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TEACHER TENURE—SOME PROPOSALS
FOR CHANGE

MICHAEL R. LANZARONE*

I. INTRODUCTION

A significant portion of the United States work force possesses some measure of job security. In the private sector, many union contracts provide that an employee may not be fired or otherwise disciplined except for just cause. In the event of a contested disciplinary action, a neutral arbitrator typically decides whether the employer’s action was justified.1 The arbitrator often has the power to lessen the penalty and to fashion other appropriate remedies such as reinstatement, back pay, or a combination thereof.2

It has been suggested that the protection offered by such contracts is not always satisfactory.3 Where an employee has been wrongfully discharged, it is typically his union—and not the wrongfully discharged employee—that is empowered to prosecute the grievance. Furthermore, the interests of the union and the employee may not coincide,4 or there may be legitimate differences of opinion between them with respect to the merits of the dismissal. In either case, the wrongfully-discharged employee often receives less than the protection to which he is arguably entitled. Moreover, only about twenty-five percent of the work force is unionized,5 and not all union members are protected by job security provisions. Nevertheless, the common law rule permitting firing at will has been made inapplicable to a significant number of private-sector employees.

In the public sector, state and federal statutes grant a degree of job security to most governmental employees. On the federal level, the Civil Service statute guarantees that a “permanent” employee will be notified

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2. Id. at 57.
3. See id. at 60-62.
of the reasons for his dismissal and will be given some opportunity to reply in writing to the charges. Civil Service Commission regulations, which apply to removals, suspensions, furloughs without pay, and reductions in rank or pay, provide that adverse action may not be taken against such an employee except to "promote the efficiency of the service;" and the regulations specifically forbid actions based on marital status, political beliefs, race, color, creed, sex, or national origin. Not all federal employees are "permanent," however, and the statute and regulations specifically recognize the existence of a probationary period during which various procedural protections do not apply.

Similar state statutes also recognize the existence of a probationary period during which the statutory protections are not applicable. In many jurisdictions special statutes govern the teaching profession. They typically provide that a teacher who has successfully completed a probationary period obtains tenure and may not be terminated except for cause and then only after a hearing. In this respect they are not unlike the general civil service laws.

In recent years, the job security protection enjoyed by public school teachers has been increasingly questioned. The Scranton Report, issued in 1970, called for a reconsideration of tenure for the purpose of improving teaching. In 1971 the Newman Report recommended a revision

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6. 5 U.S.C. §§ 7501-33 (1970). In most cases, the statutes do not require any adversary hearing although "[e]xamination of witnesses, trial or hearing . . . may be provided in the discretion of the individual directing the removal or suspension without pay." Id. § 7501(b). In some cases, a hearing is required. Id. § 7532(c)(3)(C). See generally American Fed’n of Gov’t Employees v. Acree, 475 F.2d 1289 (D.C. Cir. 1973); McGhee v. Johnson, 420 F.2d 445, 446 n.1 (10th Cir. 1969).
8. Id. § 752.104(a).
9. Id. § 752.104(b)-(c).
10. Id. §§ 752.105, 315.801 et seq. Even the probationary employee is entitled to learn the reasons for which he is being dismissed, id. § 315.804, and can appeal to the Civil Service Commission a termination which he believes was based on discrimination because of race, color, religion, sex, national origin, marital status, or political attitudes. Id. § 315.805(b). See generally Jaeger v. Freeman, 410 F.2d 528 (5th Cir. 1969); Williams v. United States, 434 F.2d 1346 (Ct. Cl. 1970).
in higher education tenure policies. That same year, the New York legislature abolished tenure for principals, assistant principals, and all other supervisory personnel. More significantly, that legislature also lengthened the probationary period from three to five years.

A current American Federation of Teachers publication notes:

[T]here is a new strength in the attack against tenure today. It is an attack against tenure itself and not simply against a few teachers. . . . Tenure is marked, at one time or another, as the cause of most of what is wrong with education and, by implication, society.

It is not too difficult to find reasons for opposition to the tenure system. Many parents (who are also voters) have undoubtedly dealt with teachers whom they considered incompetent. They have been told, with some justification, that the tenure statutes make it impossible to rid a school system of such employees. Moreover, if those teachers have sufficient seniority and advanced degrees, they can earn in excess of $15,000 for less than ten months' work. Such salaries, which are often higher than those of the taxpayer-voter, constitute a significant percentage of the total expense of running a school district. Given the rise in school taxes, increased teacher militancy, and various unsettling reports with respect to the schools, it is perhaps understandable that legislators, school boards, and taxpayers are amenable to changes in a system which arguably permits incompetent personnel to hold an easy job at an ever-increasing salary.

This article will examine the legal status of both the probationary and tenured teacher and will make various recommendations for change. In general, the author has concluded that the probationary teacher is altogether too vulnerable to arbitrary action by the employer; and for that reason alone, the job security protection of tenure, albeit with certain changes, is necessary.

II. BACKGROUND—THE PROBLEM IN GENERAL

Absent contractual or statutory provisions to the contrary, an employer may discharge an employee at will. Regardless of the length of prior employment, an employee acquires no inherent right to future employment. *Pearson v. Youngstown Sheet and Tube Co.* affords an example of the unjust results that can follow.

Plaintiff had been employed by the company for over twenty-eight years when he was taken ill. In an action for breach of implied contract, he alleged that the employer's physician negligently and incorrectly had informed the company that he was fit to return to work and that an agent of the employer mistakenly had told the company that he had voluntarily terminated his employment rather than work again. The court ruled that the company could discharge plaintiff because the employer-employee relationship "is terminable at the will of either party." It found that neither plaintiff's long-term employment, nor his consequent unsuitability for employment elsewhere, nor the circumstances of his dismissal created a duty on the part of the employer.

A public school teacher admittedly is not as vulnerable as the plaintiff in *Pearson*. Most jurisdictions grant statutory tenure to teachers within five years. Further, even a probationary teacher may be somewhat less vulnerable to arbitrary action than his counterpart in the private sector. It should be noted, however, that a teacher who is not granted tenure at the end of a five-year probationary period is at a serious disadvantage in today's job market. His failure to obtain tenure will in itself raise questions. Moreover, in a period of teacher surplus and taxpayer pressure to cut costs, he will be competing with many less experienced and hence lower salaried individuals.

III. THE PROBATIONARY GOVERNMENT EMPLOYEE—THE CASE LAW—PROCEDURAL DUE PROCESS

The loyalty cases of the 1950s resulted in a large number of decisions dealing with the employment rights of government employees. One of the

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22. 332 F.2d at 441.

23. Id.


25. For example, many jurisdictions provide that a probationary teacher cannot be fired during the school year except for cause. See the sources cited in note 125 infra.
earliest, Bailey v. Richardson, 26 involved the dismissal of a temporary civil service employee under a Civil Service Commission regulation which authorized such action if "[o]n all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." 27 Plaintiff Bailey was charged with membership in the Communist Party, association with Communist Party members, and membership in various other suspect organizations. After an administrative hearing at which she was denied the rights to learn the identity of her accusers or to cross-examine them, she was dismissed from her job and barred from taking civil service examinations for three years. The court, in refusing to order her reinstatement, observed that Bailey was not constitutionally entitled to a quasi-judicial hearing before dismissal and that a government job was not "property" within the meaning of the fifth amendment. 28

In his dissent, Judge Edgerton agreed that nonpunitive executive dismissals did not require a hearing. 29 On the other hand, he reasoned that dismissal for disloyalty was a punishment which, under the due process clause, could not be imposed unless the accused employee were afforded the safeguards of a judicial trial. 30

Bailey involved the dismissal of a government employee pursuant to an executive order authorizing dismissals from government service because of disloyalty. 31 While such dismissals were before the Supreme Court on numerous occasions during the decade, the Court's constitutional views with respect to the program were never clearly set forth. For example, in Peters v. Hobby, 32 the Court merely ruled that petitioner's dismissal from government service was contrary to the provisions of the applicable executive order. 33 Only Justice Douglas raised the argument that it was unconstitutional to dismiss the petitioner without giving him an opportunity to confront his accusers. 34

In New York, a probationary teacher is entitled to 30 days' notice prior to dismissal. N.Y. Educ. Law § 3019-a (McKinney 1970).

26. 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951). The Bailey decision was questioned by the Supreme Court in Board of Regents v. Roth, 408 U.S. 564, 571 & n.9 (1972).


28. 182 F.2d at 57.
29. Id. at 69 (Edgerton, J., dissenting).
30. Id. at 69-71.
31. Id. at 49 (majority opinion).
33. Id. at 347-48.
34. Id. at 350-52 (Douglas, J., concurring). Justice Black also stated he would have preferred to decide the case on the basis of the constitutional issue raised by Justice Douglas,
Tacit recognition that employment was constitutionally protected came, not in a case involving public employment, but rather in a case arising in the private sector. In *Greene v. McElroy*, plaintiff had been discharged from his job with a defense contractor after the government revoked his security clearance in a proceeding in which he had no opportunity to confront and cross-examine the persons whose statements reflected adversely on his loyalty. Chief Justice Warren phrased the precise issue in *Greene* as:

[whether the Defense Department was] authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination.

