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## A Review of the Development of Nebraska Teachers' Continuing Contract Law

Mark D. McGuire

*McGuire and Norby*

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# A Review of the Development of Nebraska Teachers' Continuing Contract Law

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## I. INTRODUCTION

During my practice for the last twenty-six years, I have had the opportunity to represent teachers through their membership in the Nebraska State Education Association (NSEA) as well as participating in the legislative process that impacted their right of continuing employment, or "tenure." This article relates some of that history, beginning in approximately 1971.

Before commencing that discussion, it is important to note that there were two separate teacher dismissal laws in Nebraska until 1971. One applied to Class IV and V school districts – Lincoln and Omaha, respectively – and was codified in sections 79-1255 to 79-1262 of the *Nebraska Revised Statutes* (Reissue 1943). The other statutory scheme applied to all other teachers employed by all other school dis-

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\* Partner in the Lincoln, Nebraska, law firm of McGuire and Norby; University of Nebraska College of Law, J.D. 1973; University of North Dakota, B.A. 1968. I have spent much of my professional life representing teachers, individually and collectively, through their membership in the Nebraska State Education Association. This article is dedicated to former Senator Gerald Koch, Chair of the Legislature Education Committee from 1979 to 1982. Senator Koch's insights, perseverance, and wisdom are largely responsible for the well-developed system of teacher continuing contract law in Nebraska. Dedication is further made to Mr. James R. Griess, Executive Director of the Nebraska State Education Association, who for twenty-seven years has been a friend, a source of support, and always a true teacher advocate. The Nebraska continuing contract law is part of his legacy to Nebraska's teachers and education.

tricts and was then codified as section 79-1254 of the *Nebraska Revised Statutes* (Reissue 1943). This dual system operated without much excitement for a good number of years, until 1971 when the Legislature enacted 1971 Neb. Laws 266, which was intended to create a "just cause" standard for termination of teachers in Class I, II, III, and VI school districts. This article will track three major legislative enactments concerning teachers and their employment rights and how the Nebraska Supreme Court has interpreted and interacted with these legislative changes.

## II. JUST CAUSE FOR TERMINATION: 1971-1981

In *Schultz v. School District of Dorchester, County of Saline, Nebraska*,<sup>1</sup> the federal Nebraska District Court abstained from determining whether the then existing form of *Nebraska Revised Statutes* section 79-1254 (Reissue 1943) created a protectable property right by assuring a teacher in a Class I, II, III, or VI school district continuing employment, which could not be terminated without a determination of just cause. The premise of the Court's holding was based on two U.S. Supreme Court cases, then barely a year old. In *Board of Regents of State Colleges v. Roth*, the United States Supreme Court stated that:

A teacher has no constitutional right to a hearing before termination of a contract of employment at the end of the contract period, unless there is at stake the loss of "liberty" or "property."<sup>2</sup>

. . . .

Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure benefits and that support claims of entitlement to those benefits.<sup>3</sup>

. . . .

A property interest must be more than a "mere subjective 'expectancy.'"<sup>4</sup>

In its opinion, the Nebraska Court was swayed by the comments of Chief Justice Burger in his concurring opinion in *Perry v. Sindermann*,<sup>5</sup> in which he stated that:

[I]f relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether [the teacher] is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the question arising under state law.<sup>6</sup>

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1. 367 F. Supp. 467 (D. Neb. 1973).

2. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

3. *Id.* at 577.

4. *Id.* at 469 (quoting *Perry v. Sindermann*, 408 U.S. 593, 603 (1972)).

5. 408 U.S. 593, 604 (1972).

6. *Schultz*, 367 F. Supp. at 472.

Therefore, the *Schultz* Court abstained from deciding what it considered a question of state law and suggested that the Nebraska Supreme Court should resolve the issue.

On October 24, 1974, the Nebraska Supreme Court did just that by addressing the issue of educational employment as property rights and determined that the form of section 79-1254, R.R.S. 1943, as amended by LB 266 in 1971, did not create a substantive right of continuing employment requiring a determination of "just cause" for the lawful termination of the contract for teachers employed in Class I, II, III, or VI school districts.

