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ABSTRACT

The speaker examines a cross-section of the cases illustrating reasonable cause for dismissal of teachers. He considers teacher behavior both in and out of the schools in covering such topics as insubordination, cruelty, personal appearance, curriculum decisions, immoral behavior, political activity, illegal strikes, and criminal conduct. Court decisions suggest that board members have the authority and the duty to act to dismiss a teacher if that teacher's behavior is a threat to the school community. The speaker recommends that boards follow their written policies, follow state statutes, seek legal counsel, and recognize and respect the teacher's constitutional rights. (Author/IRT)

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Topeka, KS
June 3, 1977

Reasonable Cause for Dismissal of Teachers

Board Members, School Board Attorneys and Guests:

It is good to be invited back to Topeka to address this conference. Four years ago I talked with you about "substantive due process for teachers." Today we will focus primarily on developments in this same area since that time. Some of you may have looked with some skepticism at the title given to my remarks--doubting that teachers can be dismissed for reasonable cause. Although areas of doubt exist, the recent court decisions we will examine this afternoon do provide considerable guidance as to what causes are reasonable and legal.

As we set the stage for our discussion, it is important to recognize that teachers represent a cross-section of modern day society and the "teacher stereotype" of the past no longer exists. For example two years ago, a Connecticut coach was suspended pending investigation after three stolen turkeys were found in the trunk of his car; a Florida home economics teacher placed second in the Miss Nude World contest; a male physical education teacher in California posed naked for Playgirl magazine; and more recently and closer to home, a West Plains, Missouri speech and drama teacher won a "hot pants" contest at a local tavern.

With increasing frequency, the courts are examining controversies resulting from the dismissal of teachers for conduct that deviates from community norms. During this session, we will examine recent decisions dealing with in-school conduct. Following the break, we will

consider decisions ruling on the legality of dismissals imposed because of the teacher's out-of-school conduct.

In-School Conduct

The legal authority of school boards to exert control over the in-school conduct of teachers is less subject to question than their authority with regard to out-of-school conduct. Where this authority is not expressly stated in the statutes, it is normally considered to be implied.

The courts usually uphold the reasonable exercise of this authority except when the control involves the teacher's exercise of "fundamental," i.e., constitutional rights, which the U.S. Supreme Court said in Tinker v. Des Moines "are not shed at the school house gate." When fundamental rights are involved, encroachment can be justified only by a "compelling state" interest such as protecting the school operation from "substantial and material disruption."

The statutes of many states specify the grounds for terminating employment contracts. The list included in the Kansas Statute repealed in 1974 is typical--incompetency, inefficiency, conduct unbecoming a teacher, neglect of duty, immorality, and insubordination.

Insubordination

The generic definition of insubordination is "unwillingness to submit to authority." As the adversary role of employer and employee gained wider acceptance, there appeared to develop a simultaneous increase in the resistance to school board authority. It is not surprising, then, that "insubordination" has become the most frequently cited reason for removing errant teachers.

An Arkansas coach became uncooperative after he was passed over for the athletic director's position. As conditions continued to deteriorate, the board chose not to renew his contract. The court described the situation thusly:

> It is a sad story. But it is the type of problem that confronts school boards, unfortunately on not infrequent occasions--the type that totally involves the entire school community. This particular school community has finally resolved the problem. It cannot be said that it did so in an unfair or arbitrary manner. The matter should therefore remain at rest.

The court held that no constitutional rights were infringed but it did observe that "(n)o adequate and comprehensive rationale has yet been enunciated by the Supreme Court in this type of case." According to the opinion, "there was substantial evidence from which the board could find that he was insubordinate." (Williams v. Day, 412 F. Supp. 336, 1976)

Unless restricted by State law, school boards generally have the authority to adopt policy controlling the use of corporal punishment. Attempts to limit the teachers' use of physical means to control student behavior is often a source of conflict. A recent Missouri case illustrates this point. (Board of Education v. Shank, 542 S.W.2d 779, 1976)

The school board had adopted a regulation that "(c)orporal punishment shall be used only as a last resort after other corrective measures have been used without success." The procedures to be used were listed as follows:

1. The punishment shall be administered by the principal or a teacher designated by the principal;

2. The punishment shall be witnessed by at least one additional adult;

3. The punishment shall be reasonable as to nature and amount, and shall not be of such nature as to leave permanent ill effects.

The board charged the teacher with violating this regulation.