The Court found no such specific authorization and held that the Defense Department officials "were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." Because the Court found that the Defense Department lacked statutory authority to act as it had, it did not decide the constitutionality of the specific procedures; nonetheless, the Court seemed to recognize that, even in the private sector, the due process clause of the fifth amendment constitutionally protects employment against unreasonable federal governmental action. Specifically, the Court pointed out that the right to hold given private employment and to follow one's chosen profession free from unreasonable governmental interference comes within the liberty and property concepts of the fifth amendment.

While the Court limited its precise holding, several of its statements had constitutional implications. The Chief Justice wrote as follows:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal

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but did not express an opinion thereon. Id. at 349-50 (Black, J., concurring).

36. Id. at 493.
37. Id. at 508.
38. Id. at 500-05, 508.
39. See id. at 506-08.
cases... but also in all types of cases where administrative... actions were under scrutiny.\textsuperscript{40}

Such a principle is, of course, not inconsistent with the proposition that under certain circumstances the interest of a government employee in retaining his job may be summarily denied. For example, in \textit{Vitarelli v. Seaton},\textsuperscript{43} the Court required the government to conform to procedural standards established for loyalty cases by regulations promulgated pursuant to an executive order.\textsuperscript{42} Nevertheless, it specifically recognized the government's power summarily to discharge probationary employees "without the giving of any reason."\textsuperscript{43}

In June, 1972, the Supreme Court decided two cases\textsuperscript{44} involving the constitutional status of probationary teachers.\textsuperscript{45} In \textit{Board of Regents v. Roth},\textsuperscript{40} the respondent, who had been hired to teach at a state university for a fixed term of one academic year, alleged that the board of regents had denied him procedural due process by its summary decision not to rehire him. The district court granted Roth summary judgment and the court of appeals affirmed, holding that the fourteenth amendment required university officials to inform him of the reason for nonretention and to grant him a hearing.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{40} Id. at 496-97 (citations and footnote omitted). See K. Davis, Administrative Law § 7.04 (3d ed. 1972).
\item \textsuperscript{41} 359 U.S. 535 (1959).
\item \textsuperscript{42} Id. at 539-40.
\item \textsuperscript{43} Id. at 539. See Jaeger v. Freeman, 410 F.2d 528 (5th Cir. 1969); cf. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), cert. denied, 397 U.S. 991 (1970) (Civil Rights Act case).
\item \textsuperscript{44} Board of Regents v. Roth, 408 U.S. 564 (1972), noted in 41 Fordham L. Rev. 684 (1973); Perry v. Sindermann, 408 U.S. 593 (1972).
\item \textsuperscript{45} A host of prior cases dealt with the procedural rights of probationary teachers whose employment had been terminated. Some courts held that no prior hearing was required nor was the employer required to inform the teacher of the reasons for its action. E.g., Orr v. Trinder, 444 F.2d 128 (6th Cir. 1971), cert. denied, 408 U.S. 943 (1972); Thaw v. Board of Pub. Instruc., 432 F.2d 98 (5th Cir. 1970); cf. Robles v. El Paso Commun. Action Agency, Project Bravo, Inc., 456 F.2d 189 (5th Cir. 1972). Other courts held that a written explanation of the reasons for nonretention must be given, but no hearing was required. E.g., Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971); cf. Thomas v. Kirkwood Commun. College, 448 F.2d 1253 (8th Cir. 1971). Finally, certain courts concluded that a probationary teacher was entitled both to the delineation of the reasons for his nonretention and to a hearing to contest those reasons. See, e.g., Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971), vacated for reconsideration in light of Roth, 408 U.S. 940 (1972); Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971), rev'd, 408 U.S. 564 (1972); Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970) (hearing before board required where teacher claims failure to rehire was due to exercise of first amendment rights, but no hearing required "where the only matter in issue is a difference of view over a school board's exercise of judgment and discretion concerning matters non-constitutional in nature..." Id. at 947).
\item \textsuperscript{46} 408 U.S. 564 (1972).
\item \textsuperscript{47} Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970), aff'd, 446 F.2d 806 (7th Cir. 1971), rev'd, 408 U.S. 564 (1972).
\end{itemize}
In reversing, the Supreme Court noted that state law "leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials" and held that respondent had no constitutional right "to a statement of reasons and a hearing on the University's decision not to rehire him for another year." The Court reasoned that the requirements of procedural due process "apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." The majority conceded "that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." It noted that property rights as such are not created by the Constitution but arise from independent sources such as state law or other existing rules or understandings. For example, in Goldberg v. Kelly, persons receiving welfare benefits had a continuing right under the applicable statutes to receive such benefits, and this right was safeguarded by procedural due process. Likewise, tenured teachers, professors dismissed during the terms of their contracts, and even teachers hired "without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment," have "interests in continued employment that are safeguarded by due process." But respondent Roth was unable to demonstrate any such interest. His "property" interest was created and defined by the terms of his appointment, which terminated at the end of the academic year and made no provision for renewal. In addition, no state statute or university rule created any legitimate claim to re-employment. The Court concluded that "respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." In short, there was no property interest to which the fourteenth amendment's procedural protections could be applied.

In Perry v. Sindermann, the Court was faced with a harder case. Respondent Sindermann had taught in the Texas state college system for over ten years. During the 1968–69 academic year, he was elected president of the Texas Junior College Teachers Association and immediately

48. 408 U.S. at 567.
49. Id. at 569.
50. Id.
51. Id. at 571-72.
52. Id. at 577.
54. 408 U.S. at 577 (citing Connell v. Higginbotham, 403 U.S. 207 (1971); Slochower v. Board of Educ., 350 U.S. 551 (1956); and Wieman v. Updegraff, 344 U.S. 183 (1952)).
55. Id. at 578 (emphasis in original).
56. 408 U.S. 593 (1972).
became involved in public disagreements with the policies of his college's board of regents, which decided not to renew his contract for the next academic year. In a press release in 1969 and in the court proceedings, petitioners claimed that Sindermann had been guilty of insubordination in defying his superiors by attending legislative committee meetings even though college officials had refused to permit him to leave his classes for such a purpose. The district court, which granted summary judgment for petitioners, concluded that respondent had not stated a cause of action since his employment contract expired on May 31, 1969, and the college in which he taught had not adopted the tenure system.

The court of appeals reversed, holding that failure to allow respondent the opportunity for a hearing would violate the constitutional guarantee of procedural due process if respondent could show that he had an "expectancy" of re-employment. The Supreme Court agreed.

The Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. The Court ruled that respondent's allegations raised a question of fact as to whether he possessed such an interest in continued employment, and that he was entitled to show at trial that he had such a "property" interest. His longer length of service and certain rules of his college distinguished his situation from that of the teacher in Roth, and may have given him the equivalent of statutory tenure.

The net effect of the Roth and Sindermann decisions is to reaffirm the government's right to fire a nontenured employee without affording a hearing at which he may contest the action, unless he is protected by contract or unless the employee can demonstrate specific circumstances which give him some legitimate interest in continued employment, i.e., an interest protected by the fourteenth amendment. In Roth, there were no such circumstances. In Sindermann, the Court concluded there may have been:

A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant

57. Id. at 596. The district court opinion is not officially reported.
59. 408 U.S. at 599.
60. Id. at 599-603.
61. The Odessa College Rules provided: "'Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.'" Id. at 600. See id. at 600 n.6; Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).
62. See text accompanying notes 46-55 supra.
facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a “common law of a particular industry or of a particular plant”... so there may be an unwritten “common law” in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university... that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice.63

IV. PROCEDURAL DUE PROCESS AND DEPRIVATION OF LIBERTY

The Roth decision also recognized that the procedural due process requirements of the fourteenth amendment apply to deprivations of liberty64 and that absent special circumstances, “the right to some kind of prior hearing is paramount.”65 The Court noted that the liberty guaranteed by the amendment denotes “not merely freedom from bodily restraint but also the right of the individual to... engage in any of the common occupations of life... .”66 It agreed that “[t]here might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated,”67 as for example where the state said it was refusing to rehire because the employee had been guilty of dishonesty or immorality: “For ‘[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.’”68 The Court pointed out that the state had made no charge that would damage Roth's standing in the community. Had it done so, “due process would accord an opportunity to refute the charge before University officials,”69 but in fact there was “no suggestion whatever that the respondent's interest in his ‘good name, reputation, honor, or integrity’ [was] at stake.”70

A teacher dismissed for alleged theft of school funds, therefore, would be entitled to a hearing to contest such a charge. But the factual situation does not always produce so obvious a conclusion.71 Moreover, it is the employer who decides in the first instance whether the reasons for dismissal require a prior due process hearing, and “[t]he purpose of such no-

63. Perry v. Sindermann, 408 U.S. at 602 (citation omitted).
64. 408 U.S. at 569; accord, Perry v. Sindermann, 408 U.S. at 599.
65. 408 U.S. at 569-70.
66. Id. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
67. Id. at 573.
69. 408 U.S. at 573 (footnote omitted).
70. Id.
71. See, e.g., Jeffries v. Turkey Run Consol. School Dist., No. 73-1535 (7th Cir., Feb. 5, 1974); Suarez v. Weaver, 484 F.2d 678 (7th Cir. 1973); McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973).
tice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons. 72

At least one court has argued that dismissal for incompetency involves a teacher’s “reputation and good name as a teacher, which comes within the concept of liberty as expressed in the Roth case.” 73 However, the decisions cited by the Roth Court did not involve the employee’s competence as a capable worker; rather, they involved personal honor, integrity and reputation. 74

The Roth Court also recognized that foreclosing one from his chosen occupation may amount to a deprivation of liberty, but concluded that “[m]ere proof . . . that [a teacher’s] record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty.” 75 This conclusion is persuasive in theory, but in practice the situation may not be quite so simple. One of the first acts of a subsequent potential employer will be to ask the former employer the reasons for the earlier termination. Even if these reasons do not reflect upon the teacher’s character, they may shed sufficient doubt upon his competence as a teacher as to make it very difficult for him to obtain another teaching position.

