Michigan Law Review

Volume 37 | Issue 3

1939

CONSTITUTIONAL LAW - SCHOOLS AND SCHOOL DISTRICTS - TEACHERS' TENURE LEGISLATION

Bertram H. Lebeis
University of Michigan Law School

COMMENTS

CONSTITUTIONAL LAW — SCHOOLS AND SCHOOL DISTRICTS — TEACHERS' TENURE LEGISLATION — Although the question of security of employment for public school teachers was discussed as far back as the year 1885, when tenure was interpreted to mean the application of civil service principles to the teaching profession, the organized teacher tenure movement is of comparatively recent origin. From within the profession itself impetus was given to the movement by continuous campaigns carried on by local, state and national teachers' associations. From without, the growth of the movement was facilitated by a wider recognition of the evils attendant upon the unlimited power of school boards to "hire and fire" their employees at will. Surveys brought to light the instability of the teaching body and the large number of teachers required to fill vacant positions each year. In 1923, for example, the statewide turnover of teachers ranged from four per cent in Florida to forty-seven per cent in Wyoming, while the local turnover was in many cases even greater, more than one-half of the

teachers being new in their positions anually.[1] In a number of jurisdictions a school board had the power to employ teachers for a term longer than the life of the board itself,[2] but this fact alone gave no assurance of continued employment. As one court expressed it,

> "No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all. . . . It is no infringement on the constitutional rights of anyone for the board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal. The board is not bound to give any reason for its action."[3]

The large turnover in the profession was due in part to certain practices which were widespread throughout the country; among them may be noted discharge (1) because of political reasons, (2) because of non-residence in the community, (3) in order to make places for friends and relatives of board members or influential citizens, (4) in order to break down resistance to reactionary school policies, and (5) in order to effect economies either by diminishing the number of teachers and increasing the amount of work assigned to those retained, or by creating vacancies to be filled by lower salaried, inexperienced employees. Of these practices the first was exceedingly influential in the growth of the tenure movement, some of the more notorious cases of political dismissal challenging the attention of the public to the injury to professional morale and efficiency resulting from the misuse of the control vested in the administrative agencies.[4] The remedy for such abuses was sought in legislation designed to strip the school boards of

[1] "The Problem of Teacher Tenure," 2 NATIONAL EDUCATION ASSOCIATION RESEARCH BULLETIN 143 (1924).

[2] See annotation in 70 A. L. R. 794 at 802 (1931). In several states, statutes expressly authorize contracts for more than one year. Mo. Rev. Stat. (Gillespie Cum. Ann. Supp. 1937), § 9209; 1 N. D. Comp. Laws Ann. (1913), § 1297; Tex. Comp. Stat. (1928), arts. 2781, 2809.

[3] People ex rel. v. City of Chicago, 278 Ill. 318 at 325-326, 116 N. E. 158 (1917).

[4] "The Problem of Teacher Tenure," 2 NATIONAL EDUCATION ASSOCIATION RESEARCH BULLETIN 145 (1924). Among the cases there referred to are the Denver Case of 1915, the San Diego dismissals of 1918, the Oklahoma dismissals of 1922, and the cases of Dr. Finegan of Pennsylvania, Dr. Chadsey of Chicago, and Dr. Ettinger of New York City. In 1916, 68 Chicago teachers with ratings of "satisfactory" and with recommendations by the superintendent for re-employment, were dismissed without notice, hearing, or filing of charges against them.

their autocratic power and to prescribe for them rules of administrative action which would ensure a greater degree of security to their employees.

I.