The testimony indicated that the teacher had administered corporal punishment to five children on three different occasions. In none of these instances was an adult witness present and after the first two, school administrators reminded the teacher of the regulation and ordered her to avoid further violation.

Following the procedures contained in the state statutes, the board gave the teacher notice and a hearing after which it terminated her contract. The teacher appealed the board decision to the circuit court which ordered the teacher reinstated with back pay. Although the appellate court affirmed that decision the state supreme court held in favor of the board.

Most often, the courts sustain the dismissal of teachers who use corporal punishment in defiance of administrative directives. (Jerry v. Board of Education of Syracuse 376 N.Y.S.2d 737, 1975) The principal had warned a physical education teacher repeatedly to keep his hands off his pupils. A hearing panel ruled that the evidence was not sufficient to justify dismissal. The board elected not to follow the panel's recommendation. The following testimony convinced the court that the board's action was warranted:

> (His acts included) . . . striking children with dodge balls, soccer balls, hands and fists throwing or pushing children against walls and floors so as to strike their heads and knees, the pulling of hair . . . and the pulling of a child by the ear. Some children cried and shook with fear and sought to stay in their home room.

Elementary school students testified that he called them "dummies, damn babies, big babies, stupid bastards, little shitheads" and used such other terms as "the f-word, Jesus Christ, bitch . . ."

Cruelty

The statutes of a number of states list cruelty as a ground for

discharge. However through the years, school boards have not relied frequently on this ground. During the past year such a case was decided by the Pennsylvania courts.

The action was brought by a teacher with sixteen years service in the district. The cruelty charge followed a single incident in the teacher's sixth-grade classroom. The problem began near the end of the school day when the teacher called one of the pupils to the front and told him to be quiet and work on his lesson. After the boy had returned to his seat, the teacher heard the remark, "The elephant is angry." Since the plaintiff was a large, heavy set man weighing 230 pounds he assumed that the reference was directed at him. Believing that the same boy made the remark, the teacher called him back to the front, grabbed him by the shoulders, shook him, pushed him into the blackboard causing him to hit his head. After the boy had fallen to the floor, the teacher grabbed him by the hair and arm, stood him up, then pushed him into a bookcase. Again the boy struck his head and fell to the floor. The teacher then shouted, "He is crying like a baby," and kept the boy after class. The student did ride home on the school bus. When the bus arrived at his house, another student helped him inside. As he was dizzy and nauseous, had pain in his head and was vomiting, his parents took him to the hospital. Although the doctor found no apparent injuries, the soreness and pain continued two weeks.

The Secretary of Education sustained the board's dismissal of the teacher. The Commonwealth court held that the evidence was sufficient to support the action, affirmed the decision, and dismissed the appeal. (Landi v. West Chester Area School Dist., 353 A.2d 895, 1976)

Personal Appearance

Teachers continue to challenge school board attempts to regulate their personal appearance. A superintendent ordered a teacher to shave off his beard before the school term began. The teacher refused to do so unless his appearance proved disruptive. No rule against beards existed and other teachers had appeared in school wearing beards and mustaches without causing disruption. After he had worn the beard to class, the school board dismissed him for insubordination. The Texas Civil Court of Appeals ruled that the contract had been illegally terminated and awarded the teacher the remainder of his salary plus interest from February 19, 1970 to November 12, 1975. (Ball v. Kerrville Indep. School Dist., 529 S.W.2d 792, 1975)

Dismissal actions have been upheld when the board had a written policy regulating dress and grooming. For example, the Tennessee Supreme Court upheld the discharge of a teacher who refused to shave. The board regulation said, in part: "No apparel, dress, or grooming that is or may become potentially disruptive of the classroom atmosphere or educational process will be permitted." (Morrison v. Hamilton Cty. Bd. of Ed., 494 S.W.2d 770, 1973)

The Supreme Court has also ruled recently on the constitutionality of a grooming regulation in Kelly v. Johnson. The regulation, applicable to male police officers, "was directed at style and length of hair, sideburns, and mustashes, beards and goatees were prohibited, except for medical purposes. . ." Justice Rehnquist's majority opinion indicated that the enactment of the regulation was not so irrational that it could be considered a deprivation of the officer's "liberty" interest in freedom to choose his hair style. (96 S. Ct. 1440, 1976)