Several court opinions since Roth have suggested that a definitive evaluation resulting in a finding of professional incompetence would constitute a disability sufficient to require a due process hearing, 76 but the case

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72. 408 U.S. at 573 n.12.
75. 408 U.S. at 574 n.13 (emphasis added). The decision in Greene v. McElroy, discussed at notes 35-40 supra and accompanying text, may have turned on the fact that the government’s action made it impossible for Greene to pursue his chosen profession. 360 U.S. at 475-76, 508.

See De Vaughn, Termination and Due Process—A Comment, 2 J. Law & Educ. 305 (1973), which raises the pertinent question: “Why should a personnel officer recommend [a teacher] with such unanswered questions as why [he] was nonrenewed when other well-qualified personnel are available without a cloud?” Id. at 308 n.10. Similarly, another commentator has made the relevant observation: “There can be no doubt that a teacher’s professional reputation is damaged by nonrenewal, and it may well bring an end to his professional career.” 1971 Wis. L. Rev. 354, 358.

law is by no means conclusive.\textsuperscript{77} It may stretch "the concept too far to suggest that a person is deprived of 'liberty' when he simply is not re-
hired in one job but remains as free as before to seek another."\textsuperscript{78} The
conclusion is not quite so patent, however, where nonretention results
from definitive evaluation of professional incompetence.

If the reasons for nonretention are sufficiently definitive, the teacher
may find it virtually impossible to pursue his chosen profession. In such a
case, the due process clause should apply, even though the teacher's \textit{personal}
honor or integrity is not questioned.

A teacher dismissed for professional incompetence is especially vul-
nerable at the present time. The scarcity of teaching jobs is only one part
of the picture.\textsuperscript{79} A second—and perhaps more important—fact is that a
teacher with more experience and more education is more expensive.\textsuperscript{80}
Given the already-strained tax situations in most school districts, it is
simply good business to hire the recent graduate rather than the teacher
with four years experience and several credits beyond a bachelor's degree.
The difference in salary alone can amount to approximately $2,000
annually.

\section*{V. The Licensing Cases}

The recent Supreme Court decisions in \textit{Roth} and \textit{Sindermann} are to
some extent inconsistent with the rulings in various cases involving the

\textsuperscript{77} For cases which have not ordered a hearing in similar situations see Jablon v. Trustees of the Cal. State Colleges, 482 F.2d 997 (9th Cir. 1973); Jenkins v. United States Post Office, 475 F.2d 1256 (9th Cir.), cert. denied, 414 U.S. 866 (1973); Canty v. Board of Educ., 470 F.2d 1111 (2d Cir. 1972), cert. denied, 412 U.S. 907 (1973); Russell v. Hodges, 470 F.2d 212 (2d Cir. 1972).

\textsuperscript{78} 408 U.S. at 575.

\textsuperscript{79} See N.Y. Teacher, June 3, 1973, at 33, cols. 3-4, citing federal government reports predicting a teacher surplus of one million between 1970-75 and a possible teacher shortage in the following decade. See also id., Feb. 3, 1974, at 1, cols. 1-4, noting the disappearance of approximately 4,500 teaching positions in New York City during the past few years. In 1973-74, enrollment in New York State's public and private elementary and secondary schools declined slightly for the third consecutive year. Id., Sept. 16, 1973, at 15, col. 1. In discussing teacher unemployment, it should be noted that districts are not required to pro-
vide unemployment insurance for teachers. In this respect, the teacher is in a disadvantageous position when compared to employees in the private sector. Legislation has been introduced to require public school districts to provide unemployment compensation. N.Y. Sen. bill 1698-A & N.Y. Assembly bill 4723, 196th Sess. (1973).

\textsuperscript{80} Based on receipt of approximately 285 contracts, the New York State United Teachers Research Division estimated that the 1973-74 median salary of a beginning teacher in New York State was $8,000. The figure rises to $10,040 for a teacher with a master's degree entering his fourth year of teaching. N.Y. Teacher, Oct. 14, 1973, at 11. Given the rules for teacher certification, all teachers will have a substantial number of graduate credits within five years and most will have a master's degree. See note 128 infra and accompanying text.
grant or revocation of a license to practice a given profession. While some older decisions hold that a license is a privilege which may be revoked without notice or hearing, the better-reasoned decisions discussed below recognize that license revocation may require a hearing with various procedural safeguards to enable the licensee to contest the proposed revocation, depending on the reason for which the license is revoked. The licensing cases have in fact recognized the applicability of the due process clause, not only with respect to revocation, but also with respect to the initial application for a license.

In Goldsmith v. United States Board of Tax Appeals, plaintiff brought suit to compel the board to enroll him as an attorney entitled to practice before the board. A rule permitted the board to deny admission at its discretion. The Supreme Court reasoned that "this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." Goldsmith did not hold that an applicant for a license is always entitled to a trial-type hearing; but where refusal to license is due to alleged unfitness, the Court ruled that plaintiff was entitled to notice of the charges and a hearing to answer them.

In Willner v. Committee on Character and Fitness, which involved the refusal of the New York courts to admit petitioner to the bar, the Supreme Court pointed out that procedural due process requires that the petitioner be given notice of the reasons for the refusal to admit him. The Court further required that a hearing be held and, although it did not lay down the procedural safeguards required at the hearing, it did point out "that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood."

Perhaps the basic rationale of the licensing cases was best set forth in Hornsby v. Allen. A governmental agency entrusted with the licensing power ... functions as a legislature when it prescribes these standards, but the same agency acts as a judicial body when it makes a determination that a specific applicant has or has not satisfied them.

The New York courts have recognized that when the revocation of a license depends on the existence of facts regarding the licensee, due

82. 270 U.S. 117 (1926).
83. Id. at 123.
84. 373 U.S. 96 (1963).
85. Id. at 103.
86. 326 F.2d 605 (5th Cir. 1964).
87. Id. at 608.
process requires the holding of a hearing. In *Hecht v. Monaghan*, petitioners' hack license had been revoked after he was brought before a New York City police captain and charged with refusal to return change to a passenger. The New York City Administrative Code which empowered the police department to issue and revoke such licenses had no provisions requiring a hearing. Since the revocation depended on the truth of certain factual allegations which would constitute violations of the Code if true, and since petitioner was not in any way a member of the agency that granted or revoked the licenses, the court of appeals ruled that the agency was acting in a quasi-judicial fashion; hence, petitioner should be fully informed of both the charges and the evidence against him and be given the opportunity to cross-examine opposing witnesses, inspect documents, and offer rebuttal. Absent these safeguards and any other essential element of a fair trial, petitioner's license could not be revoked.

A series of cases involving the New York City Board of Education demonstrates the distinction made by the courts between revocation of a license and loss of a particular job. In New York it is settled that a probationary teacher may be dismissed without a hearing. In addition, a specific by-law of the city Board has long provided that a teacher's license would terminate "if and when the service of the licensee is terminated by discontinuance of probationary appointment or by dismissal." Prior to decentralization, this rule was no departure from the cases previously discussed, since the licensor and the employer were the same and the by-law could be viewed simply as a declaration that the employer would not rehire a teacher who had been dismissed. The effect of the rule was softened by the existence of a procedure which gave probationary teachers certain due process rights which were not constitutionally or statutorily required. In addition, as at least one court pointed out:

"[The city license] is not authorization to engage in the teaching profession. Without it one can still teach in any non-public school in or out of the City of New York. Nor is it needed to teach in any public school out of New York City." This is true because the so-called city license issued by the Chancellor of the New York City School District was a requirement over and above the

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91. Id. § 105(a).
state teaching certificate issued by the State Commissioner of Education; it was the latter certificate which made one eligible to seek employment in the public school districts outside New York City.

The passage of the decentralization law, which permitted the New York City Board of Education to divide the city into thirty-one separate community school districts, changed the legal situation. Shortly thereafter the State Commissioner of Education held that the above mentioned by-laws did not provide sufficient procedural protection to justify cancellation of a city teaching license where dismissal of a probationary teacher pursuant to by-law 105 also resulted in termination of the city license. The Commissioner reasoned:

Prior to the enactment of the decentralization statute and the creation of 31 community school districts as semi-autonomous units of the New York City school system, employment and licensure in that system were, for all practical purposes, synonymous. Termination of employment left the existence of such a license a hollow form, without any legal substance. Since the enactment of [the decentralization law], however, where a teacher is dismissed from employment by one of these 31 community districts, he may be re-employed by any of the other 30 such districts, provided he holds a license. The license, therefore, is now a valuable property right and is entitled, as such, to the protection set forth in the decision in Hecht v. Monaghan and its progeny.

