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Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

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**TEACHER TENURE UNDER FIRE****Overview**

Teacher tenure continues as a source of considerable discussion and debate. At the heart of this often “heated” discourse is a basic misconception. More often than not it is believed that individual faculty members who acquire tenure status automatically receive permanent employment, and therefore cannot be dismissed from their job. This is not true. Even though tenure (status) and job (position) come together (contractually), they are nonetheless severable. “Tenure in its general sense is a mode of holding or occupying a position or job.”(Alexander and Alexander, 1998)

*Historical Foundations:* Tenure has deep roots in old property law. It springs from the days when “worthy individuals” were granted rights to possess, use, enjoy, and reap profits from land belonging to “the Crown.” The possessors never really owned the land upon which they lived. So long as persons selected for tenure on the land continued to satisfy “the Crown,” their status remained in tact. As the years passed tenure in educational institutions grew as a status deeply rooted in property law.

*Tenure Today.* Translated into contemporary American jurisprudence, teacher tenure in public education is a creature of state statutory law. State legislative enactment permits, but does not require, tenure status to exist. In some states, for example Virginia, state law makes it possible for tenure status to be awarded professors at public colleges and universities, but not teachers in public elementary and secondary schools. Teachers in public elementary and secondary schools in Virginia are eligible for what the state law calls “continuing contract” status.

An educational institution awarding tenure to a specific faculty member merely allows that person, and no other persons, to occupy (*possess*), use, and reap benefits from his/her faculty position. Technically, a faculty member’s mere expectation that tenure will be conferred at some later date is not enough. An individual must be officially offered and formally accept tenure in a particular position for it to be considered a “property interest.” (*Board of Education v Roth, 1972*). However, in awarding tenure status in a specific position (*e.g.,* classroom teacher) the educational institution (public school system, college, or university) never actually relinquishes true ownership of that particular faculty position. Tenure is merely *possessory* in nature.

*How is Tenure Acquired?* To be eligible for tenure status, a faculty member must demonstrate to the institution, over time (considered a probationary period), that he/she has met the qualifications necessary (*i.e.*, is worthy) to occupy, use, enjoy, and reap benefits from a faculty position. Once selected for and formally awarded tenure, a faculty member's tenure status will remain in place, so long as his/her "job performance" (when evaluated on *job-related criteria*) is deemed satisfactory. In recent years, some institutions have instituted a *post-tenure review* to reevaluate the faculty member's worthiness for continued tenure status.

*Is Tenure Possible in All Positions?* Generally, not all positions in an educational institution are "tenure track positions." For example, in some settings, administrative positions are not considered tenure track positions. A faculty member hired into a non-tenure track faculty position is not eligible for tenure no matter how long he/she stays on the job, and no matter how productive is he/she in that position.

*Tenure: What is it?* Legally, teacher tenure "is a statutory right imposed upon a teacher's contractual employment." (Emma v Schenectady City School District, 1998) It guarantees job security and fairness, and serves two primary purposes. *First*, tenure exists to protect competent and productive teachers from unconstitutional, unlawful, arbitrary, and capricious employment actions. A tenured teacher can be dismissed from employment only for cause(s) enumerated in state law (*e.g.*, incompetency, immorality, conviction of a felony or crime of moral turpitude, insubordination). *Second*, the dismissal of a tenured teacher can occur only in accordance with prescribed procedures (*e.g.*, notice on or before a specific date, an opportunity for a hearing). As with cause, these procedures are specified in state statutory law. (Hudgins and Vacca, 1999) In effect, tenure laws, "can help maintain a good educational system by ensuring the stability and security of satisfactory teachers and by outlining orderly procedures for the dismissal of unsatisfactory teachers." (Fischer, Schimmel, and Kelly, 1999) To discover how tenure status (continuing contract) and its specific guarantees are attained, one must examine the specific statutes, and case law, of a given state. Also, the specific policies and procedures of local school boards must be examined.

## **Emerging Issues**

The preeminent issue facing school officials concerns whether or not it is possible to dismiss (terminate the employment of) a tenured faculty member? The answer to this question is "Yes." The United States Supreme Court itself has made it clear that state tenure statutes, where they exist, are not intended to remove or in any way diminish the authority of local public school boards to make necessary employment decisions. (Pickering v Board of Education, 1968) As indicated above, the security inherent in tenure status lies in the *process* (required by law) when employment decisions are made.

*Grounds for Termination.* Keeping in mind that dismissal must be for cause, many *bona fide* reasons to terminate the employment of a tenured teacher exist. For example, an egregious act by a tenured staff member (*e.g.*, sexual harassment of a colleague or student, physical assault on a colleague or student, misuse of school funds) may trigger the immediate removal (either with or without pay) of that tenured person from his/her job.

