. Unpaid leaves of absence may be granted to public school employees for any purpose which is deemed worthwhile and proper by the county board of education.

Among fringe benefits afforded public school employees in West Virginia are workmen's compensation insurance, unemployment compensation, and the opportunity to participate in a state-sponsored comprehensive group medical and life insurance program at little or no cost to the employee. County boards of education are also authorized to deduct premiums of local group insurance programs and for tax-sheltered annuities.

All regularly employed employees of county boards of education are required to participate in the State Teachers Retirement System, contributing a fixed percentage of their annual income to this fund. Eligibility for retirement benefits is based upon age, years of service, and in some instances, disability.

By state law, West Virginia public school employees are accorded certain seniority rights. These deal primarily with promotion and job security.

West Virginia statute specifies both the rights of public school employees during reductions in work force and the procedures. These must be followed by county boards of education when such actions are being implemented.

County boards of education are required to follow a state-wide mandated employee grievance procedure. Grievances which cannot be resolved within the prescribed intra-county levels, must be decided by a regional hearings examiner. Decisions of these examiners may be appealed through the courts.

Under the current federal and state constitutional provisions, school employees may meet together, form associations, and work in concert to improve their own circumstances or the circumstances of the school system. However, since West Virginia does not have a statute which makes it legal to bargain collectively or to strike, employee organizations cannot legally engage in such activities.

NOTES

¹Louis Fischer and David Schimmel, The Rights of Students and Teachers (New York: Harper and Rowe, 1982), p. 94.

²Sweezy v. New Hampshire, 354 U.S. 234 (1957).

³Fischer and Schimmel, loc. cit.

⁴Ibid., p. 110.

⁵Ibid.

⁶Ibid.

⁷M. Chester Nolte, How to Survive in Teaching (Chicago: Teach'em, 1978), p. 139; see also William Thomas McNeel, "An Analysis of the Laws Affecting Public School Administrators, Teachers, Service and Auxiliary Personnel in West Virginia," (Ed.D. diss., Virginia Polytechnic Institute and State University, 1979), p. 175.

⁸DeVito v. Board of Education, 317 S.E.2d 159 (W.Va. 1984).

⁹Webb v. Lake Mills Community School District, 344 F.Supp. 791 (N.D., Iowa 1972).

¹⁰Simon v. Jefferson Davis Parish School Board, 289 So.2d 511 (La. 1974).

¹¹Miller v. California, 413 U.S. 15 (1973).

¹²Cary v. Board of Education, 598 F.2d 535 (10th Cir. 1979).

¹³Adams v. Campbell City School District, 511 F.2d 1242 (10th Cir. 1975).

¹⁴Dean v. Timpson Independent School District, 487 F.Supp. 302 (E.D. Tex. 1979).

¹⁵Epperson v. Arkansas, 393 U.S. 97 (1968).

¹⁶W.Va. Code, §18A-2-2.

¹⁷State Superintendent of Schools, Prescribed Probationary and Continuing Contracts of Employment for West Virginia Teachers.

¹⁸E. Edmund Reutter, Jr., and Robert R. Hamilton, The Law of Public Education (Mineola: The Foundation Press, 1976), p. 380.

¹⁹W.Va. Code, §18-5-15.

²⁰*Fox v. Board of Education*, 236 S.E.2d 243 (W.Va. 1977).

²¹*Beverlin v. Board of Education*, 216 S.E.2d 554 (W.Va. 1975).

²²W.Va. Code, §18A-2-5.

²³W.Va. Code, §18A-4-16; also statements by Brentz Thompson, Research Assistant to the State Superintendent of Schools, in a telephone interview on 25 April 1988.

²⁴*Ibid.*

²⁵*Ibid.*

²⁶Interpretation, State Superintendent of Schools, "Employee" April 16, 1986.

²⁷*Ibid.*

²⁸Interpretation, State Superintendent of Schools, "Employee" April 3, 1984.

²⁹W.Va. Code, §21-5C-3(a).

³⁰W.Va. Code, §18A-4-8a.

³¹W.Va. Code, §21-5C-3.

³²West Virginia Board of Education, Policies, Rules, and Regulations, §5210.

³³Interpretation, State Superintendent of Schools, "Contract" November 30, 1977 (35); see also W.Va. Code, §18A-4-16.

³⁴W.Va. Code, §§18A-4-9; 18A-5-5.

³⁵W.Va. Code, §18A-4-10.

³⁶Ibid.

³⁷Ibid.

³⁸Interpretations, State Superintendent of Schools, "Employee" February 22, 1974 and April 8, 1974 (6).