Protest

In Ahern v. Board of Education of Grandview, the courts rejected a Nebraska teacher's requests for injunctive relief under the Civil Rights Act of 1871 (327 F. Supp. 1391, 1971). The teacher's unorthodox teaching style and her outspokenness resulted in warnings by the school administration. The incident leading to her discharge occurred when she returned to duty after an absence and reacted to a report about problems between a substitute teacher and her students. The plaintiff said to her class, "That bitch! I hope that if this happens again . . . all of you walk out." One of these problems, a slapping incident, was role-played in her other classes. The teacher encouraged her students to develop a proposal for a school regulation regarding corporal punishment. In regard to the teacher's statements in the classroom, the court said:

> I am persuaded that the exercising of a constitutional right was not the reason for the discharge. Although a teacher has a right to express opinions and concerns, as does any other citizen on matters of public concern, by virtue of the First and Fourteenth Amendments, . . . I doubt that she has the right to express them during class in deliberate violation of a superior's admonition not to do so, when the subject of her opinions and concerns is directly related to student and teacher discipline.

The courts have consistently held that First Amendment protections extend to nonverbal expression. For the most part, the decisions on student rights on this area antedated those dealing with teacher rights. A New York teacher's contract was not renewed because she would not salute the flag and say the pledge of allegiance in her class as required by state law. Her refusal stemmed from an objection to the words "liberty and justice for all." She did not act disrespectfully toward the flag nor encourage her pupils to follow her example. The Second Circuit Court held that the teacher's expressions of protest were indeed protected from encroachment by the First Amendment. (Russo v. Central School Dist. No. 1, 469 F.2d 623, 1972)

Curriculum Decisions

Does First Amendment protection extend to the teacher's choice of instructional materials? As demonstrated by the cases that follow, public school teachers are asserting a constitutional right to academic freedom. The charges, frequently insubordination, arise when the teacher is ordered to stop using the materials in question, but refuses to do so.

The Seventh Circuit Court upheld the dismissal of three teachers who were fired for distributing a poem titled "Getting Together" to their eighth-grade classes. The poem relating to the Woodstock musical festival described the apparent pleasures and benefits of drug use and illicit sex, (Burubaker v. ...d of Education, 502 F.2d 973, 1974). The teachers charged that the dismissal violated their freedom of speech and their civil rights as protected by 1983. The court disagreed:

> We do not believe that however much the reach of the First Amendment has been extended and however eager today's courts have been to protect the many varieties of claims to civil rights, (that) the (school board) had to put up with the described conduct of the (teachers).

The forbidden publication in a 1976 case was Catcher in the Rye (Harris v. Mechanicville Cent. School Dist., 382 N.Y.S.2d 251). After parental objections, the superintendent and principal talked to the teacher and secured his agreement not to use the book. Later, however, the teacher allegedly restored it to the curriculum. The board dismissed the teacher for insubordination based on this charge and another charge that he walked out of conference with the principal and refused to return. In formulating its opinion the court observed:

> Balancing the rights and advantages of academic freedom versus some measure of effective control over the contents of a curriculum presents an enormously difficult problem to individual teachers and administrators in modern schools as indeed to the courts, particularly when an obscenity factor is involved.

The court overturned the dismissal as a violation of substantive due process. There were no board policies or directives concerning the teaching of the subject matter in question nor was there testimony of witnesses establishing that the teacher had failed to follow the agreement with the administrators on its use. The court indicated that the matter of disciplining the teacher should be returned to the board to consider some penalty provided by law short of dismissal.

In a complicated 1976 case, the Seventh Circuit Court reversed and remanded a federal district court's decision enjoining a teacher discharge for unprofessional conduct. (Fern v. Thorp Public School Dist., 532 F.2d 1120, 1976) The teacher had requested the injunction when told by his superintendent that he might be subject to discharge for using an instrument called the "Human Sexual Awareness Inventory" in his "Contemporary Living" class. The record described the instrument which the teacher developed in connection with his teaching duties in military service. The inventory consisted of four parts: Part I contained line drawings of male and female figures with directions requiring the sexual parts to be matched with their proper names; Part II also used the line drawings but required matching with "street" names; Part III included forty true-false items, for example, "Virginity in women is an important factor in determining success in marriage"; and Part IV was made up of twenty items, such as "Engaging in sexual relations with more than one person at a time (group sex) is alright," to which the students were to respond on a five point agreement/disagreement scale.