The form of section 79-1254 of the *Nebraska Revised Statutes* (Reissue 1943) before the Court in 1974 was amended by 1971 Neb. Laws 266 and provided:

The original contract of employment with an administrator or a teacher and a board of education of a Class I, II, III, or VI district shall require the sanction of a majority of the members of the board. Any contract of employment between an administrator or a teacher who holds a certificate which is valid for a term of more than one year and a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before May 15 to amend or terminate the contract at the close of the contract period; provided, that the secretary of the board shall, not later than April 15, notify each administrator or teacher in writing of any conditions of unsatisfactory performance or other conditions because of a reduction in staff members or change of leave of absence policies of the board of education which the board considers may be cause to either terminate or amend the contract for the ensuing school year. Any teacher or administrator so notified shall have the right to file within five days of receipt of such notice a written request with the board of education for a hearing before the board. Upon receipt of such request the board shall order the hearing to be held within ten days, and shall give written notice of the time and place of the hearing to the teacher or administrator. At the hearing evidence shall be presented in support of the reasons given for considering termination or amendment of the contract, and the teacher or administrator shall be permitted to produce evidence relating thereto. No member of the board of education may cast a vote in favor of the election of any teacher when such member of the board is related by blood or marriage to such teacher.<sup>7</sup>

The Nebraska Supreme Court was not troubled by the language in the statute requiring the teacher to be advised in writing "of conditions of unsatisfactory performance . . . which the board considers *may be cause* to terminate or amend the contract for the ensuing school year."<sup>8</sup> The statute further defined what would be considered relevant evidence for production at the hearing. "At the hearing evidence shall be presented in support of the reasons given for considering termination or amendment of the contract, and the teacher or administrator shall be permitted to produce evidence relating thereto."<sup>9</sup>

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7. NEB. REV. STAT. § 79-1254 (Reissue 1943).

8. *Schultz v. School Dist. of Dorchester, County of Saline*, 192 Neb. 492, 222 N.W.2d 578 (1974)(emphasis added).

9. NEB. REV. STAT. § 79-1254 (Reissue 1943).

Again, the Court was still not persuaded that this statute required "just cause" be proven even though the legislation's language mandated the production of relevant evidence for termination, i.e. facts which would establish cause.<sup>10</sup>

Although the Court did not find these words to be ambiguous, it nevertheless carefully reviewed the legislative history of 1971 Neb. Laws 266. The Court's analysis of the legislative history primarily focused on comparing what the legislation provided upon actual passage with what LB 266 stated in its original form.

As originally introduced, L.B. 266 required that the ultimate decision by the board to terminate a contract must be based solely upon a deficiency constituting reasonable and just cause for such termination. That provision, however, was excised by the Legislature from L.B. 266 as finally passed, and no longer appears therein. We regard that fact as indicative of a legislative intent not to place any limitation upon the boards of education in respect to the reasons for which they decide to terminate teaching contracts.<sup>11</sup>

The Court then held:

[T]hat section 79-1254, R.R.S. 1943, in its present form does not create in a teacher employed pursuant to its terms a substantive right of continued employment by the school district requiring determination that reasonable and just cause exists for termination of such employment.<sup>12</sup>

Because of the Nebraska Supreme Court's holding, teachers in all school districts other than Omaha and Lincoln were in effect "probationary" in that their employment could be terminated for any reason, including no reason. Without a right to continued employment, absent the determination of just cause, these teachers had no protectable property interest, thus no entitlement to procedural or substantive due process.

The legislative response was swift. The following year, LB 82 was heard before the Education Committee on January 20, 1975. On February 18, 1975, LB 82 was advanced to "Enrollment and Review" for engrossing (1975 Neb. Laws 82, page 752, Floor Debate) and signed by Governor Exon on February 26, 1975.

While the Nebraska Supreme Court held in October of 1974 that just cause was not required for teacher termination, the practitioners of school law in the teacher termination area had, since 1971, applied section 79-1254 as if just cause and its resultant property interest were required elements for proper teacher termination. Thus in 1975, consistent with the intent of LB 82, section 79-1254 of the *Nebraska Revised Statutes* set forth and defined the requirement of just cause to lawfully terminate a teacher's contract.<sup>13</sup>

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10. *Schultz*, 192 Neb. at 499, 222 N.W.2d at 583.