Thus, the passage of the decentralization law has changed the legal significance of the city license. No longer can the city Board decide that, as a general policy, a probationary teacher whose employment is terminated by one of the community school boards will lose his city license which may assist him in obtaining employment in the other districts of the city. Deprivation of a license precludes an individual from seeking employment in a specific job market. In certain situations, loss of a particular job can have the same effect. In such cases, there should be no difference in the procedural due process protections that are afforded.

VI. SUBSTANTIVE DUE PROCESS

Certain grounds for the dismissal of a probationary teacher may be precluded because they involve the deprivation of specific constitutional or statutory rights. These include dismissals because of union activity,


In New York, the Public Employment Relations Board (PERB) may determine whether
In both Roth and Sindermann, the Court recognized that the government may not deny employment to a person for reasons that infringe protected interests. Lack of tenure or a contractual right to re-employment would not, for example, defeat a claim that nonrenewal of a teacher's contract violated his first and fourteenth amendment rights. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." In this respect the Roth and Sindermann decisions are consistent with an impressive array of prior cases which voided employee dismissals on substantive constitutional grounds. For example, Keyishian v. Board of Regents held that non-tenured faculty at a state university could not be dismissed pursuant to New York's anti-communist Feinberg Law, which was so vague and overly broad as to "bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with First Amendment rights." Similarly, in Wieman v. Updgraff, the Court, in finding an Oklahoma loyalty oath invalid, pointed out that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." In short, there are certain grounds upon which the government
may not base the dismissal of an employee from government service.\textsuperscript{105}

The question which remains is whether the dismissal of a teacher for trivial reasons not associated with the exercise of constitutional rights is constitutionally permissible. This precise issue was before the Seventh Circuit in \textit{Jeffries v. Turkey Run Consolidated School District}.\textsuperscript{106} The case concerned Dorothy Jeffries, a probationary teacher who lacked any "claim of entitlement to the position which would qualify as a property interest under the [Supreme] Court's reasoning in \textit{Roth} and in \textit{[Sindermann]} . . . ."\textsuperscript{107} Her employment was terminated for reasons which did not constitute a deprivation of life or liberty within the meaning of the fourteenth amendment.\textsuperscript{108} In addition, the termination was not motivated by the exercise of any of her constitutional rights nor by any discriminatory purpose.\textsuperscript{109} Nevertheless, Mrs. Jeffries alleged that "the Board decision was itself completely without basis in fact or logic, and argue[d] that such an arbitrary and capricious action violate[d] her constitutional right to 'substantive due process.'"\textsuperscript{110}

The court reasoned that in order for a plaintiff to have a substantive due process claim the state action must deprive him of "life, liberty, or property . . . [without] a rational basis."\textsuperscript{111} The court found it unnecessary to decide whether the board's action had such a basis because plaintiff had no property right in continued employment:

\begin{quote}
As \textit{Roth} squarely holds, the right to procedural due process is applicable only to state action which impairs a person's interest in either liberty or property. Certainly the constitutional right to "substantive" due process is no greater than the right to procedural due process. Accordingly, the absence of any claim by the plaintiff that an interest in liberty or property has been impaired is a fatal defect in her substantive due process argument.\textsuperscript{112}
\end{quote}

There are of course many legitimate grounds for the dismissal of a probationary teacher which involve no deprivation of any constitutional or statutory right and clearly have some relationship to the improvement


\textsuperscript{106} No. 73-1535 (7th Cir., Feb. 5, 1974) [hereinafter cited as Slip op.].


\textsuperscript{108} Slip op. at 3. See notes 75-79 supra and accompanying text.

\textsuperscript{109} Slip op. at 3. See notes 95-98 supra and accompanying text.

\textsuperscript{110} Slip op. at 4.

\textsuperscript{111} Id.

\textsuperscript{112} Id. at 5. Accord, Crabtree v. Brennan, 466 F.2d 480 (6th Cir. 1972) (per curiam); see Scheelhaase v. Woodbury Cent. Commun. School Dist., 488 F.2d 237 (8th Cir. 1973); cf. Drown v. Portsmouth School Dist., 451 F.2d 1106 (1st Cir. 1970); Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970).
of the educational system.\textsuperscript{113} The teacher may fail to maintain a proper relationship with students, parents or fellow teachers. There may be a failure to respond to the suggestions of a supervisor or to adapt to the established methodology of the school district. There may be an absence of professional growth—a failure to improve or advance professionally through post-graduate education, membership in professional societies and the like.\textsuperscript{114} Any of the above faults could be sufficient to warrant dismissal of the probationary employee or make the employer unwilling to grant tenure. Nevertheless, the nature of the judgments involved, the possibility of abuse, and the difficulty of proving in a court that a stated ground for dismissal was not the actual basis of the employer's action raise the question of whether some change in the legal position of the probationary teacher is not warranted.

Given the fact that there are grounds for dismissal upon which the government may not act, the failure of the Supreme Court to require a governmental employer to specify the actual reason for its action is difficult to understand. On this issue at least, the First Circuit's opinion in \textit{Drown v. Portsmouth School District}\textsuperscript{115} is persuasive. Judge Coffin there argued that a non-tenured teacher has "an interest in being rehired sufficient to prevent the school district from not doing so for constitutionally impermissible reasons,"\textsuperscript{116} and concluded that the probationary teacher was entitled to learn the reasons for his nonretention.\textsuperscript{117} The Supreme Court may have settled the constitutional question, but the wisdom of the result is questionable. However, there has been no suggestion that this information cannot be obtained through the discovery process once litigation involving the allegedly improperly dismissed plaintiff has

\begin{footnotesize}
\textsuperscript{113} E.g., Fluker v. Alabama State Bd. of Educ., 441 F.2d 201 (5th Cir. 1971) (desire of employer to improve quality of teaching staff). There may be procedural due-process implications, however, if the termination results from a conclusive evaluation of the teacher's professional competence. See note 76 supra and accompanying text.

\textsuperscript{114} See, e.g., Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972) (failure to follow instructions and to work cooperatively and harmoniously with superiors); Knarr v. Board of School Trustees, 452 F.2d 649 (7th Cir. 1971) (lack of concern for punctuality, and encouraging students to violate school rules); Simcox v. Board of Educ., 443 F.2d 40 (7th Cir. 1971) (failure to award tenure due to lack of self-direction and lack of cooperation with administration in following prescribed procedures); Ewing v. Camacho, 441 F.2d 1142 (9th Cir. 1971) (refusal to comply with supervisory decisions concerning course of study; unnecessarily rude and abrasive attitude toward other faculty members). See note 191 infra and accompanying text.

\textsuperscript{115} 435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971).

\textsuperscript{116} Id. at 1183.

\textsuperscript{117} Id. at 1185. This is especially true since, "[f]rom the viewpoint of the school board, a requirement that it state its reasons for not rehiring a non-tenured teacher would impose no significant administrative burden." Id.
\end{footnotesize}
begun, and several states currently require school boards to state their reasons for not rehiring non-tenured personnel. This requirement and the ability of an employee to inspect materials such as supervisor's evaluations would help prevent arbitrary actions against probationary employees.

VII. THE PROBLEM IN NEW YORK

The New York experience with respect to the legal status of probationary teachers exemplifies many of the legal problems and inequities in the system. As already noted, the New York legislature has lengthened the probationary period to five years—one of the longest in the nation. That same legislature later enacted a statute requiring all school boards outside New York City to inform non-tenured teachers of the reasons for their dismissal. Unions in New York, pursuant to the provisions of the so-called Taylor Law, have attempted to improve the job security status of both probationary and tenured employees by means of collective bargaining. In addition, numerous decisions both of the courts and of New York's Commissioner of Education provide some basis for an evaluation of the tenure system. In short, given the interplay of the legislative, administrative, and judicial activity, the New York experience may provide a basis for evaluating the present status of the probationary and tenured teacher and for recommending alternatives which might be considered by the various state legislatures.

Section 3012 of the New York State Education Law sets out the procedure under which probationary teaching employees are accorded tenure in most of the school districts in the state. The law requires the service of a probationary period, a favorable superintendent's recommendation, and the grant of tenure by the board of education. The section specifically provides that "[t]he service of a person ... may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority vote of the board of education;" in this respect, the New York law is harsher than most other

123. Id.
124. Id. § 3012(1)(a).
states' laws which require "good cause" to dismiss a probationary teacher during the school year. The only restrictions on the New York law allowing summary dismissal of probationary teachers are the requirements that "[e]ach person who is not to be recommended for appointment on tenure, shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period" and that the teacher be given thirty days' notice of a dismissal during the probationary period.

