

IOWA PUBLIC SCHOOL TEACHERS: PROCEDURAL DUE PROCESS REQUIREMENTS FOR CONTRACT TERMINATION

I. INTRODUCTION

The termination¹ of a teacher's contract to teach in a particular public school district results directly in the loss of employment with that school district for the following school year. Furthermore, given the current tight job market for teachers, contract termination may also have the practical effect of eliminating a teacher from the field of education entirely.² A teacher faced with the prospect of contract termination and the resultant severe career consequences is thus ultimately concerned with the substantive basis for the school board's decision; that is, whether the decision to terminate was based on valid and just grounds. Outside of litigation, a teacher can be assured of the substantive basis for the school board's decision only if given an opportunity for fair and meaningful participation in the termination decision. In short, some measure of procedural due process must be accorded a teacher facing termination to protect against unsubstantiated charges or arbitrary or discriminatory action on the part of the school board.³

The importance of procedural due process protection to a teacher in a contract termination situation is not, however, the determinative factor in either the existence of procedural protections or their fairness. Rather, the critical question is whether a teacher has any right to procedural due process under the laws of a particular state⁴ or the United States Constitution. The purpose of this Note is to examine the procedural due process rights of public school teachers⁵ in Iowa, particularly in light of the recent changes to the Iowa statute governing the termination of teaching contracts.⁶

1. "Termination" as used in this Note refers to the process of non-renewal as distinguished from a direct discharge of a teacher from a position.

2. See *Turner v. Board of Trustees*, 16 Cal. 3d 818, ___, 129 Cal. Rptr. 443, 452, 548 P.2d 1115, 1124 (1976) (Tobriner, J., dissenting) (suggesting that contract termination is equivalent to a revocation of a license to teach).

3. See generally, Comment, *Procedural Due Process Protection of Liberty Interests In Probationary Teacher Re-Employment*, 22 S.D.L. Rev. 180 (1977).

4. See *Board of Regents v. Roth*, 408 U.S. 564 (1972). An excellent summary of the general issue of procedural due process for public employees may be found in Note, *The Due Process Rights of Public Employees*, 50 N.Y.U.L. Rev. 310 (1975).

5. The term "public school teacher" as used in this Note refers to all certified employees of a public school district. See IOWA CODE § 279.13 (1977). Furthermore, since Chapter 280A, section 23 of the IOWA CODE (1977), provides that professional employees of Iowa area vocational and community colleges are governed by the same contract termination statute as public school teachers, the focus of this Note is also applicable to such employees.

6. IOWA CODE §§ 279.13-.19 (1977). The present law is the result of substantial changes effected by the Sixty-sixth Iowa General Assembly, 1976.

II. BACKGROUND

A public school teacher, like any other public or private employee, has no inherent right to procedural protections prior to contract or job termination simply because of the nature of the job.⁷ Procedural protections, such as the right to notice or the right to have a hearing, if they exist at all, must be granted to a teacher. Such rights find their basis from three sources:⁸ 1) the due process clause of the fourteenth amendment to the United States Constitution;⁹ 2) state law; and 3) contractual agreements between a teacher and a school board.

A. Constitutional Procedural Due Process

As employees of state government, public school teachers are within the purview of the fourteenth amendment to the Constitution which protects citizens against state-deprivation of property without due process.¹⁰ However, procedural due process under the Constitution exists only when there is a protected property interest. In *Board of Regents v. Roth*¹¹ and *Perry v. Sindermann*¹² the Supreme Court established standards for determining when a protected property interest in public employment exists so as to require the state to accord a teacher procedural due process when employment is terminated.

In *Roth* the respondent was a non-tenured college teacher and under the applicable state law he was entitled only to his one year appointment. Further, there was no provision, either in the state law or Roth's employment contract, that required renewal of the contract.¹³ Following the one year term, the contract was not renewed and neither specific reasons for the non-renewal nor a hearing were given.¹⁴ The Court held that Roth did not have a protected property interest such to give him the right to the procedural protections of notice and a hearing.¹⁵ The Court reasoned that a "protected property inter-

7. At one time all public employment, including public school teaching, was considered a privilege. Under this circumstance the employing board was under no obligation to grant public employees any procedural rights. See Ashe & DeWolf, *Procedural Due Process and Labor Relations in Public Education: A Union Perspective*, 3 J.L. & Educ. 561 (1974). See also Arnett v. Kennedy, 416 U.S. 134, 150-51 (1971) (history of rights of federal employees).