11. *Id.*

12. *Id.* at 500, 222 N.W.2d at 583.

13. Committee Statement, 1975 Neb. Laws 82, Committee Records.

Although not part of the original bill, a floor amendment to LB 82 provided for a two-year probationary period. What the Legislature intended by the language regarding the probationary period will become significant as this history develops.

The first test of the "just cause" provisions of section 79-1254 resulting from LB 82 was delineated in *Sanders v. Board of Education of South Sioux City Community School District No. 11*.<sup>14</sup> In the spring of 1976, Mrs. Sanders was in her sixth year of employment with the School District of South Sioux City. Her March 23, 1976, evaluation had an overall rating of "good," and her principal recommended renewal of her contract.<sup>15</sup> The evidence adduced at the hearing against Mrs. Sanders indicated that on several occasions students who should have been in Mrs. Sanders' classroom were found elsewhere in the school, on occasion gymnastic equipment was not properly safeguarded, and volleyballs were not properly secured.<sup>16</sup>

The Nebraska Supreme Court affirmed the decision of the District Court of Dakota County finding that there was no substantial evidence of incompetency or neglect of duties sufficient to establish just cause to terminate Mrs. Sanders' contract.<sup>17</sup>

The *Sanders* Court took this opportunity to give force and effect to the "just cause" requirement as defined by LB 82, stating that:

Evidence that a particular duty was not competently performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination. Incompetency or neglect of duty are neither measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties. The conduct of Mrs. Sanders complained of by the board might well be categorized as minimal rather than substantial evidence of incompetence or neglect of duty. However her performance of duty is classified, there is a complete absence of evidence that Mrs. Sanders' performance of her particular duties was below the standard of performance required of other teachers in the high school performing the same or similar duties. Neither is there any expert testimony that Mrs. Sanders' conduct was, or should be, sufficient evidence of incompetency or neglect of duty to constitute just cause for termination of her contract.<sup>18</sup>

Attorneys representing school districts reacted to *Sanders* by standardizing a litany of questions for use at a termination hearing to establish that their administrators were expert witnesses, that the administrator had observed the performance of the teacher at issue, and that the teacher did not meet the standard expected of other teachers performing the same or similar duties. This approach be-

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14. 200 Neb. 282, 263 N.W.2d 461 (1978).

15. *Id.* at 284, 263 N.W.2d at 462.

16. *See id.* at 285, 263 N.W.2d at 463.

17. *See id.* at 290-91, 263 N.W.2d at 465.

18. *Id.* at 290, 263 N.W.2d at 465.

came known as the "magic questions" standard and seemed sanctioned by the Nebraska Supreme Court in *Davis v. Board of Education of School District of Callaway*,<sup>19</sup> in which the Court found:

In the case now before us the testimony of the expert witnesses charged with the duty of evaluating the performance of the teacher was that her performance did not meet the appropriate standard. They recommended that her employment be terminated and the evidence, including the expert testimony, as a matter of law, was sufficient to support the action of the board in terminating her employment.<sup>20</sup>

The Court in *Davis* went on to gratuitously provide that:

The language in *Sanders* with reference to a standard of performance should not be interpreted to mean that in every hearing on termination before a board of education there must first be expert testimony establishing the appropriate and acceptable standard of performance before a board may consider whether particular conduct falls below that standard.<sup>21</sup>

In apparent reliance on the Court's analysis of the holding of *Sanders* as set forth in *Davis*, the School District of Alliance attempted to terminate Mr. James Hollingsworth in May of 1979.<sup>22</sup> While the principal testifying did not compare Mr. Hollingsworth's performance to other teachers performing the same or similar duties, that failure was not critical.<sup>23</sup> The *Hollingsworth* Court thoroughly analyzed all of the evidence presented and not merely whether or not the right phrases were uttered.<sup>24</sup> Having done so, the Court concluded that "[i]n building its case against Mr. Hollingsworth, the school board fashioned a house of straw which cannot stand in the fresh breeze of careful analysis."<sup>25</sup>