Tenure legislation of one sort or another is now in force in nineteen states and the District of Columbia. Three states[5] provide for "continuing contracts," whereby a teacher's contract is deemed to continue in existence from year to year unless, on or before a fixed date each year, it is terminated by the school board. The other sixteen states and the District of Columbia have enacted legislation modeled after that adopted by New Jersey in 1909.[6] Although varying in specific details, the general pattern of these laws may be described briefly. For a period ranging from one to five years, the teacher is on probation and during that time he may be denied re-employment at the end of any school year, but dismissal during the year must be for cause. If re-employed at the end of the probationary period the teacher then holds his position without further election during efficiency and good behavior. He may be dismissed only for cause, and only after notice accompanied by written charges, opportunity to be heard, and a finding by the board that the charges filed against him are true. The teacher is allowed the assistance of counsel, and the board is authorized to subpoena witnesses for either side to give testimony under oath. Some of the statutes make the action of the board final, subject of course to judicial review with respect to the requirements of due process of law. Others provide specifically for administrative appeals to a higher educational board or official, or for appeals to the county or district court. When enumerated, the grounds for dismissal include dishonesty, immoral character or conduct, insubordination, physical or mental incapacity to perform the duties of employment, persistent refusal to obey reasonable rules and regulations, and natural diminution in the number of pupils.

[5] 1 Mont. Rev. Code (1935), § 1075 et seq.; Neb. Laws (1937), c. 182, p. 713; 3 Nev. Comp. Laws (Hillyer, 1929), § 5998.

[6] 3 Cal. Gen. Laws (Deering, 1931), Act 7519, § 5.500 et seq.; 3 Colo. Stat. Ann. (Courtright's Mills, 1930), §§ 6767m, 6767n; D. C. Code (1929), tit. 7, c. 1; Fla. Laws (1935), c. 17248, p. 1061; 2 Fla. Laws (1937), c. 18743, p. 1142; Ill. Rev. Stat. (State Bar Assn. 1937), c. 122, §§ 136b, 161, 186; 6 Ind. Stat. Ann. (Burns, 1933), §§ 28-4307, 28-4308; Kan. Laws (1937), c. 311, p. 500; La. Gen. Stat. (Cum. Ann. Supp. 1937), § 2267; Mass. Gen. Laws (Ter. Ed. 1932), c. 71, §§ 41, 42, as amended by Mass. Acts (1934), c. 123; Mich. Pub. Acts (Ex. Sess. 1937), No. 4, (Mason Supp. 1937), § 8150-51 et seq.; I Minn. Stat. (Mason 1927), § 2935-1 et seq., as amended by Minn. Laws (1937), c. 161, p. 229; 1 N. J. Rev. Stat. (1937), § 18:13-16 et seq.; N. Y. Education Law, §§ 561, 827, Consol. Laws (Cahill, 1930), c. 15; Okla. Sess. Laws (1936-1937), c. 34, art. 16, p. 179; 5 Ore. Code Ann. (Supp. 1935), § 35-2613 et seq.; Pa. Stat. Ann. (Purdon Supp. 1937), tit. 24, § 1126; Wis. Stat. (1937), §§ 37.31, 39.40, 41.15(12), 42.55(18) and (19).

Despite the permanent tenure afforded by the statute, the teacher's position is an employment and not an office, the effect of the statute being merely to annex to the contracts of employment certain legal consequences, and not to make the relation any the less one originating in contract.[7] While it is commonly said that a tenure statute should be liberally construed so as to promote the beneficent purpose of legislation in which the public at large is interested,[8] it is nevertheless imperative that the conditions precedent to the acquisition of a permanent status be performed. Oral contracts are insufficient to give tenure where written contracts are required by the statute.[9] So also with informal action by the board when formal action is necessary.[10] And mere service for the probationary period does not ipso facto entitle a teacher to tenure status if the statute requires that he be recommended by the superintendent as competent, efficient and satisfactory.[11]

2.

Deliberate attempts of the school boards to prevent the acquisition of permanent status make the practical enforcement of the tenure laws a matter of considerable difficulty, and except in so far as they are frustrated by the courts, make tenure a right in name only. One of such attempts is well illustrated by several cases arising in California, where the tenure law requires the board to classify as permanent teachers those who have been re-employed for the year next succeeding the probationary period. The practice of the school board is to employ its teachers from year to year and to neglect to classify those who are eligible for permanent status. This subterfuge does not prevent the operation of the law in making such classification, however, and if the teacher is eligible he is considered so classified. Obviously this must be true, or the tenure law would be evaded by the simple expedient of using contracts reading for a yearly employment only.[12]

Another device which meets with judicial condemnation is the

[7] Abraham v. Sims, 2 Cal. (2d) 698, 42 P. (2d) 1029 (1935); Kostanzer v. State ex rel. Ramsey, 205 Ind. 536, 187 N. E. 337 (1933).