8. See generally Brown, *Tenure Rights In Contractual and Constitutional Content*, 6 J.L. & Educ. 279-307 (1977).

9. U.S. CONST. amend. XIV, § 1.

10. *Id.* The due process clause also protects against the deprivation of life and liberty without due process. While interests in life and especially liberty are subject to protection, such interests are created in *individual* situations, whereas property interests may be created for all teachers of a state or a school district *simultaneously*. Therefore, this Note will consider the scope of procedural protections only in the context of constitutionally protected property interests. See note 42, *infra*, for a discussion of the circumstances in which procedural due process must be accorded despite an absence of a protected property interest.

11. 408 U.S. 564 (1977).

12. 408 U.S. 593 (1977).

13. 408 U.S. at 578.

14. *Id.* at 568.

15. *Id.* at 578.

est" in this context would require a showing that Roth had a legitimate claim of entitlement to continued employment, an entitlement which was *created*, not by the Constitution, but by state law or independent contractual arrangement.¹⁶ Thus Roth had, at best, only an abstract expectation in continued employment, and as such, that interest was not a protected property interest. In *Perry*, the Court added another dimension to the source of protected property interests by holding that a non-tenured teacher had acquired a property interest in continued employment through an implied understanding that unofficial tenure could be obtained under certain circumstances of professional service.¹⁷

Although the *Roth-Perry* standard for determining whether a property interest is protected has not been consistently followed by the court,¹⁸ it is clear that an essential factor in the application of Constitutional procedural due process to public teachers is the existence of this interest. Dicta in *Roth*¹⁹ and holdings in subsequent cases²⁰ support the conclusion that tenure laws or contracts provide the requisite property interest. Other courts have held that where state law does not provide for tenure there is no protected property interest in continued employment.²¹ Thus, following the *Roth-Perry* standard, courts have primarily looked for a legitimate claim to continued employment. Under a tenure law,²² a claim of entitlement to continued employment arises from the fact that a teacher may not be dismissed *except* for "just" or "adequate cause."²³

State tenure laws which have been held *not* to create a protected property interest may be placed in two categories: either 1) the statute made no provision for contract renewal;²⁴ or 2) the statute provided for one-year con-

16. *Id.* at 577.

17. 408 U.S. at 600. The implied understanding of the possibility of unofficial tenure was created by a statement in a faculty handbook.

18. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134 (1974). In *Arnett* a plurality found a protected property interest, but also held that the procedural protection due was not derived from and defined by the Constitution, rather, it was defined by the statute which created the property interest in question.

19. 408 U.S. at 567 (by implication since the lack of tenure was the basic reason for the absence of any property interest).

20. *Perry v. Sinderman*, 408 U.S. 593 (1972) (implied tenure created a protected property interest); *Williams v. Day*, 553 F.2d 1160 (8th Cir. 1977) (lack of tenure determinative in finding that no protected interest existed). See also *Collins v. Wolfson*, 498 F.2d 1100 (5th Cir. 1974).

21. See, e.g., *Clark v. Mann*, 562 F.2d 1104, 1115 (8th Cir. 1977) (no property interest because statute did not provide teachers with tenure).

22. "Tenure" under a statute or a contract is basically an employment status which gives a teacher the right to be dismissed only for adequate cause. Thus, it is in effect a limit on employing institutions' authority to terminate teachers. See generally *Brown*, *supra* note 8.

23. See, e.g., *Bogart v. Unified School Dist. No. 298*, 432 F. Supp. 895, 903 (D. Kan. 1977). In *Bogart* the state law, which the court termed a continuing contract law but which also had elements of tenure, provided that termination after probationary period could be "for cause" only. K. S. A. § 72-5411 (1972). See also *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 66 Wis. 2d 469, 225 N.W.2d 658 (1975), *rev'd on other grounds*, 426 U.S. 482 (1976).

24. This statutory configuration exists where the law provides for probationary status and termination is at the will of the board. See, e.g., *Burns v. Board of Educ.*, 47 Ill. App. 3d 589,

tracts with automatic renewal absent termination.²⁵ In the first instance, where the statute makes no provision for contract renewal, a property interest is not created for the reason that a teacher has nothing on which to base an expectation of continued employment. In the second instance, where the statute provides for some measure of automatic contract renewal, the rationale to support a finding that a property interest does not exist is more difficult to articulate.