The Nebraska Supreme Court, after analyzing all of the evidence presented at the termination hearing, concluded as follows:

Finally, a careful review of the entire record would indicate that for 2½ years Mr. Hollingsworth was a competent and industrious teacher. There is nothing in the record to reveal what prompted the decision to ask for his resignation on January 31, 1979. It does appear that, from that date forward, the administration commenced the systematic and diligent search for evidence which would justify the decision which had already been reached. That search has failed.<sup>26</sup>

The status of the law regarding teacher termination as of the spring of 1981 was essentially that the Nebraska Supreme Court had given true effect to 1976 Neb. Laws 266, particularly the statutory language defining just cause. *Hollingsworth* gave meaning to the

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19. 203 Neb. 1, 277 N.W.2d 414 (1979).

20. *Id.* at 3, 277 N.W.2d at 415.

21. *Id.*

22. *See Hollingsworth v. Board of Educ. of the Sch. Dist. of Alliance*, 208 Neb. 350, 303 N.W.2d 506 (1981).

23. *Id.* at 360, 303 N.W.2d at 512.

24. *See id.*

25. *Id.* at 359, 303 N.W.2d at 512.

26. *Id.* at 361, 303 N.W.2d at 513.

word "just" as used in the phrase "just cause." This Court clearly signaled that it would look at the substantive record made at a termination hearing and not simply at whether the right questions and the right answers were given by school district's administrative prosecution witnesses. This approach is further reflected in *Schulz v. Board of Education of the School District of Fremont*<sup>27</sup> and in *Drain v. Board of Education of Frontier County School District No. 46*.<sup>28</sup>

### III. JUST CAUSE FOR TERMINATION: 1981-2000

Issues continued to linger, however, regarding the fact that the School Districts of Omaha and Lincoln were governed by a different set of statutory requirements than the other school districts. Also, issues existed as to whether under the LB 82 amendments probationary teachers were entitled to notice of possible termination and a hearing, although without a standard of just cause.

LB 259 was introduced in January 1981. It proposed to reduce the length of the probationary status of Lincoln and Omaha teachers to two years and proposed a hearing process for probationary teachers. The Education Committee heard initial debate on LB 259 on February 2, 1981. A month later, the Nebraska Supreme Court decided *Meyer v. Board of Education*.<sup>29</sup>

The issue in *Meyer* was whether section 79-1254 of the *Nebraska Revised Statutes* (Reissue 1943) required that notice of possible termination be given to probationary teachers and whether it entitled them to a hearing before their employing board of education if requested. The Court succinctly answered the question:

*Neb. Rev. Stat. § 79-1254* (Reissue 1971) was amended by 1975 Neb. Laws, L.B. 82, and the original sections were repealed. *Legislative Journal* (1975) at 599. As set out above, probationary teachers were excluded from the protection established by L.B. 82 and they are not included in the class of teachers entitled to notice, a hearing, and just cause shown for termination of their contracts.<sup>30</sup>

Although LB 259 was not introduced as a response to *Meyer* as the timing of the decision showed, it did come at a very appropriate time in the legislative debate. Ten days earlier, the Education Committee had voted to hold LB 259 in Committee for further study. The consequences of *Meyer* were part of the issues needing resolution.

The interim study that followed to resolve these key questions was led by the watchful eye and firm hand of Senator Gerald Koch, Chair of the Education Committee. Participants in the interim study included representatives from the School Districts of Omaha, Lincoln,

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27. 210 Neb. 513, 315 N.W.2d 633 (1982).

28. 244 Neb. 551, 508 N.W.2d 255 (1993).

29. 208 Neb. 302, 303 N.W.2d 291 (1981).

30. *Id.* at 306, 303 N.W.2d at 293.

Westside, and Millard, the Nebraska Council of School Administrators, and the Nebraska School Board Association. I was pleased to be a participant as counsel for the NSEA.