[8] Hogsett v. Beverly Hills School Dist., 11 Cal. App. (2d) 328, 53 P. (2d) 1009 (1936); State ex rel. Clark v. Stout, 206 Ind. 58, 187 N. E. 267 (1933); McSherry v. City of St. Paul, (Minn. 1938) 277 N. W. 541. Cf. O'Connor v. Emerson, 196 App. Div. 807, 188 N. Y. S. 236 (1921), affirmed 232 N. Y. 561, 134 N.E. 572 (1921), indicating that it should be strictly construed because in derogation of the common-law right of contract on the part of public authorities.

[9] Board of School Commrs. v. State ex rel. Wolfolk, 209 Ind. 498, 199 N. E. 569 (1936).

[10] Barnhardt v. Gray, 12 Cal. App. (2d) 717, 59 P. (2d) 254 (1936).

[11] Holm v. Board of Education, 141 Misc. 194, 252 N. Y. S. 389 (1931), affirmed 260 N. Y. 572, 184 N. E. 97 (1932).

[12] Briney v. Santa Ana High School Dist., 131 Cal. App. 357, 21 P. (2d) 610 (1933); La Shells v. Hench, 98 Cal. App. 6, 276 P. 377 (1929).

systematic forcing of resignations as a condition of re-employment for the following year. Under threat of a refusal to employ him for the ensuing year, and accompanied by a promise to re-employ him if he accedes, the teacher is required to "resign" at the end of his probationary period, the intended result being effectively to preclude him from asserting tenure rights. Refusing to be influenced by the appearance of the transaction, the courts uniformly brand such tactics as a sham for the sole purpose of evading the law. The resignation is not necessary to terminate the employment at that time; its only purpose is to keep the teacher on probation and thereby to reserve to the board the power to discharge him without reference to tenure rights. Hence it is held that a resignation at the end of the probationary period, given without any intention of terminating his employment as a teacher and upon a definite promise that he will be re-employed, is ineffective and does not defeat his right to tenure upon re-employment.[13] "A resignation is in the nature of a notice of the termination of a contract of employment and is contractual in its nature. It is ineffectual without the intent of the incumbent to sever the relationship of employer and employee."[14]

If conditions warrant it, the board has the undoubted authority to discontinue certain types of instruction; but it may not procure the indirect discharge of a teacher by purporting to abolish a "position" and at the same time continue the identical type of work, perhaps under a different name.[15] Similarly the tenure law may not be circumvented by the expedient of employing a teacher on a per diem basis or as a "supply substitute" teacher, when in fact he is employed continuously as a regular teacher for the required probationary period.[16] Every tenure statute contains the qualification that its provisions are not to apply in case there is such a diminution in the number of pupils as to necessitate the dismissal of a teacher. Such a provision does not give

[13] Abraham v. Sims, 2 Cal. (2d) 698, 42 P. (2d) 1029 (1935); Mitchell v. Board of Trustees, 5 Cal. App. (2d) 64, 42 P. (2d) 397 (1935); Sherman v. Board of Trustees, 9 Cal. App. (2d) 262, 49 P. (2d) 350 (1935); Hosford v. Board of Education, (Minn. 1937) 275 N. W. 81, modified (Minn. 1938) 280 N. W. 859. The rule is otherwise, however, where the resignation is bona fide and elements of duress and intent to circumvent the law are lacking. Merman v. Calistoga Joint Union High School Dist., 5 Cal. (2d) 438, 55 P. (2d) 195 (1936); Board of School Commrs. v. State ex rel. Bever, 211 Ind. 257, 5 N. E. (2d) 307 (1936); Chalmers v. State Board of Education, 11 N. J. Misc. 781, 168 A. 236 (1933).

