



## THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

**CEPI Education Law Newsletter**

Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

MAY 2012 : Vol. 10-5

**TEACHER TENURE: LEGAL AND POLICY ISSUES****Overview**

In recent years tenure has come under attack, especially from those who wish to hasten the process of reforming public education. The general view of these critics is that tenure status for administrators and teachers (where available by law) represents a major impediment to true reform. More specifically, they believe that tenure, once awarded, makes it impossible to remove individuals whose job performance is less than acceptable.

*Historical Foundation:* Tenure is a position-based concept with deep historical roots in property law—especially real property in the English feudal system. Tenure can be traced back to a time when a person could only possess (hold) and live on the king's land so long as the king granted permission and remained satisfied with the land holder's services rendered. In early times the king never gave up true ownership of the piece of land. If the possessor's performance and productivity did not satisfy him the property interest was terminated. While much has changed in property law over the centuries, much of its historical foundation has carried over to our legal system and is embedded in our current system of tenure as practiced in contemporary educational institutions.

*Tenure Status Today.* Tenure in public school systems must be placed in the context of state law. Tenure status is created by state statute. As Alexander and Alexander tell us, “[t]enure is a statutory right to hold office or employment and receive the benefits and emoluments of the position. Tenure, in general, is a mode of holding or occupying a position or job.” (Alexander and Alexander, 2012) Other legal experts make it clear that “...tenured teachers do not have a right either to a particular position in a school district or to indefinite employment.” (Fischer, Schimmel, and Kelly, 1999) As one court summarized: “[tenure] is meant to give job security to certified employees who meet the necessary qualifications and who satisfactorily have served the probationary period....” Thompson v. Modesto City High School Dist. (Cal. App. 1977) As a general rule, tenure does not automatically transfer from one position to another in the same school system, or from one school system to another in the same state. (Vacca and Bosher, 2012)

In some states tenure is not available for school principals and supervisors, while in other states tenure is not available for classroom teachers. At some universities, while tenure status is available to full-time teaching

faculty, it is not available to administrators. Thus, one must turn to the statutes of a given state to determine: (1) if tenure status is available or not, (2) what positions fall under the state's tenure statute (e.g., principals, classroom teachers), (3) eligibility criteria (e.g., years of probation prior to eligibility, work-related productivity measures), (4) the nature of tenure as included in negotiated collective bargaining agreements (in more unionized states), and (5) the procedural requirements (notice, cause, and hearing) required for revocation of tenure status. In addition, state contract law and local school system policies must be factored into the research.

*Personal Example.* As a former public school teacher and university professor I was fortunate to possess tenure status as a teacher at both levels of education. I had met and fulfilled eligibility criteria (including a specified period of probationary time) and was granted tenure by the governing board. Technically, in my being awarded tenure, I was granted a "property interest" in my position. However, I also knew that my tenure (as a teacher or professor) was not a permanent arrangement of private ownership. I merely was the occupant (tenant) in an existing position in a formal organizational structure. And, I knew that I had to continue to fulfill the expectations of my employer or risk losing occupancy. If at some later date I was dismissed from employment someone else could fill that existing vacant position. Fortunately, to revoke my tenure a *formal process* (notice, cause, and hearing) had to be followed. In my view entitlement to a mandated procedure prior to termination is the most important aspect of achieving tenure

### **Federal Law Overlay and Job Security**

Beginning in the late-1960's and moving into the early-1970's, in addition to resurrecting such old civil rights remedy sources as Section 1983 and 1985 (CRA 1871), the job security of public school administrators and teachers (both tenured and non-tenured) was bolstered by the application of federal constitutional law guarantees (Fourteenth Amendment's due process and equal protection mandates) in employment discrimination cases. So too were the anti-discrimination protections contained in the Civil Rights Act of 1967, Title VII; Title IX of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1975; Americans with Disabilities Act (1990) and other civil rights statutes relied on by complaining parties in emerging public employment cases. In the 1980's federal law also was applied where employees sought remedy in what became known as the "sexual harassment in the workplace era."

The United States Supreme Court itself added an important dimension to job security and the importance of achieving tenure when it handed down Board of Regents v. Roth (1972) and Perry v. Sindermann (1972). In addition to state tenure guarantees the Court made it clear that both substantive and procedural due process guarantees were available to parties who could establish a *property interest* in their employment.

### **Harbaugh v. Board of Education of the City of Chicago (N.D. Ill. 2011)**

Recently I came across an interesting tenure-related case decided by a federal district court in Illinois. Harbaugh v. Board of Education of the City of Chicago (N.D. Ill. 2012) involved an action brought by a full-time teacher (hereafter referred to as "Ms. H.") whose employment had been terminated.

*Facts:* In July of 2003, Ms. H. was hired as a music teacher at Blaine Elementary School in Chicago. She also had worked as a "day-to-day substitute" in the Chicago Public Schools between 1996 and 2002. She did not argue that her time as a "day-to-day substitute should be counted for tenure purposes.