The study soon turned from an exchange of ideas to drafting a compromise bill. As mentioned, the significant issues involved the disparity in policy between Omaha and Lincoln and the rest of Nebraska's teachers, the length of probation for a new teacher, and the type of process due a probationary teacher prior to termination. In addition, it was agreed that much of the undisputed Nebraska law involving teacher termination issues would remain unchanged. While it may seem this list of established precedent would be short, it was actually quite involved. An example of this precedent was the case law that required that a vote to terminate a teacher must be by a majority vote of the board of education, rather than a quorum of the board, as established by *Houser v. School District of South Sioux City*.<sup>31</sup>

Senator Koch was clear that the exercise would be successful, and everyone was expected to compromise. As the designated drafter in a pre-computer word processing era, it seemed that the compromise bill was drafted and redrafted a hundred times. The "final draft" was agreed to on Christmas Eve 1981.

A significant compromise in the draft concerned the time frame for probation. In our draft, probation in Omaha and Lincoln would last three years, it would no longer be extendable to four or five years in Omaha and Lincoln, and probation would last two years for all other school districts in the State. From the "final draft" of Christmas Eve to the hearing on the modified bill on January 26, 1982, the State School Board Association found it necessary to object to the two years of probation due to input from its membership. Even though that issue became an open one, the balance of the compromise included an agreement that all parties involved, going forward, would not come back in future years and attempt to change legislatively that which upon agreement had been reached without the consent or acquiescence of the parties. To the credit of each entity involved, now nearly twenty years later, this commitment has survived – truly a tribute to all of those involved.

The length of probation became a major issue on the Floor as the bill was debated. Accordingly, an amendment was adopted to increase the length of probation to three years for all school districts by a vote of 24 to 22.<sup>32</sup>

Over the lunch hour recess which followed the vote, Mr. James R. Griess, now Executive Director of the NSEA, and I prepared a further amendment. We were responding to the argument in support of the

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31. 189 Neb. 323, 202 N.W.2d 621 (1972).

32. Legislative History of LB 82, March 3, 1982.

need for a three-year probationary period. For example, Senator Goll, who was promoting the three-year across-the-board amendment, stated that “[a]n extra year would certainly give us an opportunity to work with a teacher who is marginal to give them the necessary help to improve their skills.”<sup>33</sup> The language we prepared was offered by Senator Koch and was adopted as an amendment to the bill by a vote of 23 to 6.<sup>34</sup> That language is now codified in section 79-828(2) of the *Nebraska Revised Statutes* (Reissue 1996) as follows:

The purpose of the probationary period is to allow the employer an opportunity to evaluate, assess, and assist the employee’s professional skills and work performance prior to the employee obtaining permanent status.

.....  
All probationary certificated employees employed by Class I, II, III, and VI school districts shall, during each year of probationary employment, be evaluated at least once each semester, unless the probationary certificated employee is a superintendent, in accordance with the procedures outlined below: The probationary employee shall be observed and evaluation shall be based upon actual classroom observations for an entire instructional period. If deficiencies are noted in the work performance of any probationary employee, the evaluator shall provide the teacher or administrator at the time of the observation with a list of deficiencies, a list of suggestions for improvement and assistance in overcoming the deficiencies, and followup evaluations and assistance when deficiencies remain.

.....  
If the probationary certificated employee is a superintendent, he or she shall be evaluated twice during the first year of employment and at least once annually thereafter.<sup>35</sup>

The remaining question was how the Nebraska Supreme Court would interpret or apply this language. In 1997, some fifteen years later, the Court dealt with this issue. Specifically, the issue focused upon the consequence if a school district failed to evaluate a probationary teacher as the statute required and then attempted to terminate that teacher.

York County School District No. 083 hired Ms. Kristin Cox as a music teacher for the 1993-94 school year. Her first semester ended January 14, 1994, and her first evaluation was January 28, 1994. Her performance was rated as “satisfactory” in almost all areas, although her “relationship with students” performance was rated as “needs improvement.”<sup>36</sup>

On March 14, 1994, the Board of Education took action to renew the contracts of all teachers except the contract for Kristen Cox.<sup>37</sup> Cox was evaluated the next day. Again, her performance was rated as

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33. *Id.* at 8157.

34. *Id.* at 8184.

35. NEB. REV. STAT. § 79-828 (Reissue 1996).

36. *Cox v. York County Sch. Dist. No. 083*, 252 Neb. 12, 14, 560 N.W.2d 138, 140 (1997).