[14] Sherman v. Board of Trustees, 9 Cal. App. (2d) 262 at 266, 49 P. (2d) 350 (1935).

[15] State ex rel. Karnes v. Board of Regents, 222 Wis. 542, 269 N. W. 284 (1936). Cf. Weider v. Board of Education, 112 N. J. L. 289, 170 A. 631 (1934).

[16] McSherry v. City of St. Paul, (Minn. 1938) 277 N. W. 541; Board of Education v. Wall, 119 N. J. L. 308, 196 A. 663 (1938).

the board authority to dismiss tenure teachers when there remain positions, filled by non-tenure teachers, which the discharged teacher is competent to fill.[17] So also, while the school board has wide discretion in the matter of assigning work to its employees, the power must not be abused, and there is justification in supposing that a refusal to assign work to a teacher or an assignment of work for which he is not qualified would be prevented by judicial intervention.[18]

These constitute some of the more extreme practices to which the school authorities are wont to resort in an effort to adhere to their former policies of employment and discharge of teachers. Candid though they may be in admitting the purpose of their actions, it is not for the inferior administrative agencies of the state to question or dispute the wisdom of the policies adopted by their creator. The reported cases all indicate an astuteness on the part of the judiciary to thwart such practices, and thereby to effectuate the social policy declared by the legislature.

3.

A large portion of the litigation under the tenure laws arises out of dismissals of teachers after they have attained permanent status. When the statute sets out the specific grounds for dismissal no problem is likely to be presented, but it is otherwise where dismissal must be "for cause" or for certain specified grounds "and other good and just cause." A preliminary question to be considered in this connection is whether "cause" is a question of fact, or whether it is a matter to be determined exclusively by the administrative agency in a proper exercise of its power. The minority view upholds the former alternative, that it is always a jury question whether or not there are adequate grounds for dismissing a particular teacher.[19] The decided weight of authority, however, favors the view that the school board, rather than any court or jury, is the proper tribunal which in the first instance must determine the question of "cause"; and its decision is not to be set aside unless it has acted arbitrarily, capriciously, or in bad faith.[20]

[17] Barnes v. Mendenhall, 98 Ind. App. 229, 183 N. E. 556 (1932); Seidel v. Board of Education, 110 N. J. L. 31, 164 A. 901 (1933).

[18] Mitchell v. Board of Trustees, 5 Cal. App. (2d) 64, 42 P. (2d) 397 (1935); Dutart v. Woodward, 99 Cal. App. 736, 279 P. 439 (1929); White v. Board of Education, 117 W. Va. 114, 184 S. E. 264 (1936); Neal v. Board of Education, 116 W. Va. 435, 181 S. E. 541 (1935).

[19] School Dist. No. 94 v. Gauthier, 13 Okla. 194, 73 P. 954 (1903); School Dist. No. 62 v. Morgan, 127 Okla. 193, 260 P. 46 (1927).

[20] School City of Elwood v. State ex rel. Griffin, 203 Ind. 626, 180 N. E. 471 (1932); Morris v. School Dist., 139 Kan. 268, 30 P. (2d) 1094 (1934); Meade County Board of Education v. Powell, 254 Ky. 352, 71 S. W. (2d) 638 (1934); Rinaldo v. Dreyer, (Mass. 1936) 1 N. E. (2d) 37; Finch v. Fractional School Dist.,

A more controversial question relates to the meaning to be attributed to the words "other good and just cause" following a list of specified grounds of dismissal. Judicial interpretation of the phrase is twofold. (1) According to one view, the phrase must be read in conjunction with the words immediately preceding it, and it implies a dereliction by the teacher which may be the subject matter of a charge against him.[21] (2) The contrary interpretation is that "good cause" is not limited to some form of inefficiency or misconduct on the part of the teacher, because such matters are amply covered by the named causes; it includes any ground put forth by the administrative board in good faith, providing it is not arbitrary, irrational or unreasonable.[22] The wisdom of the latter rule of construction in this particular situation is a matter of some doubt. The result would seem to be that the scope of "other good and just cause" will be limited only by the capacity of the local school officials to discover policies for the community which apparently would be advanced by the dismissal of tenure teachers; and the ultimate consequence will be increased difficulty and perhaps impossibility for a teacher to retain a tenure position by relying solely upon professional qualifications and personal competency.[23]

One of the most frequently contested questions in the matter of dismissals is whether or not marriage of a teacher constitutes good cause for discharge within the meaning of a statute which does not expressly provide therefor.