During the 2003-2004 school year at Blaine, Ms. H. was classified as a “full-time-basis (FTB) substitute teacher”—a label given by the school board to a substitute teacher assigned full-time to a school. She taught as a FTB substitute teacher on a regular teaching certificate. At the time the school board distinguished FTB’s from “day-to-day substitutes.”

In November 2003, Ms. H. received a letter from the school board’s CEO informing her that, pursuant to the terms of the proposed Union contract, effective July 1, 2004, all regularly certified FTB’s in vacant teaching positions not being held for teachers on leave would be classified as appointed probationary teachers and immediately place them on a track to become tenured. Thus, as of that date the FTB category would be eliminated and those affected would be given proper recognition and a greater job protection either as probationary appointed teachers (PAT) or temporary assigned teachers (TAT).

In August 2004, MS. H. received a letter notifying her that she was changed from FTB to PAT. In the letter it stated that her probationary period began July 1, 2004, and if she remained a PAT for four consecutive and complete years of satisfactory service she would receive tenure at the start of the fifth year of appointment. She therefore would be tenured on July 1, 2008.

In May of 2008, the board terminated Ms. H.’s employment effective June 30, 2008. The board did not characterize her termination as one for cause and she was not provided a hearing or other opportunity to contest her termination. In a letter from the school system’s CEO it stated that the reasons for termination were her “failure to improve in setting and maintaining norms, standards, and established routines for student conduct” and her exhibition of “pedagogical differences with school philosophy.” She was not appointed to another full-time position in the school system. Subsequently, Ms. H. challenged her termination in court.

*Court Opinion.* Originally filed as a four count complaint in a state court, but subsequently removed to federal district court by the school board, Ms. H. alleged that she was unlawfully terminated from her job. More specifically she alleged her termination violated the Illinois Tenure Act, and the due process clauses of the United States Constitution and the Illinois Constitution. She sought reinstatement to her position, back pay, back benefits, and retroactive seniority. The school board argued that Ms. H. did not in fact achieve tenure status and therefore received “all of the process she was due as a probationary teacher.”

In this case the dispute centers on whether the 2003-2004 school year, during which Ms. H. was employed as a FTB substitute, counts toward her four-year probationary period.

Citing Board of Regents v. Roth (1972), Carey v. Piphus (1978) and several state court decisions on point the court opined that whether Ms. H. is entitled to due process as a matter of federal law depends on whether she has a *protected interest* in continued employment as defined by state law. To the court there is no question that someone who has achieved tenure status under the Illinois Code has a protected “property interest” in employment and therefore is entitled to a meaningful opportunity to rebut any claim that discharge is for cause. However, a hearing in connection with discharge of a probationary employee is not required.

*Decision.* Following a detailed discussion of Illinois tenure law (including the Illinois Code, appropriate Illinois court decisions, and the Union collective bargaining agreement) the court concluded that Ms. H.’s service as a FTB did not count towards her tenure eligibility. Thus, she did not achieve tenure. The district court concluded that her “lack of tenure status is fatal” to her request for a writ of mandamus (e.g., reinstatement) and her due process claim (notice and hearing prior to termination). The board’s motion for summary judgment was granted.

### **Policy Implications.**

Harbaugh v. Board of Education of the City of Chicago (2012) demonstrates three important things each of which has a bearing on local school board policies. First, it shows how state tenure law and aspects of federal constitutional law can be brought together in the same court action. Second, it illustrates how an action initially filed in a state court can be removed to a federal court for resolution of the issues. Third, and focusing directly on the purpose of my commentary, the case illustrates the importance of a teacher possessing tenure status (i.e., a property interest in employment) as a condition precedent to receiving pre-termination due process of law (i.e., notice, cause, and an opportunity to be heard).

While Harbaugh is but one case, in my view the following implications for school board policy contained in the case are worth contemplating. Policies must make it clear that:

- All tenure policies and procedures are in compliance with state statutory provisions and mandates.
- Achieving tenure status in the school system is the result of an evaluation process.
- Eligibility (including probationary service required, what counts toward years of service, employment positions included) for and other work-related criteria to be evaluated to achieve tenure status are clarified and articulated.
- Tenure status does not equate to permanent employment in or permanent assignment to a particular position in the school system—rather, it guarantees the implementation of a formal process (notice, cause, and hearing) if and when a tenured employee is terminated.
- The Board reserves the right to non-renew and/or dismiss from employment any individual whose work performance is less than satisfactory.

### **Final Comment.**

In my view if tenure is to survive the recent spate of criticism and remain viable, the emphasis must be refocused on the *procedural aspects* associated with: (1) initial granting of tenure status to eligible personnel, and (2) subsequent dismissal decisions involving tenured employees whose work has fallen below expected standards of effectiveness and productivity. Tenure will survive as a major source of job security, stability, and longevity for competent personnel where evaluation procedures are clearly communicated to all tenure track personnel, built on valid, reliable, and work-related criteria, consistently applied, and yield substantive decision-making documentation.

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Richard S. Vacca  
Senior Fellow CEPI

**Note:** The views expressed in this commentary are those of the author.