The current pressure on the employer to replace employees receiving high salaries with less experienced and lower-paid personnel promises to increase with the continuing rise in the cost of financing education. Moreover, the rules with respect to teacher certification require that the majority of teachers currently being hired obtain a master's degree or thirty semester hours of graduate credits within five years after securing their first (provisional) teaching certificate, if they wish to remain in the profession. Paradoxically, because of the manner in which salary scales are typically constructed, a teacher who obtains such a degree receives a substantial raise in pay; because decisions as to tenure will now be made after the same five years, this pay increase perhaps lessens his chances of obtaining tenure. He can of course work elsewhere, but the economics of the marketplace are against him.

Given the extended length of the probationary period, the continuing educational requirements, and the absence of any formal review of the teacher's progress, the New York probationary teacher who has served for a number of years may argue that he has an "expectancy" of re-employment under the rationale of the Roth and Sindermann decisions. The issue was specifically left open by Judge Kaufman in a recent Second Circuit case, but the weaknesses of the argument must nevertheless be recognized. Not the least of these is that Sindermann was employed at a college which had no formal tenure system.


127. N.Y. Educ. Law § 3019-a (McKinney 1970). The statute would be complied with if a probationary teacher were informed on August 1 that he was not to be rehired on September 1—the start of the school year. See Little v. Board of Educ., 42 App. Div. 2d 782, 346 N.Y.S.2d 575, 576 (2d Dep't 1973) (dissenting opinion).

128. 8 N.Y.C.R.R. § 80.15-18 (1971). There are exceptions in the case of industrial arts and similar subjects where provisional certificates have a ten-year life. Id. § 80.19-21.

129. See note 80 supra.


131. 408 U.S. at 602. For an example of a case in which the employee has successfully
The tenuous position of the probationary teacher is perhaps best illustrated by the situation described in *Albaum v. Carey*. The superintendent of schools refused to recommend that the board of education grant tenure to Elvin Albaum, a probationary teacher. Albaum challenged the constitutionality of section 3012(2) and sought a court order to compel the superintendent to recommend him and the board of education to consider him for tenure. The complaint alleged "that plaintiff—a model teacher—was not granted tenure solely because he participated in a teacher's union in a high level capacity." Although counsel for the state insisted that the right to deny tenure was not restricted in any way, a three-judge court held that the provisions of the federal and state constitutions are to be read into the portion of section 3012 which requires: "the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory." Holding that the statutory language "refers to definite criteria enforceable in New York courts through an Article 78 proceeding," the court was able to uphold the constitutionality of the statute. However, it found that plaintiff had not been denied tenure because of the exercise of any of his constitutional or statutory rights and also concluded that plaintiff's union activities had not contributed to the superintendent's decision. It described Albaum as a "devoted, highly skilled, and imaginative teacher," but pointed out that "he had difficulties in developing new programs and in carrying out school policies because of substantial and continuing disagreements with administrators and supervisors." The court concluded that "[d]enial of tenure was caused by a desire on the part of... the school superintendent to eliminate from the school system a nettlesome individual who created annoying administrative problems." Such an individual is apparently not sufficiently "competent, efficient and satisfactory" to be recommended for tenure.

While the three-judge court did not deal at length with the question,
its opinion states that the Education Law contains definite criteria, enforceable in an article 78 proceeding, that place some statutory restraints on the right of a superintendent to fire or, more accurately, to refuse to recommend the granting of tenure. At least one New York state court has supported the reasoning of the Albaum decision. In Tischler v. Board of Education,\(^\text{140}\) petitioner brought an article 78 proceeding to compel the board of education to grant her tenure, alleging that the board's failure to do so was an attempt to punish her for engaging in union activities. In reversing the dismissal of the petition, the appellate division reasoned as follows:

The petitioner's appeal from the order entered upon that decision presents a question as to the scope of the power of a board of education to deny tenure to a probationary teacher. Under the terms of subdivision 2 of section 3012 of the Education Law, the Superintendent of Schools is required to recommend probationary teachers for appointment on tenure at the end of their probationary term if he finds them to be "competent, efficient and satisfactory". The Superintendent's recommendation is a screening device which brings before the Board of Education all those who are qualified by objective standards (Albaum v. Carey ...). The statute clearly contemplates that the recommendation be voted upon by the Board, but fails to prescribe precise standards for the Board's action. Thus the Board is given broad discretion to take into account the intangible subjective factors that are impossible to enumerate but which are inherent in the choice of a permanent teaching staff for carrying on the work of the school district. Nevertheless, there is no reason to believe that the Board's discretion is boundless.\(^\text{141}\)

That is, although there is no statutory language limiting the discretion of the board of education, that discretion is not without limit\(^\text{142}\) and at least the Tischler court suggested that the board's reason for acting must in some way be related to the purpose of the probationary period or the betterment of the educational system.

VIII. ATTEMPTED SOLUTIONS

A. Employer Action

For over twenty years the New York City Board of Education has granted certain procedural rights to probationary teachers with respect to "the discontinuance of service during the probationary term, or at the expiration thereof."\(^\text{143}\) Section 105a of the Board's by-laws requires that

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\(^{142}\) See text accompanying notes 100-05 supra.


For a description of other procedures which school districts might employ see Jacobsen,
the teacher receive written notice of the dismissal and have the opportunity to appear before the New York City Superintendent of Schools or his designee to contest the dismissal. The employee can demand to be confronted by witnesses, to call witnesses, and to introduce any relevant evidence. While there is no right to be represented by an attorney, the teacher can be “accompanied and advised” by a co-employee. Prior to the decentralization law, a teacher who was informed that the city Superintendent was recommending a denial of tenure would request a review pursuant to section 105a; after such review, the Superintendent would decide whether to rescind his original recommendation. Under the decentralization law, however, the community superintendents and community school boards make tenure recommendations and grant tenure. The current legal status of the section 105a procedure is therefore open to serious question. Nevertheless, for a considerable period of time, it gave probationary New York City employees procedural due process protection not accorded to other teachers in the state.

B. Collective Bargaining

Teaching organizations throughout New York have attempted at the bargaining table to regain the job security protection eliminated by the 1971 legislature, and in some instances have attempted to obtain job security protection never accorded under the Education Law. While existing statutes limit the power to bargain with respect to certain issues, there are some areas, clearly proper subjects of bargaining, in which greater job protection might be negotiated for the probationary teacher. In September of 1967, the New York State legislature enacted the Taylor Law to govern labor-management relations between public employees on the one hand and the state, local governments, and other political subdivisions on the other. The law recognizes the “right” of public employees to organize, and states that “harmonious and cooperative relationships between government and its employees” are promoted by, inter alia, “requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations” concerning salaries, wages, hours and other “terms and


146. Id. § 200.
conditions of employment.""147 Shortly after the passage of the law, the Associated Teachers of Huntington negotiated the following provision in its agreement with the Board of Education: "'Non-tenure teachers will be notified of termination of employment not later than March 1st, except that for the third year, the teacher will be notified not later than January 1.'"148 The agreement also contained a clause which called for the arbitration of grievances and defined "grievance" as "'a claim which involves the interpretation and application of the terms and provisions of [the] contract.'"149

The Board had sent a notice of termination to a first-year teacher two months after the time required by the contract. The teachers' association instituted grievance proceedings, finally invoking the compulsory arbitration provisions of the agreement. In denying the Board's motion to stay arbitration, the court held that since there was no "unequivocal exclusion from arbitration" the decision as to arbitrability was to be resolved in arbitration and not in a court;150 the holding was consistent with the rule laid down by the New York Court of Appeals in Long Island Lumber Co. v. Martin.151 In seeking to avoid arbitration, the Board argued that the notice of termination provision for non-tenured teachers, even though freely agreed to, was void. The Huntington court noted that the Education Law provided that persons not recommended for tenure be notified "not later than sixty days immediately preceding the expiration of [the] probationary period"152 and ruled that there was nothing to prevent the Board from agreeing to a more liberal notice policy.153 Under the present statute, a teaching employee is entitled to sixty days' notice if the superintendent is not recommending him for tenure at the end of the five-year probationary period.154 Prior thereto, a probationary teacher may be dismissed with thirty days' notice, even in the middle of the school year.155 In this respect, the New York law is

147. Id. § 203.
148. Associated Teachers (Huntington) v. Board of Educ., 60 Misc. 2d 443, 444, 303 N.Y.S.2d 469, 470 (Sup. Ct. 1969) (at the time the agreement was negotiated, the probationary period was three years). This case is not to be confused with the case cited in note 159 infra. The instant case will occasionally be referred to as "Huntington," and the latter as "the court of appeals Huntington case."
149. Id. at 443, 303 N.Y.S.2d at 470.
150. Id. at 445, 303 N.Y.S.2d at 471.
152. 60 Misc. 2d at 446, 303 N.Y.S.2d at 472 (emphasis added).
153. Id. at 446-47, 303 N.Y.S.2d at 473.
155. Id. § 3019-a (McKinney 1970).
harsher than that in most other states.\textsuperscript{156} Moreover, since most school jobs are filled on a September-June basis, the difficulty in finding employment if one is fired in November is patent.\textsuperscript{157}

The effect of the notice provision negotiated in the Huntington case is salutary in a number of respects. It provides somewhat more reasonable notice for the teacher whose employment is to be terminated. Significantly, the Huntington agreement provided for a longer notice period for those teachers with greater seniority. This distinction is a sensible one, particularly in today's market when the experienced, and therefore more highly paid, employee may have greater difficulty in obtaining other employment.