Finally, you may have seen an April 29, 1977 newspaper article reporting the dismissal of a Pittsburg, Pennsylvania teacher for using a 12-minute segment of the movie "Deep Throat" in a course titled "Celebration" which dealt with sex, drug and alcohol abuse and morals. We are not quite

that progressive in Missouri; one board recently banned the dictionary selected for use in a junior high school.

Immoral Behavior

The final topic on in-school conduct is immoral behavior. In Illinois, a band director lost his position because of immoral conduct. (Lombardo v. Board of Educ., 241 N.E2d 495, 1968) The specific misbehaviors involved are described in the following testimony of a female student enrolled in one of his classes:

> . . . She was in the plaintiff's band class and when he taught he made her sit between his legs and put his arms around her and put his hands on her chest. She further testified that he touched her with the palms of his hands six or seven times. She thought he had done it accidentally and found when she tried to push his hands away he replaced them. She further testified . . . that he put his elbow in her lap and his hand on her chest . . . . The plaintiff kissed her on the cheek and would stick his tongue in her ear and kissed her on the cheek and on the face a lot.

The same type of conduct was described in the testimony of other students. The court concluded that the evidence sufficiently justified the board's action.

Last year, a Colorado teacher was dismissed for immorality after engaging in somewhat similar conduct. According to the record, during a field trip the teacher was riding in the rear seat of a van being driven by one of the adult chaperones. He engaged in activities which he characterized as "good-natured horse play" and which consisted of "touching and tickling the girls on various parts of their bodies and occasionally between the legs in proximity to the genital areas." There was reciprocal conduct on the part of the girls. The language use was occasionally vulgar and contained many sexual innuendos. Later on during the trip in violation of the "lights out" rule, the teacher spent some time alone in

van with a female student discussing her personal problems. On another occasion he was seen in a motel room lying on the bed with a female student watching television.

The state supreme court (Weissman v. Board of Educ., 547 P.2d 1267, 1976) rejected the teacher's arguments that "immorality" as a ground for dismissal was unconstitutionally vague and that his actions could not serve as a basis for dismissal unless the board established that they had an adverse effect on his ability to teach. On this latter point, the court said, "In our view, whenever a male teacher engages in sexually provocative or exploitive conduct with his minor female students a strong presumption of unfitness arises against the teacher." The court decisions are consistent in this regard. The weight of opinion is definitely against the teacher who becomes "involved" with a student.

The state statutes as a rule make no distinction between in-school and out-of-school conduct in listing grounds for disciplinary action. One would anticipate that teacher conduct in the latter situation would be less subject to interference from employers and the state education agency. Also, outside school there would also seem to be a greater chance that some "fundamental" right might be involved without a counterbalancing "compelling" state interest.

Political Activity and Protest

Teachers who speak out publicly on various issues may incur the displeasure of their employers. Frequently, when such expressions are criticisms of the board, administrators, or some aspect of school operation, punitive action results, usually in the form of dismissal for insubordination. Such dismissals may result, too, from the teacher's protesting such things as national policy or social injustice. In either situation, the teacher disciplined for such activities, may be able to establish that First Amendment Rights were violated.

The United States Supreme Court ruling in the 1968 Pickering case (391 U.S. 563) gave great impetus to removal of unwarranted restrictions on the teacher's freedom of speech and expression. The case resulted from the dismissal of a teacher who wrote a letter to the local newspaper criticizing the administration's handling of past proposals to raise school revenue and its allocation of resources between the athletic and the educational programs of the school. The court said, in fact, that the teacher's right to speak out on issues of public concern should not serve as a basis for his discharge.

Another example involved a school superintendent's political activity during a school board election (Bell v. Board of Education 450 S.W.2d 229, Ky 1970). The dicta by Judge Palmore merits repeating:

> A school superintendent cannot be expected to confine his extra-curricular activities to birdwatching while a covetous rival is out campaigning for a school board to unseat him. So, if he remains within the confines of propriety, neither neglecting his duties nor using his powers to coerce those who are subject to his official influence, he is free to engage in political activity whether it concerns school elections or otherwise. But it is an equally harsh fact of life that if he loses, his record of performance had better be above reproach, because the winners are also human and will scrutinize his armor for an Achilles heel. Unfortunately, it is an unavoidable risk of the game, and that is what happened in this case.

Evidence showed that the superintendent used funds from federal programs to influence votes and failed to hold fire drills and to correct fire hazards revealed by a fire marshal's inspection. The court ruled this evidence was sufficient to warrant discharge. This and the previous cases clearly support Judge Palimore's observation that if a teacher engages in controversial, but legally protected or sanctioned activity, it is imperative that he "keep his house in order."