37. *Id.*

“satisfactory” in all areas other than “relationship with students,” which was still rated as “in need of improvement.”<sup>38</sup> After a hearing, the Board of Education of the School District voted against renewal of her contract for the 1994-95 school year.<sup>39</sup>

The Nebraska Supreme Court determined that the School District failed to follow the requirements of section 79-12,111(2) of the *Nebraska Revised Statutes* (Reissue 1994), because her teaching performance was not evaluated once each semester. Thus the decision not to renew Cox’s teaching contract, as reversed by the District Court, was affirmed. It was gratifying to see the Nebraska Supreme Court confirm what Mr. Griess and I had intended as we drafted the statutory language during that lunch hour some fifteen years earlier.

#### IV. REDUCTION IN FORCE

A collateral issue to traditional cause terminations occurs when the “cause” given to justify termination is reduction in force, commonly referred to as a “RIF.” A RIF normally occurs when a school district finds it has too many teachers or more than it can afford due to financial exigencies, a declining enrollment, or a change in educational program.

In 1979, the Nebraska Supreme Court considered *Witt v. School District No. 70, Frontier County*.<sup>40</sup> Mrs. Elaine Witt was an eight-year special reading teacher employed by the School District. In the spring of 1976, the school board voted to eliminate her position and terminated her contract. Although she was certified and trained to teach all elementary grades, the School District hired a new fourth grade teacher. Mrs. Witt had been “considered” but apparently rejected for the open position.<sup>41</sup>

The Court decided the case based on continuing contract law codified in section 79-1254 of the *Nebraska Revised Statutes* (Reissue 1943), stating:

It cannot be said there was a reduction in force when a new fourth grade teacher was hired before the end of the term at which Mrs. Witt’s contract was terminated. We hold a tenured teacher whose position has been abolished has a right to be retrained to fill any vacancy for which she is qualified for the next school year which occurs after notice of the elimination of her position. In other words, no new teacher may be hired to fill a vacancy she is qualified to fill. To hold otherwise would simply allow a total emasculation of the tenured teacher act.

....

An imaginative school board could simply transfer a teacher into a position it knew it intended to abolish; abolish the position the following year; hold the

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38. *Id.* at 14-15, 560 N.W.2d at 140.

39. *Id.* at 16, 560 N.W.2d at 141.

40. 202 Neb. 63, 273 N.W.2d 669 (1979).

41. *Id.*

hearing; and terminate the position and the teacher's contract, even if a vacancy should occur for which she was qualified. While this may not have been the intent herein, it does have that effect. The clear intent of the tenured teacher act is to guarantee a tenured teacher continued employment except for two justifiable circumstances: (1) discharge for a cause; and (2) reduction in the teaching force. Neither is present in this instance.<sup>42</sup>

The Nebraska Supreme Court reaffirmed *Witt* nine months later in *Moser v. Board of Education of School District of Humphrey*<sup>43</sup> and again cautioned school boards from actions that would "emasculate the intent of the tenured teacher act."<sup>44</sup>

Meanwhile, the Legislature passed 1978 Neb. Laws 375, which required every school district to have a reduction-in-force policy and to establish a number of criteria that must be included in the policy. The intent of the legislation was to delineate that something more compelling is required than a mere claim of possible cost reductions to terminate a teacher for reasons of reduction in force.<sup>45</sup> This legislation states that:

Before a reduction in force shall occur, it shall be the responsibility of the board of education and school district administration to present competent evidence demonstrating that a change in circumstances has occurred necessitating a reduction in force. Any alleged change in circumstances must be specifically related to the teacher or teachers to be reduced in force, and the board, based upon evidence produced at the hearing required by sections 79-1254 to 79-1262, Reissue Revised Statutes of Nebraska, 1943, and amendments thereto, shall be required to specifically find there are no other vacancies on the staff for which the employee to be reduced is qualified by endorsement or professional training to perform.<sup>46</sup>

The Legislature further provided a right of recall for teachers terminated because of reduction in force to any position they were qualified to perform by reason of Department of Education endorsement or college preparation.