³⁹Interpretation, State Superintendent of Schools, "Employee" April 8, 1974 (6).

⁴⁰Interpretation, State Superintendent of Schools, "Employee" February 25, 1974 (33).

⁴¹Interpretation, State Superintendent of Schools, "Employee" August 31, 1976 (6).

⁴²42 U.S.C. §2000e-2.

⁴³W.Va. Code, §18A-4-10.

⁴⁴W.Va. Code, §18-1-1.

⁴⁵W.Va. Code, §18A-4-10.

⁴⁶Interpretation, State Superintendent of Schools, "Salary" October 29, 1974 (15).

⁴⁷Interpretation, State Superintendent of Schools, "Teacher" May 2, 1963 (16).

⁴⁸W.Va. Code, §18A-5-2.

⁴⁹Interpretation, State Superintendent of Schools, "Teacher" May 2, 1973 (16).

⁵⁰Interpretation, State Superintendent of Schools, "Salary" July 11, 1977 (47).

⁵¹Interpretation, State Superintendent of Schools, "Salary" December 8, 1971 (3).

⁵²W.Va. Code, §§18A-5-2, 18-1-1.

⁵³W.Va. Code, §18-1-1; see also Interpretation, State Superintendent of Schools, "Employee" January 25, 1978 (37).

⁵⁴W.Va. Code, §18A-4-10a.

⁵⁵Interpretation, State Superintendent of Schools, "Employee" June 13, 1972 (3).

⁵⁶Ibid.

⁵⁷W.Va. Code, §18A-2-2a.

⁵⁸W.Va. Code, §18A-2-2; see also Interpretation, State Superintendent of Schools, "SDE LEAD PROJECT" September 2, 1987.

⁵⁹W.Va. Code, §§18A-5-4,-5.

⁶⁰W.Va. Code, §18-5-15.

⁶¹W.Va. Code, §18A-5-3.

⁶²W.Va. Code, §18A-5-3a.

⁶³W.Va. Code, §15-1F-1.

⁶⁴W.Va. Code, §23-2-1.

⁶⁵52 Op. Att'y Gen. 490 (1967).

⁶⁶W.Va. Code, §23-4-6.

⁶⁷Buckland v. State Compensation Comm., 115 W.Va. 323, 175 S.E. 785 (1934), as cited in Harris v. State Workmen's Compensation Comm., 208 S.E.2d 291 (W.Va. 1974).

⁶⁸W.Va. Code, §23-4-1a.

⁶⁹W.Va. Code, §§21A-1-1,-3; see also Public Law 94-566 amending the Federal Unemployment Tax Act, enacted by Congress in 1976.

⁷⁰Ibid.

⁷¹W.Va. Code, §21A-6-15; see also West Virginia Department of Employment Security, Unemployment Compensation for West Virginians (Charleston, W.Va.: West Virginia Department of Employment Security, 1987), p. 21.

⁷²W.Va. Code, §§5-16-7,-12; see also West Virginia Public Employees Insurance Board, State of West Virginia Group Benefits Reference Manual (Charleston, W.Va.: West Virginia Public Employees Insurance Board, 1988), p. 1.

⁷³West Virginia Public Employees Insurance Board, op. cit., p. 3.

⁷⁴Ibid., p. 2.

⁷⁵W.Va. Code, §5-16-12.

⁷⁶W.Va. Code, §§18-4-11; 18-5-35.

⁷⁷W.Va. Code, §18A-4-11.

⁷⁸W.Va. Code, §§18-25-1; 18A-4-12; see also 26 U.S.C. §403(b).

⁷⁹State Teachers Retirement Board, West Virginia Teacher Retirement System (Charleston, W.Va.: State Teachers Retirement Board, 1970), p. 7; see also "Highlights," State Teachers Retirement Board, July 1, 1986 and Memorandum from Brud Ansel, Executive Director, 9 May 1986.

⁸⁰W.Va. Code, §18-7A-3.

⁸¹W.Va. Code, §18-7A-14a.

⁸²State Teachers Retirement Board, Official Rules and Regulations (Charleston, W.Va.: State Teachers Retirement System, 1978).

⁸³W.Va. Code, §18-7A-25.

⁸⁴W.Va. Code, §18-7A-14.

⁸⁵Ibid.

⁸⁶W.Va. Code, §18-7A-17.

⁸⁷Ibid.

⁸⁸Ibid.

⁸⁹W.Va. Code, §18-7A-25.

⁹⁰W.Va. Code, §18-7A-23.

⁹¹W.Va. Code, §18-7A-3; see also State Teachers Retirement Board, West Virginia Teachers Retirement System, op. cit., p. 18.