Seven professional employees brought action against a superintendent and board of education in Kentucky charging that they had been transferred and demoted because of their political activity in a school board election. (Calhoun v. Cassady, 534 S.W.2d 806, Ky 1976) They supported candidates the superintendent opposed. After the election he recommended the transfers and the board approved "for betterment of the schools." The plaintiffs were not given a specific statement of reasons.

The opinion described the situation, thusly:

> Superintendent Cassidy held the hand that played the game--the teachers were poor pawns to be transferred or demoted at his pleasure. All he had to do was to recommend the transfers and demotions. Like puppets, four members voted to assist Cassidy in his vendetta against teachers and employees.

The court granted the relief sought.

Illegal Strikes

The use of "striking illegally" as a ground for teacher dismissal is an obvious by-product of the collective bargaining movement in public education. In one important respect, this type of action differs from those previously discussed in that a group of teachers rather than an individual teacher is involved. It was established early that an employer could not terminate or refuse to renew a teacher's contract solely because of union activity. But a majority of states either expressly or impliedly forbid teacher strikes. The courts are now setting the parameters of school board authority to discharge striking teachers and defining the individual rights of teachers in such situations.

The United States Supreme Court reversed a decision of the Wisconsin Supreme Court which held that the due process clause of the Fourteenth Amendment "required that the teachers' conduct and the Board's response be evaluated by an impartial decision maker other than the Board." (Hortonville Joint School Dist. v. Hortonville Educ. Association, 91 S. Ct. 2308, 1976) The Court acknowledged that it was bound to accept the highest state court's interpretation of the statute which was that the law "prohibited the strike and that termination of the striking teachers' employment was within the Board's statutory authority."

The teachers' organization and the board were unable to reach agreement on a new master contract. School began and the teachers resumed their duties while negotiations continued. In March, the union went out on strike in violation of state law. After most of the teachers ignored invitations to return to work, the board decided to hold a disciplinary hearing for each teacher still on strike.

In reversing the decision, the Supreme Court said:

> The Board's decision whether to dismiss striking teachers involves broad considerations, and does not in the main turn on the Board's view of the "seriousness" of the teachers' conduct or the factors they urge mitigated their violation of state law. It is not an adjudicative decision, for the board had an obligation to make a decision based on its own answer to an important question of policy: what choice among the alternative responses to the teachers' strike will best serve the interests of the school system, the interests of the parents and children who depend on the system, and the interests of the citizens whose taxes support it. The Board's decision was only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well.

Some of you are probably following the litigation in connection with the Kansas City, Missouri teachers strike. The board voted not to renew the contracts of striking probationary teachers. The order of the lower court that ended the strike rescinded this action of the board. On May 10, 1977, the Missouri Court of Appeals issued a preliminary writ of prohibition ordering the deletion of the provisions of this lower court encroaching on the statutory authority of the board. (School Dist. of Kansas City, Missouri v. Clymer, No. KCD 29495)

Association

The First Amendment right of assembly by judicial interpretation encompasses the right of individuals to associate with whom they choose.

In Georgia, a federal district court ruled that a school board's denial of employment to an applicant who resided on a communal farm violated her First Amendment rights. The teacher had previously substituted in the district and was recognized by the school administrators to be qualified. The superintendent refused to recommend her employment informing her that to do so would probably cost him his job. The court ordered the district to place the teacher in the first available position and pay her attorney's fees. (Doherty v. Wilson, 356 F.Supp. 35, 1973)

Criminal Conduct

Depending much on the wording of the state statutes, criminal conduct may serve as a legitimate ground for dismissal. For example, a number of state codes authorize discharge for "conviction of a felony or crime involving moral turpitude."

In Governing Board of Realto School District v. Mann (54 Cal. Rptr. 607, 1976, the court sustained a dismissal for a felony conviction. The teacher pled guilty to possession of marijuana and was sentenced to two years probation. Following successful completion of probation, the criminal court declared the offense to be a misdemeanor. However, the appellate ruled that the original conviction constituted sufficient ground for discharge.

In a somewhat similar New Mexico case, a beginning teacher appealed her dismissal (Bertrand v. New Mexico State Bd. of Educ., 544 P.2d 1176, 1975). The school board dismissed her after learning that while a university student she pled guilty to the charge of unlawful distribution of marijuana and was currently on one-year probation. The teacher first appealed the dismissal to the state board which heard new evidence and affirmed the local board's action.