The notice provisions may result in added difficulties in the preparation of the school district budget which (at least in most school districts outside New York City) is submitted to the voters between May and July, but these difficulties should not provide insurmountable problems for a board of education.

The Huntington case involved a first year teacher. If the arbitrator were to find in favor of the teacher, the appropriate relief would at best be to compel the board to rehire the teacher for the following school year. The position of this teacher as of the following September—the second year of his probationary period—is not at all clear. Perhaps he could be dismissed without notice, although the teachers' association would undoubtedly argue that such an interpretation would render the notice provision meaningless.

A more difficult question would be presented if the employee in question were in the final year of the probationary period. The granting of tenure would appear to be the only remedy that would afford complete relief. On the other hand, such relief would constitute a method of avoiding the five-year probationary period recently written into the law.\textsuperscript{158}

\begin{itemize}
\item \textsuperscript{157} See, e.g., Cooley v. Board of Educ., 453 F.2d 282, 286 (8th Cir. 1972). Furthermore, school districts in New York are not required to join the state unemployment compensation system; and in this respect, at least, a public school teacher is in a poorer position than most employees in the private sector. See N.Y. Labor Law § 560(4) (McKinney Supp. 1973).
\item \textsuperscript{158} The decisions are not conclusive. See Hauppauge Classroom Teachers Ass'n v. Millman, 35 App. Div. 2d 844, 317 N.Y.S.2d 461 (2d Dep't 1970), where the court noted that failure to observe and evaluate a probationary teacher in accordance with the terms of the collective bargaining agreement conferred no rights with regard to tenure. Some arbitrators have reached different conclusions in similar cases. See N.Y. Teacher, Dec. 2, 1973, at 4, col. 1; id., at 28, col. 1; id., Oct. 7, 1973, at 27, col. 1; id., Sept. 16, 1973, at 21, col. 1; id., May 20, 1973, at 7, col. 1. Cf. Shumate v. Board of Educ., 478 F.2d 233 (4th Cir. 1973) (per curiam); City of Albany v. Hebbey, 29 N.Y.2d 433, 278 N.E.2d 898, 328 N.Y.S.2d 658
\end{itemize}
Teacher organizations in fact have attempted to shorten the probationary period through collective bargaining; and while the validity of such a contractual provision has not been specifically passed on, various court of appeals' decisions strongly suggest its validity. In Board of Education v. Associated Teachers (Huntington),159 the court specifically upheld the legality of longer notice provisions and various other portions of the negotiated agreement.

Chief Judge Fuld, writing for the majority, set out the applicable principles as follows:

The length of time that an employee must serve satisfactorily before obtaining additional job security is a term and condition of his employment, and the presumption thus exists that boards of education may legally negotiate with respect to the question.

Public employers must, therefore, be presumed to possess the broad powers needed to negotiate with employees as to all terms and conditions of employment. The presumption may, of course, be rebutted by showing statutory provisions which expressly prohibit collective bargaining as to a particular term or condition but, "[i]n the absence of an express legislative restriction against bargaining for that term of an employment contract between a public employer and its employees, the authority to provide for such term resides in the [school board] under the broad powers and duties delegated by the statutes."161

Section 3012 of the Education Law, which provides for appointment on tenure "[a]t the expiration of the probationary term,"162 arguably is

(1972). But see Legislative Conf. of the City Univ. v. Board of Higher Educ., 38 App. Div. 2d 478, 330 N.Y.S.2d 688 (1st Dep't), aff'd, 31 N.Y.2d 926, 293 N.E.2d 92, 340 N.Y.S.2d 924 (1972), where the court refused to confirm an arbitrator's award directing the granting of tenure. The court found that the arbitrator had exceeded the power granted to him in the negotiated agreement, and also concluded that the state constitution required the same result. See also Board of Educ. v. Chautauqua Cent. School Teachers Ass'n, 41 App. Div. 2d 47, 341 N.Y.S.2d 690 (4th Dep't 1973).


161. Id. at 130, 282 N.E.2d at 113, 331 N.Y.S.2d at 23 (quoting the appellate division opinion in Teachers Ass'n (Nassau) v. Board of Educ., 34 App. Div. 2d 351, 355, 312 N.Y.S.2d 252, 256 (2d Dep't 1970)).

such a restriction; but in Weinbrown v. Board of Education\textsuperscript{163} the court of appeals held that in spite of its language, section 3012 "does not forbid the offer of an appointment to tenure prior to the expiration of the probationary period."\textsuperscript{164} Moreover, assuming the requisite acceptance, the conferral of tenure will be effective and may not be revoked.\textsuperscript{165}

The Weinbrown case involved a teacher who had virtually completed his probationary period. The board had informed petitioner of his tenure appointment and given him notice of the projected salary schedule for the following school year. Petitioner signed an acceptance, thereby indicating his willingness to return in September. The board of education, following a practice that has become typical, had made its tenure decision during the preceding spring. Whether the court would have applied the same reasoning if the offer of tenure were made a year before the end of the probationary period has been questioned by the state education department.\textsuperscript{166} On its face, however, the Weinbrown case establishes the principle that it is legal for a board of education to make binding tenure decisions prior to the end of a teacher's probationary period. Given the Weinbrown decision and the reasoning in the court of appeals Huntington case, there would appear to be no reason why a board of education could not contractually bind itself to make tenure decisions prior to the end of the probationary period.

The present contract between the New York City Board of Education and the United Federation of Teachers provides:

Teachers on probation who have completed at least three years of service on regular appointment in the school shall be entitled, with the [sic] respect to the discontinuance of their probationary service, to the same review procedures as are established for tenured teachers under section 2590-j 7 of the Education Law.\textsuperscript{167}

While the contract stops short of saying that these probationary teachers are tenured, the board agrees to give such teachers the job security protection given to tenured members of the staff. The effect is the same—no teacher may be fired without good cause.\textsuperscript{168}

At least one lower court decision subsequent to Weinbrown has held that it is beyond the power of a board of education "to reduce the statutory time period [for tenure] substantially below the new five-year

\textsuperscript{163} 28 N.Y.2d 474, 271 N.E.2d 549, 322 N.Y.S.2d 714 (1971).
\textsuperscript{164} Id. at 476, 271 N.E.2d at 551, 322 N.Y.S.2d at 715.
\textsuperscript{165} Id. at 477, 271 N.E.2d at 551, 322 N.Y.S.2d at 716.
\textsuperscript{166} N.Y. Educ. Dept' Formal Op. of Counsel No. 229 (July 7, 1971).
\textsuperscript{167} 168 N.Y.L.J., Sept. 15, 1972, at 2, col. 8.
\textsuperscript{168} N.Y. Educ. Law § 2590-j(7) (McKinney 1970) sets out the reasons for which tenured employees in New York City may be dismissed, and the review procedures which, inter alia, permit arbitration.
TEACHER TENURE

That court read *Weinbrown* as permitting an offer of tenure at some reasonable time prior to the expiration of the probationary period, but found that an agreement granting tenure protection after three years was beyond the power of the board of education. The court seemed to give insufficient effect to the court of appeals decision in the *Huntington* case, which requires a board of education to bargain with respect to all terms and conditions of employment "unless some statutory provision circumscribes its power to do so." *Weinbrown* holds that a board may make an offer of tenure prior to the expiration of the probationary period. A provision of the Education Law provides a rationale for that decision, and no statutory provision specifically forbids an earlier tenure award. Moreover, the policy of the Taylor Law to promote negotiation as to terms and conditions of employment provides an additional reason to permit negotiation. As long as the item being discussed is a term or condition of employment the board is presumed to possess the authority to negotiate, and there is "no reason why the mandatory provision of [the Taylor Law] should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment."

There is of course a basic problem with the use of the ad hoc labor negotiations approach to remedy the problems faced by the probationary teacher. Assuming that the *Weinbrown* case and court of appeals *Huntington* case permit negotiated agreements such as that arrived at in New York City, not every union will be willing or able to obtain a similar provision in its agreement. It is axiomatic that if such a provision is not required, existing agreements may not be changed. The board of education has authority to negotiate terms and conditions of employment unless some statutory provision circumscribes its power to do so. If that is the case, the board may offer tenure at some reasonable time prior to the expiration of the probationary period.

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170. 30 N.Y.2d at 127, 282 N.E.2d at 112, 331 N.Y.S.2d at 21.

171. N.Y. Educ. Law § 3012(2) (McKinney Supp. 1973) requires that a person who is not to be recommended for tenure be notified at least 60 days before the end of the probationary period.


174. Id. at 129, 282 N.E.2d at 113, 331 N.Y.S.2d at 23.

175. Tom Hobart, President of the New York State United Teachers, noted that "all too few local teacher organizations have been able to . . . negotiate a probationary period that was less than the state maximum . . . ." Hobart, Tenure, N.Y. Teacher, June 17, 1973, at 15, 16, cols. 1-2.
to be included in a collective bargaining agreement, it must be proposed by a teachers' organization and agreed to by a board of education. Such a provision benefits only a portion of the collective bargaining unit—that portion with the least seniority and, consequently, the least power in the union structure. Moreover, the provision impinges on an important "management prerogative"—the right to fire for cause. Given the present educational structure, it would be opposed by many superintendents of schools and boards of education. Whether teachers' unions in general possess the bargaining ability, the desire, and the power to obtain such a provision is open to question.