While continuing contract laws,²⁶ as tenure laws of the second category are commonly termed, typically provide for contracts of only one year in duration, such laws arguably create an expectancy of continued employment because of the fact that a contract will be automatically renewed unless terminated.²⁷ Whether this expectancy rises to the level of a claim of entitlement to continued employment under the *Roth-Perry* standard thus becomes the determinative question. The answer to this question, it is submitted, is found in the nature of the restraints placed on the school board's authority to terminate teaching contracts. In a series of cases ending with *Clark v. Mann*,²⁸ arising under the Arkansas continuing contract law,²⁹ the Eighth Circuit Court of Appeals held that that statute did "not give rise to an expectation of continued reemployment such that a teacher . . . [would have] a constitutionally protected property interest in reemployment."³⁰ Although the court in *Clark* impliedly recognized that some type of expectancy did exist, it did not clearly state the basis for its conclusion that the expectancy did not rise to the level of a property interest.³¹ However, in *Clark*,³² *Cato v. Collins*³³ and *Williams v. Day*,³⁴ the court did make a comparative reference to tenure. Therefore, it appears that these cases, holding that the Arkansas statute did not create a protected property interest, were based on the absence of that characteristic of tenure.

Thus, it may be argued that the critical characteristic of tenure laws, and the factor which gives teachers a protected property interest, is a statutory or contractual provision that a school board or employing institution may terminate only "for cause."³⁵ This conclusion is consistent with the trilogy of

362 N.E.2d 353 (App. Ct. 1977) (probationary teachers have no interest in continued employment).

25. See, e.g., *Williams v. Day*, 553 F.2d 1160, 1163 (8th Cir. 1977) (Arkansas continuing contract law which in fact provides for automatic renewal absent termination does not create a property interest).

26. See note 104 *infra*.

27. See IOWA CODE § 279.13 (1977); ARK. STAT. ANN. § 80-1304 (1947).

28. 562 F.2d 1104 (8th Cir. 1977).

29. ARK. STAT. ANN. § 80-1304 (1947).

30. *Clark v. Mann*, 562 F.2d 1104, 1115 (8th Cir. 1977). See also *Williams v. Day*, 553 F.2d 1160 (8th Cir. 1977); *Cato v. Collins*, 539 F.2d 656 (8th Cir. 1976).

31. *Id.*

32. 562 F.2d at 1115.

33. 539 F.2d at 660-61.

34. 553 F.2d at 1163.

35. In *Roth* the Supreme Court noted that there was no provision for contract renewal absent sufficient cause. 408 U.S. at 578. This permits the inference that if a provision for

cases discussed above as the Arkansas statute at issue in those cases provided for automatic renewal, but did not restrict the authority of the school board to a "for cause" termination.³⁶

If a protected interest in reemployment or contract renewal is implicated, the teacher then must be accorded the procedural protections required by the fourteenth amendment when faced with the prospect of termination of that interest.³⁷ While the Supreme Court has indicated that the test for determining minimal requirements of procedural due process is flexible,³⁸ nevertheless, two requirements are definite: timely notice and an opportunity to be heard.³⁹ Beyond these minimal and largely undefined standards, procedural requirements have been formulated by balancing the employee's protected interest against the interests of the governmental unit involved.⁴⁰ For example, in *Ferris v. Special School Dist. No. 1*,⁴¹ a federal district court established four procedural due process requirements for termination of teachers' protected employment:⁴² 1) a hearing before an impartial tribunal; 2) timely notice; 3) the right to representation by counsel; and 4) an oppor-

termination only "for cause" had existed, either by statute or contract, then Roth would have had a protected claim to continued employment.

36. ARK. STAT. ANN. § 80-1304 (1947).

37. Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972) ("[w]hen protected interests are implicated, the right to some kind of prior hearing is paramount").

38. Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 494 (1976) (noting that due process must be determined by balancing the interests of the individual with those of the state).

39. Arnett v. Kennedy, 416 U.S. 134, 166 (1974) (Powell, J., concurring) (the termination of a federal civil service employee required notice and a hearing).

40. For an excellent analysis of the measure of procedural due process required, see Ashe & DeWolf, *supra* note 7. See also Pooley, *Pretermination Hearings in Public Employment*, 25 ADMIN. L. REV. 313, 322-26 (1973).