⁹²Interpretation, State Superintendent of Schools, "Teachers Retirement Board" May 19, 1987 (17); see also 29 U.S. Code 631 (a).

⁹³W.Va. Code, §18A-4-8b.

⁹⁴W.Va. Code, §18A-4-8c.

⁹⁵Robert E. Phay, Reductions in Force: Legal Issues and Recommended Policy (Topeka: National Organization on Legal Problems of Education, 1980), pp. 1-4.

⁹⁶Ibid., pp. 5-7.

⁹⁷Ibid., pp. 9-12.

⁹⁸Ibid., pp. 16-17.

⁹⁹Weimer v. Smithtown Central School District, 424 N.Y.A.2d 472 (1980).

¹⁰⁰Bilek, et al. v. Board of Education of Berkley School District, 377 N.E.2d 1259 (Ill. 1978).

¹⁰¹Phay, op. cit., p. 28.

¹⁰²Ibid., p. 29.

¹⁰³Ibid.

¹⁰⁴W.Va. Code, §§18A-4-8b,-c.

¹⁰⁵W.Va. Code, §18A-4-8b,-c.

¹⁰⁶Ibid.

¹⁰⁷W.Va. Code, §18A-2-2; see also Memorandum from William Thomas McNeel, State Superintendent of Schools, to county school superintendents, 22 February 1988, dealing with Personnel Action Guidelines: Reductions in Force, Suspensions, Transfers, etc.

¹⁰⁸Interpretation, State Superintendent of Schools, "Principal: Salary, Teacher, Certification, Contract" April 23, 1987 (17).

¹⁰⁹Ibid.; see also Interpretations, State Superintendent of Schools, "Employee" April 17, 1987, October 6, 1986, and March 20, 1984.

¹¹⁰Memorandum from W. Thomas McNeel, State Superintendent of Schools, to county school superintendents, 22 February 1988, loc. cit.

¹¹¹State ex rel. Board of Education of Kanawha County v. Casey, 349 S.E.2d 436 (W.Va. 1986).

¹¹²West Virginia Board of Education, Policies, Rules and Regulations, §5300.

¹¹³Ibid.

¹¹⁴Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

¹¹⁵West Virginia State Department of Education, Informal Guidelines for Implementing Public Education Bills Enacted in 1985 (Charleston, W.Va.: West Virginia Department of Education, 1985), p. 103.

¹¹⁶Ibid., p. 105.

¹¹⁷Ibid., p. 108.

¹¹⁸W.Va. Code, §18-29-4.

¹¹⁹Statements by Brentz Thompson, Research Assistant to the State Superintendent of Schools, in a personal interview on 16 June 1987.

¹²⁰William Thomas McNeel, "An Analysis of the Laws Affecting Public School Administrators, Teachers, Service, and Auxiliary Personnel in West Virginia," (Ed.D. diss., Virginia Polytechnic Institute and State University, 1979), p. 196.

¹²¹United States Constitution, Amendment I.

¹²²W.Va. Const. art. III, §16.

¹²³McNeel, op. cit., p. 197; see also Joanna Banthin and Leigh Stalzer, Teachers Have Rights Too (Boulder, Colo.: Social Science Consortium, 1980), p. 120.

¹²⁴Ibid.

¹²⁵Wieman v. Updegraff, 344 U.S. 183 (1953); Shelton v. Tucker, 364 U.S. 479 (1960), Keyishian v. New York Board of Regents, 385 U.S. 589 (1967).

¹²⁶51 Op. Att'y Gen. 683 (1966).

¹²⁷West Virginia Board of Education, Policies, Rules and Regulations, §5300; see also Richard F. Meckley, Handbook of West Virginia School Law (St. Albans, W.Va.: National Learning Productions, 1987), p. 125.

¹²⁸Ibid.,; see also Meckley, op. cit., p. 126; McNeel, op. cit., p. 197.

¹²⁹West Virginia Board of Education, Policies, Rules and Regulations, §5300; see also Interpretation, State Superintendent of Schools, "Employee" March 2, 1987.

¹³⁰Interpretation, State Superintendent of Schools, "Employee" March 3, 1987.

¹³¹Op. Att'y Gen., June 26, 1974.

¹³²Ibid.

¹³³Ibid.; see also McNeel, *op. cit.*, p. 199.

¹³⁴Hortonville Joint School District v. Hortonville Ed. Assoc., et al., 426 U.S. 482 (1976).

¹³⁵Kirker v. Moore, 308 F.Supp. 615 (1970).

¹³⁶Kirker v. Moore, 436 F.2d 432 (4th Cir. 1970).