Decreases in student enrollment, closing down subject areas or entire programs, budgetary emergencies, and other such *bona fide* reasons may translate to the elimination of staff including those with tenure. In a decrease in student enrollment and reduction-in-force situation, where it is necessary to reduce the number of teachers in a school system, "[t]he school board is not required to give continuing contract teachers priority over probationary teachers...." (Underwood v Henry County, 1993)

Substandard job performance is another *bona fide* reason for dismissing a teacher. To put another way, whenever a tenured teacher's level of performance (as judged on *job-related criteria*) falls below an acceptable standard, that individual also may be in jeopardy of losing his/her job. Stated succinctly, "Tenure does not protect an individual from examination and evaluation of his or her performance nor from possible dismissal." (Wood, Cornelius, and Mendonca, 2000)

*Documentation and Due Process.* School officials must anticipate a court challenge to the termination (dismissal) of a tenured employee. As a general rule, two elements must be in place to successfully defend against such a challenge. First, *documentation* (substantive evidence) must be in place and available to undergird the decision to terminate the employee. The standard of review applied by courts is one that poses the following question: Did the school board have a rational basis supported by substantial (job-related) evidence to terminate the tenured employee? Second, school officials must show that the tenured employee was accorded *procedural due process*. (Cleveland Board of Education v Loudermill, 1985) Also, the procedural requirements specified in state law must be met. As a general rule, courts have held that a tenured teacher facing termination must be given (1) written notice of termination, (2) a written statement of reasons for the termination, and (3) a hearing before the school board. (Gauer v Kadoka School District, 2002)

### **Case Law**

Federal and state courts are in agreement that judges must neither substitute their judgment for the judgment of a local school board nor interfere with a board's *bona fide* exercise of discretion in matters of personnel administration. Courts also agree that an employee who claims the protections of a tenure (continuing contract) law must first show that he/she occupies a position (e.g., "teacher") covered by that law. (Searley v Board of Education, 1999) What follows are some examples of court decisions involving tenured teachers.

In Holt v Rapides School Board (La. 1996), a tenured teacher (who also served as a coach) challenged a local school board decision to terminate her for "willful neglect of duty." More specifically, the school board's charge of willful neglect of duty stemmed from Holt's "failing to maintain an appropriate professional teacher-pupil relationship with a student." In her lawsuit she alleged that the board's decision was both arbitrary and an abuse of discretion. A trial court ruled in favor of the teacher, reversed the school board's termination decision, reinstated her to her job, and awarded her back pay. On appeal from the school board the Court of Appeal of Louisiana affirmed the trial court. To both courts the school board's body of evidence against the teacher "was seriously lacking" and did not support the charge of willful neglect of duty. In the opinion of the judges, because the evidence presented was contradictory, inconsistent, implausible, and replete with insinuations and innuendo, the board acted arbitrarily and abused its discretion.

Gordon v Nicoletti (D.Conn. 2000) involved a tenured teacher who had received notice that she was being terminated from employment as a seventh grade language arts teacher, for "inefficiency and incompetence." Subsequently, a hearing panel determined that no reasons existed for which termination was warranted. Specifically, the panel was convinced that school officials had not formally evaluated the teacher in compliance with the school system's teacher evaluation system (which included remediation for identified deficiencies.) The next school year the teacher was reassigned to another teaching position for which she was qualified. Ultimately, she unsuccessfully challenged the transfer in court. Acknowledging that the teacher was entitled to a formal evaluation, the court held, however, that she was not entitled to her position as a seventh grade language arts teacher. What is more, the actions of school officials were not "arbitrary, oppressive, or conscious-shocking."

More recently, the United States Court of Appeals for the Sixth Circuit decided a Tennessee case involving a public school principal who had been reassigned by the superintendent to a teaching position. In Sharp v Lindsey (6<sup>th</sup> Cir. 2002), the appellant claimed, among other things, that he had a property interest in his position as principal. In his view, reassignment to a teaching position (which he characterized as a demotion) represented a deprivation of a property interest without due process. The appellate court disagreed. In the opinion of the court, state law, not federal law, creates a property interest. Thus, since the Tennessee Teacher Tenure Act specifically makes tenure status possible only for “teachers,” any tenure that appellant had in the school system did not attach to his employment as a “principal.” In the opinion of the court it was clear that the Tennessee legislature intended to create tenure (and its procedural guarantees) for teachers and not for administrative and supervisory personnel. In other words, the appellant in this case could not establish a property interest in his position as a school principal.

### **Policy Implications**

Based upon a review of the literature and case law involving teacher tenure the policy implications are clear. To avoid future problems school system policy must:

- Draw a distinction between *employment (job) position* and *tenure status* in the school system.
- Make it clear that tenure status *does not equate* to permanent employment in the school system.
- List the specific *position(s)* in the school system where tenure status is *possible* and the specific *position(s)* in the school system where tenure status is *not possible*.
- Emphasize that tenure status will be awarded solely on the results of a *rigorous formal review* of each candidate’s *job performance* and *productivity*, conducted over a *specified probationary period* (a minimum of three years).
- Incorporate the specific *causes* enumerated and the *procedural guarantees* required in the state code for the dismissal of tenured (continuing contract) employees.
- Reserve the legal prerogative of the school board to *reassign (transfer)* all employees (including those with tenure) *to any position in the school system* for which they are qualified.
- Include a *post-tenure review requirement* (to be accomplished every three to five years following the official awarding of tenure) to ensure that tenured employees continue to (a) work to improve their job performance, and (b) be productive members of the faculty.

In this writer’s opinion tenure (continuing contract) status must be protected and *should not be eliminated* from the education landscape. To be effective, however, tenure *must be improved*, through the implementation of a more rigorous and continuous performance review process. If this is successfully done, public school officials will (1) enhance the security of effective and productive employees, (2) make it easier to identify and weed out incompetent employees through documentation of sub-standard performance, and (3) provide a quality instructional program for all children.

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*Richard S. Vacca*  
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.