In the final analysis, the Taylor Law permits the employer to determine terms and conditions of employment. The law requires good faith collective bargaining and contains mediation and fact-finding procedures for the resolution of negotiation impasses. If these and similar procedures do not result in an agreement, however, the final step in the procedure is a legislative hearing at which the parties explain their position with respect to the fact-finding report. In the case of a teachers' union and a school district, the hearing occurs before the board of education. The parties before the board are the teachers' organization and the superintendent of schools or his designee. After the hearing, the board is empowered to "take such action as it deems to be in the public interest, including the interest of the public employees involved." In short, the board of education, which throughout the negotiating process has at the very least been giving instructions to its negotiators, is the final arbiter. Given the statutory provisions for the resolution of impasses, the illegality of strikes in the public sector, and the penalties that can be imposed in the event of a strike, it is doubtful that many teachers' organizations would resort to a strike for a provision which will benefit only a small portion of the membership.

C. Legislative Proposals

Thus, it appears that there are some statewide legislative changes that should be made. Initially, the probationary period itself should be shortened to three years, the period that existed prior to the 1971 change in

177. Id. § 209.
178. Id.
179. Id. § 209(3) (e) (iv).
180. Id. § 210.
181. Id.
182. Such a bill has been introduced in the state legislature. N.Y. Sen. bill 4910 & N.Y. Assembly bill 3096, 196th Sess. (1973). In addition, Governor Wilson has recently come out in favor of a reduction of the tenure period to three years. In an address before a teachers'
the law. Although the present five-year probationary period may be attractive for monetary reasons or administrative convenience, it is difficult to understand what additional qualifications or defects management can discover during the extra two years to assist in its tenure decision; three full-time teaching years in the same school system should suffice. Moreover, postponement of the tenure decision beyond three years is unfair to the employee. Finally, it invites management to postpone difficult decisions, thereby permitting some inferior teachers to continue teaching beyond the time when they should have been dismissed.

During the probationary period—at least after the first year of employment—it should not be possible to dismiss a probationary teacher, other than at the end of the school year, without cause and without providing the employee an opportunity to contest the dismissal. Such an opportunity exists in many jurisdictions. The procedure currently applicable to the dismissal of tenured teachers could be utilized, but a less formal procedure might also be considered. Such a provision should not prevent a reduction in staff due to lowered enrollment or other similar reasons causing an elimination of teaching positions.

In addition, the legislature should enact a statute, much like the present federal Civil Service regulations, to provide that all decisions not to rehire probationary teachers shall be solely for the improvement of the education system. A probationary teacher who is not rehired should be permitted to test the following issues before the Commissioner of Education or his designee:

(1) whether the stated reason for nonretention was the actual reason; (2) the good faith of the employer; and (3) whether the stated reason, if true, is for "the improvement of the education system."

The employee, in contesting his dismissal, would follow the normal rules

meeting, the Governor stated that "[i]f a superintendent of schools can't make [a tenure] decision in three years . . . [w]e ought to take a look at the superintendent." N.Y. Times, Mar. 23, 1974, at 64, col. 1.

183. Special problems will be raised by the teacher hired after the start of the school year. The protections noted below should not apply to such an employee until he has completed a full year.


185. See notes 195-204 infra and accompanying text.

186. See 5 C.F.R. § 752.104(a) (1973).

187. Section 3031 of the Education Law should be amended to require that all boards of education inform the employee of the reason for his nonretention. The law currently does not apply to New York City. N.Y. Educ. Law § 3031 (McKinney Supp. 1973).
for filing a petition before the Commissioner of Education;\textsuperscript{188} thus, he would be required to file such a petition within thirty days after receiving notice of nonretention.\textsuperscript{188} No written answer would be required from the employer unless the Commissioner concluded that the complaint of the employee and the evidence furnished therewith (affidavits, documents, etc.) proved a prima facie case.\textsuperscript{190} The Commissioner could at any time ask either party for additional information and could schedule a hearing if he believed it necessary to reach a decision.

The issues before the Commissioner would be quite limited. As long as the employer's judgment was made in good faith and the reasons for nonretention were related to the improvement of the educational system,\textsuperscript{191} the employer's action would not be upset by the Commissioner.\textsuperscript{192} Such a


\textsuperscript{189} Id. § 275.16. Section 3012 of the Education Law should be amended to require that notice of nonretention be given at least 60 days before the end of the school year. That section currently requires that 60 days notice be given to a probationary teacher who is not being recommended for tenure. N.Y. Educ. Law § 3012(2) (McKinney Supp. 1973). Ohio requires that a probationary teacher be notified on or before April 30 if the employing board does not intend to re-employ him during the following school year. Ohio Rev. Code Ann. § 3319.11 (Anderson 1972).

\textsuperscript{190} This represents a change in the normal procedures of the Commissioner. See 8 N.Y.C.R.R. §§ 275.10–13 (1969). The intent would be to discourage frivolous petitions and to require some evidentiary showing by the employee before the employer is required to answer. Hearings would not be required in most situations. Written briefs should be sufficient to determine whether the stated reason relates to the improvement of the educational system. In most cases, a good faith employer should be able to submit sufficient written information (evaluations, affidavits, documentary records) to show that his action was bona fide. Moreover, the Commissioner should insist on specific and detailed proof by the employee before he requires any answer by the employer. Such an approach should streamline the procedure and discourage unmeritorious petitions.

\textsuperscript{191} The reason for nonretention could involve the improper conduct of the employee, such as his failure to report for work on time, excessive absences, or unwillingness to follow the direction of his employer. Such reasons would often constitute sufficient cause for the dismissal of a teacher during the school year. Other reasons might not justify dismissal during the year, but would merely involve a judgment by the employer that he could improve the quality of education by hiring a different employee for the following year. Such judgments might relate to the employee's teaching ability, involving concerns which are more clearly tied to the educational process itself—for example, his relationship with students, his actual performance in the classroom, his interest in his job—or could involve behavior of the teacher outside the classroom. See Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973). For a further listing of factors that can properly be considered see Simard v. Board of Educ., 473 F.2d 988, 991–92 (2d Cir. 1973); Local 1600, AFT v. Byrd, 456 F.2d 882, 886 (7th Cir. 1972), cert. denied, 409 U.S. 848 (1973).

\textsuperscript{192} The good faith of the employer would be open to serious question if the decision not to retain a teacher were wholly unsupported in fact. But cf. Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

Section 310 of the New York Education Law provides that decisions of the Commissioner
procedure would enable the nonretained teacher to test the good faith of the employer before a third party—a member of the education establishment not directly involved at the local level—while at the same time preserving the right of the local board to fire for any reason related to the improvement of the education system, and avoiding lengthy hearings on each occasion of a probationary teacher's nonretention.\footnote{193}

IX. The Protection of Tenure

Once a teacher has achieved tenure, he may not be removed except "for neglect of duty, incapacity to teach, immoral conduct, or other reason which, when appealed to the commissioner of education, shall be held by him sufficient cause for such dismissal."\footnote{194} The Education Law likewise provides a detailed procedure which must be followed in order to dismiss a tenured teacher.\footnote{195} Written charges must be filed with the clerk of the school district who "shall immediately notify" the board of education of the charges.\footnote{196} The board is required to meet in executive session and decide within five days whether probable cause exists for the charges.\footnote{197} If the board makes such a finding "a written statement specifying the charges in detail, and outlining his rights" under the section "shall be final and conclusive, and not subject to question or review in any place or court whatever." N.Y. Educ. Law § 310 (McKinney 1969). In teacher tenure situations, the courts have ruled that determinations of the Commissioner are final unless they are purely arbitrary. Walsh v. Nyquist, 37 App. Div. 2d 869, 325 N.Y.S.2d 103 (3d Dep't 1971); Lubell v. Nyquist, 31 App. Div. 2d 569, 294 N.Y.S.2d 961 (3d Dep't 1968), motion for leave to appeal denied, 23 N.Y.2d 645, 298 N.Y.S.2d 1027 (1969); Board of Educ. v. Nyquist, 60 Misc. 2d 967, 304 N.Y.S.2d 441 (Sup. Ct. 1969), rev'd on other grounds, 36 App. Div. 2d 199, 319 N.Y.S.2d 661 (3d Dep't 1971). See generally Wood v. United States Post Office, 472 F.2d 96, 99 (7th Cir.), cert. denied, 412 U.S. 939 (1973).

\footnote{193} See Thaw v. Board of Pub. Instruct., 432 F.2d 98 (5th Cir. 1970) wherein the court stated: "It would be too much to ask the school board to hold a hearing every time it determines not to renew the contract of a probationary teacher, or even every time a terminated teacher requests a hearing without alleging unconstitutional action." Id. at 100 (emphasis omitted). The proposal will of course require an increase in the size of the staff of the Commissioner. It may, however, be most practical for the department to maintain a panel of qualified "hearing examiners" to decide such questions.

\footnote{194} N.Y. Educ. Law § 3020 (McKinney 1970).