The first test of a RIF policy's selection criteria occurred in *Dykeman v. Board of Education of the School District of Coleridge*.<sup>47</sup> The School District of Coleridge had the statutorily required reduction-in-force policy. One of the School District's justifications for reduction-in-force termination was a teacher's "[c]ontribution to the activity program," which usually meant coaching.<sup>48</sup>

Mrs. Dykeman's argument was that because the Nebraska Supreme Court had ruled in *Neal v. School District of York*<sup>49</sup> that coach-

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42. *Id.* at 68, 273 N.W.2d at 672.

43. 204 Neb. 561, 283 N.W.2d 391 (1979).

44. *Id.* at 564, 283 N.W.2d at 393.

45. LB 375 was enacted after the termination of Mrs. Witt and Mr. Moser, but before the Nebraska Supreme Court decided its cases.

46. 1978 Neb. Laws 375.

47. 210 Neb. 596, 316 N.W.2d 69 (1982).

48. *Id.* at 598, 316 N.W.2d at 70.

49. 205 Neb. 558, 288 N.W.2d 725 (1980).

ing was not teaching within the ambit of section 79-1254 of the *Nebraska Revised Statutes* (Reissue 1943), coaching duties should not be included as a criterion in a reduction-in-force decision involving a teaching contract.<sup>50</sup> The Nebraska Supreme Court disagreed. The Court declared that school boards have the authority to conduct extra-curricular programs as part of the educational program; thus a board could consider a teacher's contributions to the school's activities as part of the district's reduction-in-force policy.<sup>51</sup>

Interestingly, the *Dykeman* decision came fourteen days after the Nebraska Supreme Court's decision in *Schulz v. Board of Education of the School District of Fremont*,<sup>52</sup> in which the Court thoroughly reviewed in detail the record in a "cause" termination and reversed the decision to terminate a tenured teacher's contract.

A year later, the Nebraska Supreme Court decided *Roth v. School District of Scottsbluff*.<sup>53</sup> In *Roth*, the Court ruled in favor of Loretta Roth, a tenured teacher, but reversed the lower court's decision for Jane Montgomery because of her probationary status.

"Probationary teachers are exempted from every provision outlined in § 79-1254 . . ." (citations omitted). Thus, based on *Meyer*, we find that a probationary teacher is entitled to none of the termination or rehiring benefits allowed under §§ 79-1254, including the preferred rights to reemployment under § 79-1254.07. Consequently, the trial court erred in awarding Montgomery damages based on her preferred rights to reemployment, for as a probationary teacher, even one terminated due to a reduction in force, she has no reemployment rights under § 79-1254.07. Conversely, because Roth is a tenured teacher terminated due to a reduction in force, she has preferred rights to reemployment under § 79-1254.07.<sup>54</sup>

While there are no reported cases that directly involved reduction in force decided from 1983 to 1988, our experience at the district court level was that the rights of tenured teachers *vis-a-vis* probationary teachers were generally protected and that school districts were held to both statutory procedures as well as their own reduction-in-force policies. However, there was little in-depth analysis of the basis for a decision to terminate a teacher due to reduction in force.

In 1988, however, the Nebraska Supreme Court appeared to tighten the requirements in reduction-in-force cases. In *Trolson v. Board of Education of School District of Blair*,<sup>55</sup> the Court gave meaning to the statutory language that an alleged change in circumstances must be specifically related to the teacher affected. Because the School District's reduction-in-force policy was not offered into evidence at the termination hearing, the Nebraska Supreme Court found:

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50. *Dykeman*, 210 Neb. at 598, 316 N.W.2d at 70.

51. *Id.*

52. 210 Neb. 513, 315 N.W.2d 633 (1982).

53. 213 Neb. 545, 330 N.W.2d 488 (1983).

54. *Id.* at 547-48, 330 N.W.2d at 490 (citations omitted).

55. 229 Neb. 37, 424 N.W.2d 881 (1988).