Following the first, or eiusdem generis rule of construction, a number of courts hold that marriage per se is not a ground for dismissal, contending that since it is impossible to know in advance whether the efficiency of the teacher will become impaired because of marriage, any rule which assumes that teachers do become less competent thereby is unreasonable and purely arbitrary.[24] On the other hand, the opposing line of authority declares that marriage consti-

225 Mich. 674, 196 N. W. 532 (1924); Anderson v. Consol. School Dist., 196 Minn. 256, 264 N. W. 784 (1936); People ex rel. Peixotto v. Board of Education, 212 N. Y. 463, 106 N. E. 307 (1914); Christmann v. Coleman, 117 Ohio St. 1, 157 N. E. 482 (1927).

[21] School Dist. of Wildwood v. State Board of Education, 116 N. J. L. 572, 185 A. 664 (1936).

[22] Rinaldo v. Dreyer, (Mass. 1936) 1 N. E. (2d) 37.

[23] See the dissenting opinion of Justice Treanor in McQuaid v. State ex rel. Sigler, 211 Ind. 595 at 620, 6 N. E. (2d) 547 (1937).

[24] Dutart v. Woodward, 99 Cal. App. 736, 279 P. 439 (1929); Oxman v. Independent School Dist., 178 Minn. 422, 227 N. W. 351 (1929); School Dist. of Wildwood v. State Board of Education, 116 N. J. L. 572, 185 A. 664 (1936); People ex rel. Murphy v. Maxwell, 177 N. Y. 494, 69 N. E. 1092 (1904); Richards v. District School Board, 78 Ore. 621, 153 P. 482 (1916); Jameson v. Board of Education, 74 W. Va. 389, 81 S. E. 1126 (1914).

tutes just cause for dismissal if the board, in the bona fide exercise of its discretion, determines that the general welfare of the community as well as that of the school requires the adoption of such a rule.[25] It is questionable whether a court which takes the view that marriage per se is not a reasonable cause for dismissal should condone a contract which provides for its forfeiture upon marriage by the teacher. If the board has no authority to dismiss for such cause, it would seem that it has no authority to write into a contract a provision that marriage will terminate the employment because by so doing it is accomplishing by indirection that which it cannot do directly. The few cases in which this issue has been presented, however, hold that a teacher is properly dismissed under such a contract.[26]

4.

The validity of the tenure statutes, challenged in but three states, has been sustained as against objections based upon public policy or violation of constitutional provisions.

To the contention that the law is void as against public policy, the Indiana court has said that the state is the source of power in public school matters and when it sees fit to limit powers which would be plenary in the absence of restriction, the court cannot say that such limitations render the statute void.[27] Since there is no constitutional objection to classification of school districts any more than of cities, a tenure law which is applicable to certain areas of the state only does not contravene a prohibition of special legislation. In the case of school districts as well as of cities, the classification is ultimately according to population and is therefore based upon a substantial difference having reasonable relation to the subject of the legislation.[28] Nor does the statute constitute prohibited class legislation, as there is nothing in it which confers upon any citizen or class of citizens, as such, any privilege or immunity which does not upon the same terms belong equally to all citizens of the state. It embraces all who naturally belong to a

[25] Rinaldo v. Dreyer, (Mass. 1936) 1 N. E. (2d) 37; McQuaid v. State ex rel. Sigler, 211 Ind. 595, 6 N. E. (2d) 547 (1937), overruling School City of Elwood v. State ex rel. Griffin, 203 Ind. 626, 180 N. E. 471 (1932), and Kostanzer v. State ex rel. Ramsey, 205 Ind. 536, 187 N. E. 337 (1933), on this point.