\footnote{195} Id. § 3020-a (McKinney Supp. 1973). A federal three-judge panel in New York recently declared section 3020-a unconstitutional because it denies teachers adequate due process; specifically, the court would require the board in question to set forth the reasons for its final decision in any dismissal proceeding brought under the section, particularly when it chooses not to accept the recommendations of the hearing panel. Kinsella v. Board of Educ., Civil No. 73-187 (W.D.N.Y., Feb. 19, 1974). See text accompanying notes 196-204 infra for administrative details of a section 3020-a proceeding.


\footnote{197} Id. Such a finding requires "a vote of a majority of all the members of such board." Id.
tion must immediately be forwarded to the accused employee by certified mail.\textsuperscript{198}

Absent a waiver by the employee, the Commissioner of Education is notified and is required to schedule a hearing within twenty working days in the local school district or the county seat.\textsuperscript{199} The hearing, which takes place before a three-member panel, is governed by rules and procedures of the Commissioner, but the statute specifically provides that the technical rules of evidence do not apply; it grants each party the right to be represented by counsel and to subpoena and cross-examine witnesses. The Commissioner is required to designate a hearing officer. All testimony is taken under oath. A transcript of the proceedings, which may be in public or private at the discretion of the employee, is also mandated.\textsuperscript{200} Perhaps in an overabundance of caution, the statute provides that “[t]he employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf.”\textsuperscript{201}

The findings and the \textit{recommendations} of the hearing panel must be forwarded to the employee and the clerk of the employing board within five days. The panel similarly is required to make a recommendation as to the appropriate penalty if it believes one is warranted. Possible penalties include reprimand, fine, suspension for a fixed time without pay, or dismissal. The employing board has thirty days after receipt of the report to “determine the case . . . and fix the penalty or punishment, if any . . .”\textsuperscript{202} The board is, in short, free to ignore the recommendations of the hearing panel,\textsuperscript{203} but such action will of course be taken into account by any appellate body reviewing the matter.

An employee who wishes to challenge an adverse determination of his employing board may either appeal to the Commissioner of Education or commence a special proceeding under article 78 of the CPLR.\textsuperscript{204}

As indicated earlier, there has been a great deal of criticism of the tenure system in recent years.\textsuperscript{205} The review procedure appears unduly

\begin{thebibliography}{9}
\bibitem{198} Id.
\bibitem{199} Id. § 3020-a(3)(a).
\bibitem{200} Id. § 3020-a(3)(c) (McKinney 1970).
\bibitem{201} Id.
\bibitem{202} Id. § 3020-a(4) (McKinney Supp. 1973).
\bibitem{203} Le Tarte v. Board of Educ., 65 Misc. 2d 147, 316 N.Y.S.2d 781 (Sup. Ct. 1970); In re Wiles, 11 N.Y. Educ. Dep't Rep. 69 (1971). But see Kinsella v. Board of Educ., Civil No. 73-187 (W.D.N.Y., Feb. 19, 1974), wherein the court declared that a section 3020-a proceeding was unconstitutional absent a requirement that the board decision be based upon evidence elicited before the hearing panel; furthermore, the board must set forth the reasons and factual bases for its decision. The case and its background are discussed in N.Y. Teacher, Mar. 3, 1974, at 1, col. 3.
\bibitem{204} N.Y. Educ. Law § 3020-a(5) (McKinney 1970).
\bibitem{205} See note 17 supra and accompanying text concerning comments and proposals of the
\end{thebibliography}
cumbersome, at least in those cases where it is clear from the outset that a minimal penalty is involved. While an official reprimand may serve a salutary purpose, the possibility of having to sustain it in the appellate courts is a strong incentive for the employer to do nothing.

The process of disciplining a tenured teacher is time-consuming and typically requires the effort of counsel, the superintendent of schools, and several school management personnel. It calls for serious discussion by the board of education and management personnel, and raises the possibility that various upper-echelon school employees will be required to testify before the hearing panel. It further requires that management sustain its position before the Commissioner or the court. The time and effort required, and the lack of success experienced in many dismissal cases, make it understandable that the process is seldom used to dismiss or otherwise discipline a teacher for doing a poor job in the classroom.206

Some argue that tenure should therefore be abolished or probationary periods extended. Others suggest that no change need be made because a method already exists to remove inferior teachers; if nothing is done, management is at fault and the teacher-employee should not suffer because of management’s reluctance or incompetence. Both arguments have a certain simplistic appeal but, in the writer’s view, both miss the mark.

The teacher should have job security; in fact, its existence may often make him a better teacher. On the other hand, the present tenure system makes it difficult to eliminate the poor teacher and does not permit any action against the teacher who simply does the minimum without otherwise exerting himself. In fact, once a teacher has tenure, there may be little reason to evaluate his performance thoroughly, except when he is considered for promotion. In short, under the present system, absent complaints by parents or other staff members, management has little built-in incentive to improve the performance of the teacher who is doing a poor job.

New York State School Boards Association. In addition, the New York State United Teachers Association proposes to extend tenure protection to all teachers. N.Y. Teacher, Jan. 27, 1974, at 8, col. 3.

Perhaps a certain number of incompetents will always be with us. Clearly, there will always be differences in job performance among teachers. One must ask whether all teachers, simply because they have the same experience and educational background, should automatically receive the same salary. Perhaps merit pay in education is an idea whose time has come. In addition to rewarding good performance, a proper merit pay system would force management to evaluate performance on a continual basis and to be more concerned with this aspect of its own supervisory function.

It is easy to agree in theory that the better teacher should receive more money, but drafting a specific merit pay system acceptable to teachers and boards of education is a difficult and complicated task. The legislature could of course mandate a specific plan, but the implementation of such legislation in any given school district should be delayed until teachers and management have had sufficient opportunity to negotiate their own agreement. Nevertheless, the governor and the legislature should put the parties on notice that, in the absence of significant progress, the state will impose its own plan unless and until the parties themselves agree on a mutually satisfactory system. Such a system would force management to determine exactly who the better teachers are and would prevent the mediocre teacher, who cannot and perhaps should not be fired, from obtaining periodic automatic pay increases equal to those of his more proficient colleagues.

Any future legislation should permit the parties to negotiate the procedures for determining the employees who will receive merit pay, the amount of the award, and all other details of the plan. The parties may, for example, decide that the entire teaching staff should be eligible to receive merit pay, that the plan should cover only tenured employees, that the merit pay amount should vary, that all employees should be compensated for increases in the cost of living, or that certain employees should receive no pay increase whatsoever. In short, any legislation should

207. An April, 1970 publication of the New York State Teachers Association quoted with approval the following conclusion from the 1957 Report of the Special Committee on Merit Payments: "The study has revealed no plan for varying salaries of teachers with the same responsibilities according to a rating scale, or other means of evaluating competence, which the Committee can recommend." N.Y. State Teachers Ass'n, Salary Schedule Provisions for Nonautomatic Increments at v (1970).

permit the widest possible discretion in negotiating the content of a merit pay system, but some kind of merit system should be required. In point of fact, various school districts in New York State have negotiated merit pay plans with their employees. The parties, perforce, have decided many of the questions mentioned, including the issue of who is to determine the merit pay recipients and the standards to be applied in making that decision.

Teachers understandably approach the idea of merit pay with caution. The mechanics of the plan are not easy to formulate. Clearly, merit pay should not be used as a means for the employer to save money. Rather, it should seek to achieve a wiser distribution of the funds that are available. The amount of the award should be sufficient to provide an incentive, but it is not necessary (and probably not initially desirable) that all wage increases be based on merit. Moreover, the total monetary package should continue to be a matter for negotiation between the parties.

Both teachers and boards of education have a stake in ensuring that those who do the job obtain a fair share of the available education dollar. The emergence of a merit pay system should have several other beneficial effects. It should eliminate some of the disadvantages of the tenure system while at the same time continuing job security for the tenured employee. Although it may still be difficult to rid a school system of an incompetent teacher, such an employee will not necessarily receive the same wage increases as other employees. Since school boards would no longer be compelled to pay the mediocre tenured employee an ever-increasing salary, it should also be easier to achieve more job security for the probationary teacher, who at present is altogether too vulnerable to arbitrary action on the part of the employer. It may in fact be appropriate to suggest that boards of education grant increased protections to the probationary teacher in return for a merit pay system.

Boards must be sensitive to teacher fears of arbitrariness, must be willing to provide for teacher input in the decision-making process, and must recognize that fair administration of the plan is essential. Such a system should encourage both teachers and management to give more attention to improving the quality of teaching, which is, after all, the principal goal.

209. 4 N.Y. PERB Bulletin for Mediators/Fact Finders No. 4 (May 1973) lists the following school districts: Gates-Chili (Monroe County—418 teachers); Pittsford (Monroe County—400 teachers); Greece (Monroe County—690 teachers); Niskayuna (Schenectady County—301 teachers); Campbell (Steuben County—33 teachers); Hammondsport (Steuben County—70 teachers); Jamesville-DeWitt (Onondaga County—288 teachers); New Hartford (Oneida County—247 teachers). See generally N.Y. State School Bds. Ass'n, Evaluation and Merit Pay Clinics (1973), concerning guidelines for and alternative approaches to establishing merit pay systems.