41. 367 F. Supp. 459 (D. Minn. 1973).

42. The court in *Ferris* indicated that Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), delineated four situations in which the fourteenth amendment due process clause required a hearing on the issue of termination of a teacher's contract. The *Ferris* court added a fifth circumstance in which the due process clause would require a hearing. The situations are:

1. Where the contract nonrenewal is related to the teacher's exercise of freedom of speech under the First Amendment.
2. Where the teacher is confronted with a charge that might seriously damage his or her standing and associations in the community.
3. Where the failure to re-employ the teacher imposes a stigma or other disability on him or her which forecloses future freedom to take advantages of other employment opportunities.
4. Where the teacher, by virtue of existing state policies, the contract terms, or similar understanding, has a reasonable expectancy of reemployment.
5. [W]here the adverse reports on which action is taken are prepared by the school's superiors or plaintiff's compatriots and are fabricated, without any foundation or basis in fact

367 F. Supp. at 461-62. The above categories may be distinguished as representing "liberty" or "property" interests. Hearings required by categories one, two, three and five represent "liberty" interests. Category four represents "property" interests as defined in *Roth* and *Perry*.

tunity for cross-examination of witnesses.⁴³

It should be noted, however, that in *Arnett v. Kennedy*,⁴⁴ the plurality's decision provided a rationale which has a potential for narrowing the scope of minimum due process requirements for public employees.⁴⁵ In *Arnett*, a discharged federal employee claimed a right to a trial-type hearing before an impartial agency official.⁴⁶ The plurality found that the employee did have a protected property interest, but held that the federal statute which created the interest also defined the limits of procedural due process required to protect that interest.⁴⁷ The effect of this rationale would appear to be a constriction of procedural due process to the limits of the appropriate statute.⁴⁸

B. Statutory and Contractual Due Process

As indicated previously, the Constitution is not a teacher's exclusive source of the right to procedural due process.⁴⁹ Procedural due process rights may also be obtained by statutory mandate or contractual agreement. State education codes, in the process of granting school boards the authority to make contracts of employment with teachers, frequently place procedural restraints on the boards' authority to terminate such contracts.⁵⁰ These restraints vary from the very minimal⁵¹ to the highly detailed.⁵²

A teacher's right to procedural due process under a statute depends upon the legislative intent behind such a statute.⁵³ Once it is found that the legislative intent was to establish procedures for the termination of teachers' contracts, then teachers have an independent source of procedural due process rights to the extent they are granted by the statute.⁵⁴

43. 367 F. Supp. at 464. See also *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (termination of welfare benefits requires: 1) notice with reasons; 2) opportunity to present evidence; 3) confrontation of witnesses; and 4) impartial decision maker).

44. 416 U.S. 134 (1974).

45. *Id.* at 152. Six Justices, in both concurrence and dissent, refused to accept the pluralities' rationale and, therefore, its future application is uncertain.

46. *Id.* at 136-39.

47. *Id.* at 151-52.

48. The difficulty with this rationale is that logically a statute could create a protected property interest and simultaneously eliminate procedural requirements. Accord, *Arnett v. Kennedy*, 416 U.S. 134, 166-67 (1974) (Powell, J., concurring).

49. See text accompanying notes 8-9 *supra*.

50. See, e.g., ILL. ANN. STAT. ch. 24, §§ 24-11, 24-12 (Smith-Hurd Cum. Supp. 1977).

51. See, e.g., MONT. REV. CODES ANN. § 75-6104 (Cum. Supp. 1977).

52. See, e.g., CAL. EDUC. CODE § 13403-11 (West 1978) (procedures relating to discharge of permanent teachers); *id.* at § 13443 (procedures relating to discharge of probationary teachers); *id.* at 13447 (procedures relating to staff reduction).

53. See *Kruse v. Board of Directors*, 231 N.W.2d 626, 631-32 (Iowa 1975). In *Kruse* the Iowa Supreme Court held that the legislative intent of the Iowa law required strict compliance with the statutory time sequence for terminating a teacher's contract. *Id.* See also *Brouillette v. Board of Directors*, 519 F.2d 126, 128 (8th Cir. 1975) (Iowa's continuing contract law provides teachers with the right to procedural due process).