The complicating factor in this case was the state's Criminal Offender Employment Act (COEA) that provides only two grounds for dismissal: (1) that the employee had not been rehabilitated and (2) that the conviction related adversely to the position. The state supreme court ruled the state board had sufficient evidence to conclude that the teacher had not been rehabilitated. The probation officer testified that the teacher became angry when she was not permitted to see her file and made derogatory comments about the laws and "narcs." When a student had asked the teacher about using drugs she told him "he could get in some trouble because of some bad laws, but for him to do what he wanted." The board was not estopped from dismissing the

teacher because the offense occurred before the teacher was hired.

A Florida teacher was arrested, tried for first degree murder, and acquitted by reason of temporary insanity. Upon release the teacher requested reinstatement and restoration of tenure status which the board had approved with more than one year of probationary period remaining. The board refused and the teacher sought judicial relief. The court concluded that the board was not estopped from denying tenure since failure to complete the probationary period was caused by the employees own conduct. (Williams v. Board of Pub. Instr., 311 So.2d 812, 1975)

Immorality

Standards of morality differ from community to community and change from year to year. For this reason, caution must be used in attempting to specify what conduct currently represents "immorality," especially immorality of sufficient magnitude to justify the legal revocation of a teaching certificate, dismissal or transfer of a teacher.

As recent news items such as those reporting Anita Bryant's campaign against non-discrimination ordinance in Florida illustrate, the area of rights of homosexuals is highly controversial. In spite of public support for such action, it appears that school boards may not routinely dismiss teachers for immorality solely because they are homosexual.

In a 1976 California case, a teacher challenged his dismissal for a single incident of homosexual solicitation in a public incident of homosexual solicitation in a public restroom (Board of Educ. of Long Beach v. Millette, 133 Cal. Rptr. 275). The trial court found that the facts as presented in the charge were true. However, because this was an isolated incident precipitated by stress and pressures in the teacher's life and there was no notoriety attached to the incident, the court concluded that the teacher does not represent a threat to his pupils nor is he unfit to teach. Therefore, according

to the opinion, the conduct is insufficient grounds for dismissal. The court apparently gave much weight to a psychiatrist's testimony that the teacher was not a homosexual and the behavior would not re-occur and that there was no effect on his teaching ability. School administrators testified against reinstatement of the teacher saying that they did not consider him fit to teach.

The court of appeals, reversing trial court's judgment, held that the evidence sufficiently supported the dismissal. Here, the court noted that the conduct was in violation of the state penal code and that conviction was not a necessary prerequisite to action by the board. The appellate court disagreed with the lower court's contention that a threat to pupils must be shown.

In Maryland, the case of Acanfora v. Bd. of Education of Montgomery County (451 F.2d. 489, 1974) also concerned a homosexual teacher. The plaintiff, who had been employed as a classroom teacher for the 1972-3 school year was transferred to a non-teaching position when it was discovered that he was a homosexual. At the end of the year, his position was not renewed. He brought an action challenging his transfer.

The Court held that mere knowledge that a teacher is a homosexual is not sufficient to justify his transfer or dismissal, nor is a homosexual teacher required to become a recluse or lie about himself. He is entitled to attend public gatherings and associate with whomever he chooses, but his television appearances tended to spark controversy and produce a deleterious effect on the educational program. The refusal of the board to reinstate or renew his contract was therefore justified. On appeal, the Fourth Circuit Court held that even the public comments regarding his homosexuality had First Amendment protection. The court affirmed the district court decision, however, because the teacher failed to reveal information concerning his membership in a homosexual club in response to questions on his application.

The Washington Supreme Court held that the burden of proof was on the

school district to show that knowledge of a teacher's homosexuality would impair the learning atmosphere of the classroom (Gaylord v. Tacoma School Dist., 535 P2d 805, 1975). The trial court had based its decision upholding the dismissal solely on the testimony of the school's administrative staff. The teacher had contended that his effectiveness would not be altered. The Supreme Court remanded the case for further proceedings.