[26] Backie v. Cromwell Consol. School Dist., 186 Minn. 38, 242 N. W. 389 (1932); Ansorge v. Green Bay, 198 Wis. 320, 224 N. W. 119 (1929).

[27] Ratcliff v. Dick Johnson School Twp., 204 Ind. 525, 185 N. E. 143 (1933).

[28] Grigsby v. King, 202 Cal. 299, 260 P. 789 (1927); Morris v. Board of Education, 119 Cal. App. 750, 7 P. (2d) 364, 8 P. (2d) 502 (1932); State ex rel. Nyberg v. Board of School Directors, 190 Wis. 570, 209 N. W. 683 (1926). A similar line of reasoning serves to refute the contention that the act is invalid because it requires a teacher to serve his probationary period wholly within one district. School City of Elwood v. State ex rel. Griffin, 203 Ind. 626, 180 N. E. 471 (1932).

class, and between those included and those excluded there is an inherent difference germane to the subject and purpose of the legislation.[29]

The remaining constitutional objection to a tenure law is that it interferes with the freedom of contract, alleged to carry with it the right of terminating any given contract. It has been pointed out that the public school system, established in pursuance of the constitutional mandate imposed upon the legislature, is a state institution; and the subdivisions of the state are instrumentalities of government exercising only those powers given by the state. If the legislature declares its will to impose restrictions upon its otherwise plenary powers to cancel a contract entered into by and between itself and a teacher, the exercise of such power is not prohibited by a constitutional provision forbidding the state to impair the freedom of contract.[30]

A problem equal in importance to that of the validity of the law itself concerns the extent to which the rights of a teacher on permanent tenure are protected by Article I, section 10 of the Federal Constitution against impairment by subsequent changes in the legislation. It has been held, apparently without extensive consideration of the statute, that vested rights are acquired under the California act,[31] and the Wisconsin court has indicated that the same is true of its law.[32] The New Jersey court has taken the contrary position with respect to its tenure law.[33] The first adequate discussion of the problem came in a recent case involving the Indiana tenure statute. The act, adopted in 1927, provides that a teacher who has served under contract for five or more successive years, and thereafter enters into a contract for further services with the school corporation, shall become a permanent teacher; the contract, upon the expiration of its stated term, shall be deemed to continue in effect for an indefinite period, shall be known as an indefinite contract, and shall remain in force unless succeeded by a new contract or canceled as provided in the act.[34] By an amendatory act of 1933,[35] township school corporations were omitted from the pro-

[29] Kostanzer v. State ex rel. Ramsey, 205 Ind. 536, 187 N. E. 337 (1933); School City of Elwood v. State ex rel. Griffin, 203 Ind. 626, 180 N. E. 471 (1932).

[30] Ratcliff v. Dick Johnson School Twp., 204 Ind. 525, 185 N. E. 143 (1933).

[31] Gastineau v. Meyer, 131 Cal. App. 611, 22 P. (2d) 31 (1933).

[32] State ex rel. Nyberg v. Board of School Directors, 190 Wis. 570, 209 N. W. 683 (1926). The court regards the tenure law as a part of the state teachers' retirement fund system. In this connection, see State ex rel. O'Neil v. Blied, 188 Wis. 442, 206 N. W. 213 (1925), and State ex rel. Dudgeon v. Levitan, 181 Wis. 326, 193 N. W. 499 (1923).

[33] Phelps v. State Board of Education, 115 N. J. L. 310, 180 A. 220 (1935), and 116 N. J. L. 412, 185 A. 8 (1935), affirmed 300 U. S. 319, 57 S. Ct. 483 (1937).

[34] Ind. Stat. Ann. Supp. (Burns, 1929), § 6967.1 et seq.