54. See *Freedman v. Gould Special School Dist.*, 405 F.2d 1153, 1160 (8th Cir. 1969), where

Additionally, if a school board adopts or incorporates statutory or other procedures into a teacher's contract, then, by the law of contracts, a teacher has a right to these procedures.⁵⁵ A teacher's right to procedural due process may thus be limited or expanded by the scope of the contractual provisions for termination.⁵⁶ However, contractual due process is subject to two limitations: first, the board must have the authority to contract for termination procedures, and secondly, as previously noted, the school board may be subject to mandatory procedures under the state law.

III. PROCEDURAL DUE PROCESS FOR TEACHERS UNDER THE IOWA LAW

The contractual relations between public school teachers and school boards in Iowa are governed primarily by section 279.13 of the Iowa Code.⁵⁷

the Eighth Circuit Court of Appeals stated that "when a particular statutory procedure is set up for the dismissal of a teacher, it must be followed." *Id.*

55. It is submitted that contractual due process may take an enhanced importance under collective bargaining among teachers and school boards.

56. See *Keith v. Community School Dist.*, 262 N.W.2d 249 (Iowa 1978). In *Keith* the school board had allegedly adopted policies for the termination of a teacher's contract. While the court found it unnecessary to determine whether the teacher had a right to those procedures, there is an inference to be drawn that such would be the case under certain circumstances.

57. IOWA CODE § 279.13 (1975) provides as follows:

Contracts with teachers must be in writing, and shall state the length of time the school is to be taught, the compensation per week of five days, or month of four weeks, and that the same shall be invalid if the teacher is under contract with another board of directors in the state of Iowa to teach covering the same period of time, until such contract shall have been released, and such other matters as may be agreed upon, which may include employment for a term not exceeding the ensuing school year, except as otherwise authorized, and payment by the calendar or school month, signed by the president and teacher, and shall be filed with the secretary before the teacher enters upon performance of the contract but no such contract shall be entered into with any teacher for the ensuing year or any part thereof until after the organization of the board.

Boards of school directors shall have power to arrange for an exchange of teachers in the public schools under their jurisdiction with other public school corporations either within or without the state or the United States on such terms and conditions as are approved by the state superintendent of public instruction and when so arranged and approved the board may continue to pay the salary of the teacher exchanged as provided in the contract between said teacher and the board for a period of one year, and such teacher shall not lose any privileges of tenure, old-age and survivors' insurance or certification as a result of such exchange. Said contract may be renewed each year as determined by the employing school board provided that the visiting exchange teacher is paid in full for the service rendered by the school authorities with whom his contract is made. Such exchange teachers must have qualifications equivalent to the regular teacher employed by the board and who is serving as the exchange teacher and must secure a special certificate covering the subjects designated for him to teach in the public schools in which the instruction is given. The state superintendent of public instruction is hereby authorized to formulate, establish, and enforce any reasonable regulation necessary to govern the exchange of teachers as provided in this paragraph, including the waiver of Iowa certification requirements for teachers who are regularly certificated or licensed in the jurisdiction from which they come.

Said contract shall remain in force and effect for the period stated in the contract

This law is a continuing contract law rather than a tenure law.⁵⁸ That is, the school board is given the authority to contract with teachers for a period not to exceed one year.⁵⁹ However, the law further provides that an employment contract will be automatically renewed for the following year unless it is terminated.⁶⁰ The basic issue addressed in this part of the Note is the nature and extent of teachers' rights to procedural due process under this law, particularly in light of the amendments to it by the Sixty-sixth Iowa General