The Ninth Circuit Court considered a case resulting from the dismissal of a nontenured teacher for immorality after she admitted being a "practicing homosexual." The teacher's admission came after the principal confronted her with information supplied by a student's parent. The district court awarded damages equivalent to the teacher salary for the balance of the year and one-half salary for the following year but refused to order reinstatement. In affirming the Ninth Circuit said: ". . . although the parties have stipulated that Ms. Burton was an 'adequate teacher' we cannot say that her chances of reemployment were such as to warrant our finding the same type of 'property interest' in reemployment which might require reinstatemtn of a tenured teacher . . ." (Burton v. Cascade School Dist., 512 F2d 840, 1975).

The authority of school boards to dismiss teachers because of alleged heterosexual misconduct is also subject to restrictions. Again, unless a law violation or an illicit relationship between teacher and student is involved, the employer must show an adverse impact on the school in order to dismiss the teacher.

The Eighth Circuit Court affirmed the district court's holding for the teacher in a Nebraska case (Fisher v. Snyder, 476 F.2d. 375, 1973). The board had dismissed the teacher for immorality because she permitted young men, most of whom were friends of her 26 year old son, to spend nights in her one-bedroom apartment. While recognizing the board's right to inquire into the teacher's associations, the court ruled that such inquiries did not provide sufficient

evidence of misconduct to justify infringement of the teachers rights.

Two years later this same court considered a similar case (Sullivan v. Meade Indep. School Dist., 550 F.2d. 799, 1975). The school board employed the teacher to teach nine students enrolled in grades one through four in a South Dakota community. The teacher lived in a mobile home furnished by the school district. She began her teaching duties in August, 1974. In October of that same year her boyfriend from her home city of New York came to visit her. They continued to live together until her discharge in late November. The members of the community soon became aware of this living arrangement.

The discharge came after protests were lodged by the parents of children attending the school and others. School officials attempted to resolve the problem informally but the teacher refused to alter her living arrangment. The board, then, gave notice of a hearing on the school superintendent's recommendation that she be dismissed for "gross immorality and incompetency as the immoral conduct affects the teacher's competency to teach." During the hearing, the board asked on several occasions whether she would be willing to have her boyfriend live elsewhere but she responded negatively. Finally, the board adopted the dismissal resolution relying on incompetency rather than gross immorality as the grounds. The teacher challenged the dismissal with a civil rights action against the board and its members.

The Eighth Circuit Court applied the Wood v. Strickland (420 U.S. 309) guidelines to the present case. The court found that the board met those good-faith standards by (1) acting without malice, (2) balancing the constitutional rights of the teacher against the interests of the school community and (3) not depriving the teacher of constitutional rights that were "settled" and "undisputed" in law. The court upheld the decision supporting the action of the board but remanded the case so that the record could be changed to indicate that the denial of relief was based on "failure to establish a claim

for damages . . . to serve to avoid or lessen any stigma which may attach to her teaching record."

An Illinois teacher, married one month and eight and one-half months pregnant was dismissed for immorality. The appellate court, affirmed the trial court ruling that this charge is a cause for dismissal only when it can be shown that the teacher's conduct produces harm to the pupils, faculty or the school. The state supreme court vacated this judgment and remanded the case for a finding of fact by the board (Reinhardt v. Board of Educ., 61 Ill. 2d. 101 1975).

Similarly, a school board voted not to renew the teacher's contract because of her failure to provide a transcript of her college work. A few days later she produced the transcript but the board took no action. In April, the school principal learned of the teacher's pregnancy and the superintendent requested her resignation. After she refused, the board in accordance with the superintendent's recommendation dismissed her.

The teacher appealed to the Nebraska Equal Opportunity Commission which found the board's action discriminatory. Under a state district court order, the board accorded the teacher a hearing in which the dismissal was ratified. The teacher then brought this action (Brown v. Bathke, 416 F. Supp. 1194, 1976).

The federal court sustained the dismissal. It is unclear the extent to which the board's decision not to renew the contract without prior knowledge of the pregnancy influenced the court's holding. The opinion did indicate that the teacher had no expectancy of continued employment beyond the term of the contract.

The court accepted the board's justification as a rationale basis for the dismissal with the following comments:

> The evidence is persuasive that a junior high school teacher who develops a good relationship with students is likely to be a model to those students in wide-ranging respects including personal values . . . under those circumstances the board was within the realm of propriety

> in considering that its permitting the plaintiff to continue to teach would be viewed by the students as a condonation by the plaintiff and the school board of pregnancy out of wedlock. There is a rational connection between the plaintiff's pregnancy out of wedlock and the school board's interest in conserving marital values when acts probably distructive of those values are revealed verbally or non-verbally in the classroom.