The record tells us only the factors considered in selecting Trolson's contract as the one to be amended; there is nothing to show that the factors were used in accordance with whatever the policy may be. Thus, the evidence does not meet the requirement that the evidence produced at the hearing establish that, among other things, the change in circumstances necessitating a reduction in force specifically relate to Trolson.<sup>56</sup>

In the same year, Laura Kennedy was a probationary teacher in the School District of Ogallala, which attempted to end her employment for reduction-in-force reasons. "Kennedy also requested a complete listing of all reasons to be offered as a basis for terminating her contract, a list of all witnesses to testify on behalf of the administration or School District, a summary of their testimony, and copies of all documents to be used as exhibits."<sup>57</sup> The School District denied her request, because as a probationary teacher, she was not entitled to the same procedural process given to a tenured teacher. The Nebraska Supreme Court, however, determined she was entitled to the requested information and, in doing so, offered this explanation:

The board responds to Kennedy's claim that the notice she was given preceding the hearing was inadequate by reminding us that in *Roth v. School Dist. of Scottsbluff*, 213 Neb. 545, 330 N.W.2d 488 (1983), we held that the rights granted to tenured teachers by former Neb. Rev. Stat. §§ 79-1254 to 79-1254.08 (Reissue 1981) did not apply to probationary teachers. The legal reality is, however, that much of what was said in *Roth* has been superseded by subsequent legislative enactments. While the Legislature has not yet obliterated all distinctions between probationary and permanent employees, it has unquestionably given probationary teachers greater protection than they formerly enjoyed and has thereby correlatively limited the power of boards of education over them. See [sic], *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988); *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988).<sup>58</sup>

Thus the intent of 1982 Neb. Laws 259, which provided meaningful hearing rights to probationary teachers, was given full effect by the Nebraska Supreme Court in *Kennedy*. The case of *Cox v. York County School District No. 083*<sup>59</sup> relies in part upon the foregoing "obliteration" language from *Kennedy*. Therefore, part of what was sought legislatively in 1981 with the introduction of LB 259 regarding probationary teachers was affirmed by these decisions.

## V. FINAL OBSERVATIONS

The arena of teacher termination law has matured and become quite civil over the last three decades. School districts and their boards of education have learned that proving "just cause" is required

56. *Id.* at 42, 424 N.W.2d at 884.

57. *Kennedy v. Board of Educ. of Sch. Dist. of Ogallala*, 230 Neb. 68, 70, 430 N.W.2d 49, 50 (1988).

58. *Id.* at 72, 430 N.W.2d at 51.

59. 252 Neb. 12, 560 N.W.2d 138 (1997).

to terminate or cancel a teacher's contract and is not as erroneous as once feared – although none like the process. Similarly, having to give a probationary teacher notice of possible non-renewal and the opportunity for a hearing if requested has not been paralyzing. In fact, few probationary teacher hearings are actually held. Part of this mellowing process is attributable, in my opinion, to a different generation of school administrators. Current school administrators were young teachers twenty to thirty years ago and grew up professionally in a world of due process and fair dismissal. Those concepts are not inherently repugnant to them as was true a generation earlier.

In 1981-82 when we were working on the LB 259 interim study, Dr. Carroll Sawin was an active participant on behalf of the School District of Lincoln. He told me then what I believe now most school administrators endorse as part of their professionalism. His wisdom was that “[i]f I can't ‘counsel out’ the probationary teacher having problems, then I am not doing my job.” “Counseling out” now better defines the philosophy of the system, in contrast to the confrontational attitudes school administrators had in the past.

When hearings are held on the issue of the non-renewal of the probationary teacher, I recall the wisdom the Honorable Warren Urbom expressed in *Rozman v. Elliot* – “Even an imperfect hearing, if held with the approval of the employee, is better than no hearing at all.”<sup>60</sup> This is what probationary hearings are all about. Albeit imperfect and in a forum where the moving party has no burden of proof, probationary teachers have their opportunity to be heard.

This area of school law, while imperfect, is understood and works. Part of that is due to consistency and the absence of competing legislative efforts by one side or the other to gain an advantage. This important underpinning of the Nebraska process is a direct result of the commitment extracted by Senator Gerald Koch in 1981 and respected by all concerned parties since then. Thank you for your wise foresight, my friend.

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60. 335 F. Supp. 1086, 1100 (D. Neb. 1971).