and thereafter shall be automatically continued in force and effect for equivalent periods, except as modified or terminated by mutual agreement of the board of directors and the teacher, until terminated as hereinafter provided, however, no contract shall be tendered by the employing board to a teacher under its jurisdiction prior to March 1, nor be required to be signed by the teacher and returned to the board in less than twenty-one days after being tendered. On or before April 15, of each year the teacher may file his written resignation with the secretary of the board of directors, or the board may by a majority vote of the elected membership of the board, cause said contract to be terminated by written notification of termination, by a certified letter mailed to the teacher not later than the tenth day of April; provided, however, that at least ten days prior to mailing of any notice of termination the board or its agent shall inform the teacher in writing that (1) the board is considering termination of said contract and that (2) the teacher shall have the right to a private conference with the board if the teacher files a request therefor with the president or secretary of the board within five days; and if within five days after receipt by the teacher of such written information the teacher files with the president or secretary of the board a written request for a conference and a written statement of specific reasons for considering termination, the board shall, before any notice of termination is mailed, give the teacher written notice of the time and place of such conference and at the request of the teacher, a written statement of specific reasons for considering termination, and shall hold a private conference between the board and teacher and his representative if the teacher appears at such time and place. No school board member shall be liable for any damages to any teacher if any such statement is determined to be erroneous as long as such statement was made in good faith. In event of such termination, it shall take effect at the close of the school year in which the contract is terminated by either of said methods. The teacher shall have the right to protest the action of the board, and to a hearing thereon, by notifying the president or secretary of the board in writing of such protest within twenty days of the receipt by him of the notice to terminate, in which event the board shall hold a public hearing on such protest at the next regular meeting of the board or at a special meeting called by the president of the board for that purpose, and shall give notice in writing to the teacher of the time of the hearing on the protest. Upon the conclusion of the hearing the board shall determine the question of continuance or discontinuance of the contract by a roll call vote entered in the minutes of the board, and the action of the board shall be final. The foregoing provisions for termination shall not affect the power of the board of directors to discharge a teacher for cause under the provisions of section 279.24. The term "teacher" as used in this section shall include all certificated school employees, including superintendents.

Section 279.13 as it appears amended in Iowa Code, 1977, is set forth in note 79 *infra*.

58. *Kruse v. Board of Directors*, 231 N.W.2d 626, 634-35 (Iowa 1975). It should be noted that *Kruse* was decided under section 279.13 of the Iowa Code prior to the 1976 amendments. There have been no cases arising under the amended law. See also note 104 *infra*.

59. IOWA CODE § 279.13 (1977). Similar provisions are set out for school administrators in sections 279.23-.24 (1977).

60. *Id.*

Assembly. Since there have been no cases, as of this writing, issued by the Iowa Supreme Court construing the law as amended, the nature of teachers' rights under the prior law will be examined first. Thereafter, an analysis of the new law will follow.

A. Pre-1976 Law

The continuing contract law in Iowa prior to the 1976 amendments provided that all teaching contracts would be automatically renewed for the following year "except as modified or terminated by mutual agreement of the board of directors and the teacher"⁶¹ The law then went on to provide that, in the instance of a board initiated termination, certain procedural rights were to be accorded to the teacher:⁶² 1) notice of the board's consideration of termination; 2) a private conference with the board prior to the board's decision; and 3) a public hearing before the board subsequent to an unfavorable decision. Conspicuously absent from the law was any requirement that a board's decision to not renew a teacher's contract for the subsequent school year have a substantive basis in "cause" or "adequate cause."⁶³

Under the analytical framework of *Roth*, the initial issue in determining a teacher's right to procedural due process is the existence of a protected interest. In *Swab v. Cedar Rapids Community School Dist.*,⁶⁴ the Eighth Circuit Court of Appeals was faced with the question of whether a teacher, whose contract had been terminated according to the procedures of the Iowa law, had been accorded constitutional due process. The court held that it was unnecessary to determine whether there had been compliance because Iowa did not have a tenure law, and therefore, no protected property interest was implicated.⁶⁵ The reference to the lack of tenure was the basic rationale for the court's decision. However, because the court referred to *Roth*, it is a

61. *Id.*

62. *Id.* The section also provided for a time sequence for the termination period. See note 57, *supra*.

63. Section 279.24 did, however, indicate that a board termination during the term of a teacher's contract had to be based on incompetency, inattention to duty, partiality or any good cause. IOWA CODE § 279.24 (1975). Although section 279.24 appeared on its face to require "good cause" for nonrenewal or any termination of a teacher's contract, in fact, it was applicable only to mid-year terminations since a school board only had authority to enter into contracts for the immediate school year. See *Independent School Dist. v. Pennington*, 181 Iowa 933, 165 N.W. 209 (1917); *Burkhead v. Independent School Dist.*, 107 Iowa 29, 77 N.W. 491 (1899); OR. IOWA ATT'Y GEN. 91 (1898).

Section 279.24 was repealed by the 1976 amendments, and the successor to that section, section 279.27, explicitly states that it is only applicable to terminations during the contract year. However, section 279.27 indicates that terminations pursuant to that section are to be conducted according to the procedures outlined in sections 279.15-.19. Thus, under the post-1975 law, the procedures for termination are the same regardless of whether the termination is during the current contract year or is a termination by reason of the board's failure to renew for the succeeding school year.

