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EVIDENCE LAW FOR TEACHER EMPLOYMENT TERMINATION  
HEARINGS

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PREVIEW

EVIDENCE LAW FOR TEACHER EMPLOYMENT TERMINATION HEARINGS

by

Donald F. Uerling

A DISSERTATION

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Major: Interdepartmental Area of Administration,  
Curriculum and Instruction

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

Lincoln, Nebraska

December, 1980

**TITLE**

**EVIDENCE LAW FOR TEACHER EMPLOYMENT TERMINATION HEARINGS**

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PREVIEW

## CHAPTER I

### INTRODUCTION

#### CONTEXT OF THE PROBLEM

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

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

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<sup>1</sup>See K. Davis, *Administrative Law for the Seventies* (1976).

## II. GENERAL STATEMENT OF THE PROBLEM

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

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

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

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



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

### III. STATEMENT OF THE SPECIFIC OBJECTIVE

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

### IV. DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### V. ASSUMPTIONS

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

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

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

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

with good educational management practices.

## VI. DELIMITATIONS AND LIMITATIONS

This study was subject to certain delimitations.

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

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

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

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

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

The study was subject to certain limitations.

1. The conclusions relate only to the admission and use of evidence at a hearing, and are not a comprehensive treatment of the law of teacher terminations.
2. The results are sufficiently general in nature so that any suggestions would have to be adapted in more specific form prior to actual use.
3. The results are more pertinent for Nebraska than for any other state.
4. The results are oriented toward public elementary and secondary education.
5. Developments in the law may affect the validity of the results soon after the study is completed.

## VII. SIGNIFICANCE OF THE STUDY

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

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

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

cut back their teaching staff."<sup>4</sup>

Nolte has also stated that:

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

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

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

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

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<sup>4</sup>Id. at 5.

<sup>5</sup>M. Nolte, Duties and Liabilities of School Administrators 57 (1973).

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

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

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

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

## CHAPTER II

### REVIEW OF LITERATURE

#### I. INTRODUCTION

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

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

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



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

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

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

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

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

## II. EDUCATIONAL MANAGEMENT

### A. The Employment Relationship

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>11</sup>Id.

is illustrative of the cooperative responsibilities in this area of personnel management.<sup>12</sup>

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

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

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

<sup>13</sup>Id.

## B. Personnel Administration

### Supervision and Evaluation

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

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

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

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

improvement.<sup>15</sup>

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

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

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

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

<sup>16</sup>S. Neill & J. Custis, *Staff Dismissal: Problems & Solutions* 21 (1978).

<sup>17</sup>Id. at 22.

<sup>18</sup>Id. at 30.

<sup>19</sup>Id. at 25.

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

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