The decisions reviewing the discharge of teachers who became sexually involved with students follow a consistent pattern. In an Illinois case, a teacher challenged his dismissal for immorality (Yang v. Special Charter School Dist., 296 N.E.2d 74, 1973). The charges stated in part:

> (You were found with a female student enrolled in Peoria High School, who was less than 18 years of age, and that at said time and place both you and this student were either naked or partially undressed, that you were observed . . .by an officer . . . and that foregoing facts have become known to public by reason of the filing of a police report . . ..

The fact that the student had graduated did not affect the outcome of a dismissal action against a tenured counselor who allegedly spent the night in bed with her (Golden v. Bd. of Educ., 337 N.Y.S.2d 867, 1974). The act took place in the girl's home while her parents were away. Maintaining that his conduct did not affect his performance as a counselor, the plaintiff claimed the action against him was an invasion of privacy. The appellate court disagreed. The court noted the strict standard of conduct expected of teacher-counselors and that the community would justifiably assume the affair began while the girl was his counselee.

Even when the teacher-student relationship has parental blessing, the teacher still may be discharged for immorality (Denton v. South Kitsap School Dist., 516 P.2d 1080, 1973). Denton a junior high school teacher became acquainted with a female high school student. He obtained her parents' permission for them to date. They dated during the summer and fall when she became pregnant. They were married shortly thereafter. The state appellate court affirmed the dismissal.

In the final two cases, criminal proceedings were in progress when the

boards acted to discipline the teachers. Moore v. Knowles (312 F.2d 72 5th Cir. 1975) began when because of allegations of some eighth-grade girls, a teacher was charged with among other things statutory rape. The teacher was never tried on these charges. The board suspended the teacher and his contract was not renewed. After the long series of ligation, it was decided that the teacher had no "property" interest in the position and therefore was not entitled to a hearing. In the other case, a dismissed elementary school principal petitioned for reinstatement. (Hankala v. Governing Board; 120 Cal. Rptr. 827, 1975) The board had dismissed the principal after he had been charged with contributing to the delinquency of a minor (by causing the minor to place his hands on the principal's penis) and indecent exposure. The board attempted to serve charges on the principal but he wilfully disregarded the letter sent by certified mail to his address. By so doing, he waived his right to a hearing by not requesting it within thirty days. The court held also that the school board was not required to await the outcome of the criminal proceedings before it dismissed the teacher.

Conclusion

This afternoon we have examined a cross-section of the cases illustrating reasonable cause for dismissal of teachers. What seems to be the prevailing attitude of the courts is expressed in this excerpt from the 1976 Weissman Case:

> The power of the board of education to dismiss and discipline teachers is not merely punitive in nature and is not intended to permit the exercise of personal moral judgments by board members; rather it exists and finds its justification in the state's legitimate interest in protecting the school community from harm, and its exercise can only be justified upon showing that such harm has occurred or is likely to occur. (Emphasis added).

If you as board members believe that a teacher's conduct is a threat to the school community, the board has both the authority and the duty to act. The following suggestions may help you to avoid legal difficulty:

1. Follow your own written board policies. Boards have lost cases simply because they ignored their own policies or attempted to enforce nonexistent policies.

2. Follow state statutes. I assume that you are all familiar with the due process procedures adopted by the state legislature in 1974.

3. Seek legal counsel, especially when contract termination is anticipated.

4. Recognize and respect the teacher's constitutional rights. Compliance with the Kansas Statutes (72-5437 to 72-5442) should satisfy procedural requirement. However, remember that you may encroach on the fundamental substantive rights only by showing a compelling state interest. A "reasonable basis" is not sufficient. The consequences of violating settled constitutional rights are harsh for board members (Note some of the recent damage awards).

As the record clearly indicates, the courts are reviewing more and more personnel decisions involving the disciplining of teachers. This litigation when combined within that produced by other aspects of the educational operation represents a tremendous cost in terms of time and money for school systems. (The dollar figures quoted in a recent newspaper piece were for a day in court $2000 for a lawyer, $1000 for a transcript).

Recent U.S. Supreme Court decisions appear to support the authority of state and local officials in personnel matters. A quotation from last year's Bishop v. Wood decision (96 S. Ct. 2074, 1976) provides encouragement to those who believe in local control. "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies". Hopefully, the future will see more of the conflicts of the type discussed today resolved fairly and justly short of the courts.

Thank you.