64. 494 F.2d 353, 353-54 (8th Cir. 1974).

65. *Id.* at 354. See also *Scheelhase v. Woodbury Central Community School Dist.*, 488 F.2d 237 (8th Cir. 1974) (due process clause of the Constitution inapplicable to termination of teachers in Iowa).

logical inference that *Roth* was the definitional basis for the decision⁶⁶ and, therefore, the absence of a "for cause" restriction on the board's authority was no doubt the determinative factor.

Even absent a protected property interest for purposes of constitutional due process, Iowa teachers nevertheless did have rights to procedural due process under the pre-1976 law. The Iowa Supreme Court consistently held that the statutory procedures were not guidelines for school boards, but rather were mandates to be followed.⁶⁷ In *Kruse v. Board of Directors*,⁶⁸ a teacher whose contract had been terminated sought reinstatement on the grounds that, *inter alia*, the school board had failed to comply with the statutory procedures of section 279.13, as outlined above.⁶⁹ The supreme court agreed, explaining that the purpose of the statute was to prescribe the procedures to be followed in such terminations and, further, that strict rather than substantial compliance with these procedures was required.⁷⁰ Furthermore, in *Brouillette v. Board of Directors*,⁷¹ the Eighth Circuit Court of Appeals seemingly went beyond this standard of strict compliance by finding that the Iowa statute gave teachers a right to minimum due process to the extent set forth in the applicable statute.⁷² Thus, since the statute was silent as to the nature and form of the required notice and hearing, minimum due process required certain additional elements:⁷³

- 1) Clear and actual notice of the reasons for termination in sufficient detail to enable him or her to present evidence relating to them;
- 2) Notice of both the names of those who have made allegations against the teacher and the specific nature and factual basis for the charges;
- 3) A reasonable time and opportunity to present testimony in his or her own defense; and
- 4) A hearing before an impartial board or tribunal.

Therefore, under the prior Iowa law, public school teachers had a right to procedural due process to the extent of section 279.13 and a right to constitutional due process to the extent that the terms of that statute were ambiguous.

An unresolved question under the prior law was whether a school board and a teacher could contractually modify the statutory procedures. In a recent case this issue was raised, even though it was not addressed by the Iowa

66. See text accompanying notes 13-16 *supra*.

67. See, e.g., *Barret v. Eastern Iowa Community College Dist.*, 221 N.W.2d 781 (Iowa 1974) (strict compliance with the time specifications of section 279.13 required); *Flanders v. Waterloo Community School Dist.*, 217 N.W.2d 579 (Iowa 1974) (strict compliance with statutory requirement for notifying teacher of the board's consideration of termination required); *Ramey v. Des Moines Area Community College*, 216 N.W.2d 345 (Iowa 1974) (strict compliance with procedure in section 279.13 required).

68. 231 N.W.2d 626 (Iowa 1975).

69. See text accompanying note 57 *supra*.

70. 231 N.W.2d at 629, 631-32.

71. 519 F.2d 126 (8th Cir. 1975).

72. *Id.* at 128.

73. *Id.*

Supreme Court. In *Keit v. Community School District*,⁷⁴ a teacher whose contract had been terminated contended that an alleged school board policy which provided for termination procedures different from the statutory procedures was included as part of his contract and, therefore, the school board had an obligation to follow the procedures of the alleged board policy rather than the conflicting statutory procedures.⁷⁵ While the court found it unnecessary to resolve this issue, it did recognize that previous court decisions as well as the Iowa statute had traditionally allowed school boards and teachers to make contractual modifications.⁷⁶ However, in the recent case of *Moravek v. Davenport Community School District*,⁷⁷ the Iowa Supreme Court indicated that the procedures in chapter 279 of the Iowa Code, 1975, were mandatory and thus could not be altered by contractual modification.⁷⁸ Under the old law then, it was clear that the parties could agree to some contractual modifications but the statutory termination procedures themselves were not subject to modification.

B. 1976 Amendments

1. Changes Made By the Amendments

The 1976 amendments to Iowa's continuing contract law were substantial.⁷⁹ The changes which may be expected to have the greatest effects on

74. 262 N.W.2d 249 (Iowa 1978).

75. 262 N.W.2d at 255.