¹³⁷Kirker v. Moore, cert. den. 404 U.S. 824 (1971).

¹³⁸Interpretation, State Superintendent of Schools, "Employee" March 3, 1987.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

As a result of an extensive examination of the court decisions, statutes, opinions of the Attorney General, policies of the West Virginia Board of Education, and interpretations of the West Virginia State Superintendent of Schools presented in the study, the following conclusions appear to be justified with respect to public school personnel in West Virginia:

1. School personnel are subject to the enactments of the Legislature, and the authority of the West Virginia Board of Education and State Superintendent of Schools.

2. Public school personnel are employed and supervised by county boards of education; however, they accrue most of the benefits afforded employees of the state such as personal leave, retirement coverage, unemployment compensation, health and life insurance and workmen's compensation.

3. The recommendation of the county superintendent of schools is required before a board of education may employ professional personnel. Service personnel, however, may be

employed without the recommendation of the county superintendent.

4. Boards of education and school officials are required to comply with state law, State Board of Education policies and rules, county board of education policies, and the requirements of certain federal agencies in matters of employment.

5. Professional educators are required to hold valid certification in the areas for which they are employed.

6. Service personnel are not required to hold certificates or licenses; however, each such employee must be classified by the superintendent and county board with a state approved job title.

7. A written contract as required by state statute formalizes the relationship between a county board of education and an employee. State Board of Education policy gives probationary employees defacto tenure and essentially the same employment rights as nonprobationary personnel. Employees acquire a continuing contract after three consecutive years of satisfactory service. Except, an employee who was previously granted a continuing contract in any county within the state shall be granted another such contract after one year of satisfactory service in any other county within West Virginia provided such employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year. Employees

who are granted continuing contracts become "tenured" within the county school system where they are employed.

8. Public school personnel in West Virginia may be transferred without their consent to different positions, demoted, dismissed, or suspended only if the superintendent and the county board follow precise statutory procedural due process requirements and state and local board of education policies.

9. School employees may be dismissed for lack of need provided the procedure specified in statute is followed. Seniority by area of certification determines the employee who will be released from employment. Least senior employees so affected must be placed upon a preferred recall list and given preference when vacancies occur.

10. Public school employees may be suspended and/or dismissed for immorality, incompetency, cruelty, insubordination, intemperance, or willful neglect of duty. In the event an employee becomes subject to such action as a result of an activity or circumstances apart from his employment setting, the school board must show a rational nexus between the employee's actions and his employment responsibilities.

11. Minimum salary schedules and a minimum employment term of two hundred days have been established by the Legislature for school personnel. County boards of education, however, may contract with an employee for a longer term of

employment or a higher salary so long as this is done in a uniform and nondiscriminatory manner.

12. Academic freedom and freedom of speech of public school teachers are limited by the reasonable parameters established by local school boards and community norms. Instructional methods must be relevant to the topic being presented, be appropriate to the age and maturity of the students, and not be significantly disruptive to the functioning of the school or school system.

13. Teachers who perform extracurricular responsibilities must be given an extraduty contract and receive compensation at their regular rate of pay. Service personnel who agree to perform duties beyond their regular workday or workweek must be paid at a rate of one and one-half times their regular hourly wage. Also, State Board of Education policy requires that an employee's performance of duties covered by an extraduty contract must be evaluated separate from the evaluation covering the performance of his regular contract duties.

14. Personal leave accrues on the basis of one and one-half days for each month of employment. Unused leave accumulates without limitation and is transferable within the state. An employee who is absent from his assigned duties due to accident, sickness, death in the immediate family or other cause authorized or approved by the local board of education is entitled to utilize such leave. State law pro-

vides that an employee may use up to three days of this leave annually without regard to the reason for such absence.

15. Paid sabbatical leave is not available to West Virginia public school personnel. County boards of education, however, may grant unpaid leaves of absence for periods of up to one year for purposes it deems proper. Any professional educator who is returning from such a leave of absence must be returned to the same position or duties he held prior to the absence.

16. Fringe benefits afforded public school employees include workmen's compensation, unemployment compensation, and the opportunity to participate in a state-sponsored comprehensive group medical and life insurance program at little or no cost. County boards of education are also authorized to deduct premiums of local group insurance programs and for tax-sheltered annuities as requested by participating employees.

17. All regularly employed school personnel are required to participate in the State Teachers Retirement System.

18. West Virginia public school personnel are accorded seniority rights which primarily deal with promotion and job security.

19. County boards of education must allow employees to file grievances in accordance with the mandated statewide

procedure. Decisions of regional hearing examiners may be appealed through the courts.