[35] Ind. Acts (1933), c. 116, § 1, p. 716; 6 Ind. Stat. Ann. (Burns, 1933), §§ 28-4307, 28-4308.

visions of the act of 1927, and this omission was construed by the Indiana court as repealing the 1927 act so far as township schools and teachers were concerned and as leaving the defendant school board free to terminate the petitioner's employment. In a mandamus proceeding brought by a teacher who had attained tenure status under an "indefinite contract" in a township school corporation, the Indiana court held that the statute gave, not contractual rights, but merely a privilege to continue in employment under given conditions.[36] The United States Supreme Court reversed the decision of the state court, holding that the petitioner had acquired a valid contract with the defendant, the obligation of which would be impaired by the termination of her employment on account of the act of 1933.[37]

Although the principal function of a state legislature is to enact laws declarative of state policy and subject to later repeal, yet a legislative enactment may contain provisions which, when acted upon by individuals, become contracts between themselves and the state or its subdivisions within the protection of the Federal Constitution.[38] In determining whether or not contract rights are created, the primary inquiry must be into the terms of the statute itself, with perhaps some consideration given to the objective sought to be achieved. Proceeding upon that basis, the Supreme Court was able to find a contract in this case by virtue of the following facts: the statute under consideration was one of a long series prescribing the requisites of teachers' contracts; the title of the act itself was couched in terms of contract, providing for the making and canceling of indefinite contracts; the word "contracts" appeared twenty-five times throughout the statute, and the tenor of the act as a whole indicated that it was used advisedly, in its usual legal meaning; and all prior Indiana decisions were to the effect that the right to continued employment by virtue of the statutory indefinite contract was contractual in nature.

As in the case of statutes providing for pensions and retirement funds, the question is wholly one of statutory construction; due to the varied wording of the tenure laws, it would be difficult to predict the end result in litigation involving any one particular statute. The courts have taken widely divergent views on the question of contract rights under pension laws—whether there are any such rights, and if so,

[36] State ex rel. Anderson v. Brand, (Ind. 1937) 5 N. E. (2d) 531, 7 N. E. (2d) 777 (1937) (rehearing).

[37] Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 58 S. Ct. 443 (1938). It is to be noted that the statute was interpreted as creating a true contractual agreement, and not a quasi-contractual obligation of the kind involved in Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435 (1932). See further Kauper, "What is a 'Contract' Under the Contracts Clause of the Federal Constitution?" 31 MICH. L. REV. 187 (1932).

[38] New Jersey v. Yard, 95 U. S. 104 at 114 (1877).

when they become vested and protected against subsequent state action.[39] They may do the same in respect to tenure laws. The social policy factor is as strong in the case of tenure laws as it is in the case of pension laws, but the difference between the two is of such a nature that a denial of vested rights under the one should not, and probably will not, a fortiori dictate a denial of vested rights under the other. State-wide pension systems, involving, as they do, a heavy financial burden, could well be left subject to a greater degree of control by the legislature in the solution of its fiscal problems. But it is submitted that the control of the state over the public educational system is not seriously impaired by finding a grant of vested rights in a tenure statute. Vested rights themselves are always subject to the police power of the state, exercised for an end which is in fact public; and the provisions of the statutes relating to dismissal for cause give adequate assurance that the tenure laws need not be responsible for harboring incompetent or otherwise undesirable employees within the public school system.

Bertram H. Lebeis

---

[39] See note on teachers' pensions in 36 MICH. L. REV. 1188 (1938). A provision in a recent Florida statute is of interest in this connection: "All employments under the provisions of this Act shall be subordinate to the right of the Legislature to amend or repeal this Act at any time and nothing herein contained shall ever be held, deemed or construed to confer upon persons employed pursuant to the provisions hereof, a contract which will be impaired by the amendment or repeal of this Act." 2 Fla. Laws (1937), c. 18743, § 11, p. 1147. This may have been prompted by the decisions in Anders v. Nicholson, 111 Fla. 849, 150 So. 639 (1933), and State ex rel. Holton v. City of Tampa, 119 Fla. 556, 159 So. 292 (1935), holding that vested rights, having accrued under pension provisions, were protected against subsequent impairment. See 36 MICH. L. REV. 1188 (1938).