20. School personnel may meet together, form associations, and work in concert to improve their circumstances.

21. County board of education employees have no authority to bargain collectively or to strike.

Recommendations

An analysis of the findings of this study has led to the following recommendations:

1. Further study should be conducted to determine the impact of the decisions of the regional hearing examiners on State Superintendent interpretations, State Board of Education policies, and local board of education practices.

2. Further study should be conducted to determine the effect of the standardized statewide grievance procedure on employee morale.

3. Further study should be conducted to determine the extent to which West Virginia public school personnel are aware of their employment rights.

4. Similar studies should be conducted every three to five years to examine enactments of the Legislature and the Congress, decisions of state and federal courts, federal legislation, and new policies of the West Virginia Board of Education which affect the rights of school personnel.

5. State Board of Education policies should be developed which more clearly delineate issues such as comparable pay for duties performed under extraduty contracts, defacto tenure as it relates to probationary personnel, and the due process requirements that must be followed when an employee is being suspended or dismissed.

6. As a practicing administrator, the writer feels that the West Virginia Code should be revised to allow school superintendents and school boards more flexibility to deal with personnel issues. For example, sections of the code which deal with pay scales for part-time service personnel, assignment of duties to service personnel, extraduty contracts for professional personnel who attend school related functions such as parent-teacher conferences on a regular basis, and promotion based upon seniority need to be improved. The code also needs to be revised to require all employees to satisfactorily complete a probationary period before gaining any type of tenure (defacto or dejure).

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APPENDIX A. OUTLINE OF EDUCATION EMPLOYEE GRIEVANCE PROCEDURE

Outline

EDUCATION EMPLOYEE GRIEVANCE PROCEDURE

(W.Va. Code, §§18-29-4,-7)

Level I

IMMEDIATE SUPERVISOR

1. Event occurs or becomes known or most recent occurrence.

2. Grievant or his representative within fifteen days of step one schedules a conference with employee's supervisor to discuss the issue.

3. Supervisor holds an informal conference within three days of step two with grievant and/or designated representative.

4. Supervisor responds to grievant within two days of step three.

5. If the issue is still unresolved, a written grievance is filed with supervisor within ten days of step four by grievant or designated representative using proper form.

6. Supervisor issues a written decision within five days of step five. If the decision is unsatisfactory, the grievant may appeal to Level II.

Level II

CHIEF ADMINISTRATOR

1. Grievant appeals to chief administrator or designee within five days of an unsatisfactory decision of immediate supervisor.

2. Chief administrator or designee conducts a hearing within five days of step one--procedural and substantive due process requirements apply and a "mechanical" recording must be made of the hearing.

3. Chief administrator or designee issues a written decision within five days after the step two hearing. This decision may affirm, modify or reverse the decision of the employee's immediate supervisor. If this decision is unsatisfactory, the grievant may appeal to the governing board.

Level III

GOVERNING BOARD

1. Grievant may appeal to governing board within five days of receiving the unsatisfactory decision of the chief administrator.

2. Within five days of step one, the board may conduct a hearing, decide on the record of the Level II hearing, or waive participation.

3. If participation is not waived, the board must issue a written decision within five days of step two which affirms, modifies, or reverses the decision of the chief administrator.

Level IV

HEARING EXAMINER

1. Grievant may appeal to a regional hearing examiner within five days an unsatisfactory response from the governing board.

2. Hearing examiner conducts a hearing within ten days of step one or within thirty days by mutual consent of the parties.

3. Hearing examiner issues a written decision within thirty days of step two with the findings and conclusions binding on both parties and enforceable by court action. This decision may be appealed to circuit court by either party within thirty days.

APPENDIX B. GLOSSARY OF TERMS

Glossary of Terms

Affirm: To confirm, ratify, or approve; an appellate court may confirm a judgment or decree of a lower court.

Appeal: The review of a case by a court of superior jurisdiction. Also, an appeal is the request for a higher court to review the decision of a lower court.

Brief: A written summary of a case. Also, a written statement prepared by one side in a lawsuit to explain its case to a judge.

Certiorari: (To be more fully informed) An original writ or action whereby a cause is removed from an inferior to a superior court for review.

Common Law: The principles of law derived from the ancient law of England which are embodied in court decisions. It is often called "judge-made" law which is based on customs and precedents.

Hearing: An oral proceeding before a court or quasi-judicial tribunal.

Jurisdiction: The court's authority to hear a case.

Litigation: The process of conducting a lawsuit.

Mandamus: A writ issued by a court ordering that some official duty be performed.

Plaintiff: The party who initiates a lawsuit.

Remand: A higher court may send a case back to a lower court with instructions to take some action in the case.

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