76. *Id.* at 255-56. The court cited *Ashby v. School Township*, 250 Iowa 1201, 98 N.W.2d 848 (1959), and *Miner v. Lovilia Independent School Dist.*, 212 Iowa 973, 234 N.W. 819 (1931), as being supportive of such a proposition. Reference was also made to the statute which provided for termination by mutual agreement of the board and the teachers. 262 N.W. at 255-56.

77. 262 N.W.2d 797 (Iowa 1978).

78. *Id.* at 805. See also text accompanying notes 128-50 *infra*, for an in-depth analysis of the limits of contractual modifications.

79. IOWA CODE § 279.13 (1977) provides as follows:

1. Contracts with teachers, which for the purpose of this section means all certified employees of a school district and nurses employed by the board, excluding superintendents, assistant superintendents, principals, and assistant principals, shall be in writing and shall state the number of contract days, the annual compensation to be paid, and any other matters as may be mutually agreed upon. The contract may include employment for a term not exceeding the ensuing school year, except as otherwise authorized.

The contract is invalid if the teacher is under contract with another board of directors to teach during the same time period until a release from the other contract is achieved. The contract shall be signed by the president of the board when tendered, and after it is signed by the teacher, the contract shall be filed with the secretary of the board before the teacher enters into performance under the contract.

2. The contract shall remain in force and effect for the period stated in the contract and shall be automatically continued for equivalent periods except as modified or terminated by mutual agreement of the board of directors and the teacher or as terminated in accordance with the provisions specified in this chapter. A contract shall not be offered by the employing board to a teacher under its jurisdiction prior to March 15 of any year. A teacher who has not accepted a contract for the ensuing school year tendered by the employing board may resign effective at the end of the current school

teachers' rights to procedural due process may be categorized as follows: 1) an expansion of the statutory procedures for contract termination accompanied by highly detailed prescriptions for each procedural component,⁸⁰ 2) the

year by filing a written resignation with the secretary of the board. The resignation must be filed not later than the last day of the current school year or the date specified by the employing board for return of the contract, whichever date occurs first. However, a teacher shall not be required to return a contract to the board or to resign less than twenty-one days after the contract has been offered.

This section is a substantially unchanged version of the first half of the old section 279.13. Thus the major change in section 279.13 was by way of deletion. Those portions deleted appear as altered in sections 279.15-.18 of the Iowa Code, 1977.

80. *Id.* §§ 279.15-.18 provides as follows:

279.15 Notice of termination request for hearing

1. The superintendent or the superintendent's designee shall notify the teacher not later than March 15 that the superintendent will recommend in writing to the board as a regular or special meeting of the board held not later than March 31 that the teacher's continuing contract be terminated effective at the end of the current school year.

2. Such notification shall be in writing and shall be personally delivered to the teacher, or mailed by certified mail. The notification shall be complete when received by the teacher. The notification and the recommendation to terminate shall contain a short and plain statement of the reasons, which shall be for just cause, why the recommendation is being made. The notification shall be given at or before the time the recommendation is given to the board.

As a part of the termination proceedings, the teacher's complete personnel file of employment by that board shall be available to the teacher, which file shall contain a record of all periodic evaluations between the teacher and appropriate supervisors.

Within five days of the receipt of the written notice that the superintendent is recommending termination of the contract, the teacher may request, in writing to the secretary of the board, a private hearing with the board. The private hearing shall not be subject to chapter 28A and shall be held no sooner than ten days and no later than twenty days following the receipt of the request unless the parties otherwise agree. The secretary of the board shall notify the teacher in writing of the date, time, and location of the private hearing, and at least five days before the hearing shall also furnish to the teacher any documentation which may be presented to the board at the private hearing and a list of persons who may address the board in support of the superintendent's recommendation at the private hearing. At least three days before the hearing, the teacher shall provide any documentation he or she expects to present at the private hearing, along with the names of any persons who may address the board on behalf of the teacher. This exchange of information shall be at the time specified unless otherwise agreed.

279.16 Private hearing—decision record

The participants at the private hearing shall be at least a majority of the members of the board, their legal representatives, if any, the superintendent, the superintendent's designated representatives, if any, the teacher's immediate supervisor, the teacher, the teacher's representatives, if any, and the witnesses for the parties. The evidence at the private hearing shall be limited to the specific reasons stated in the superintendent's notice of recommendation of termination. No participant in the hearing shall be liable for any damages to any person if any statement at the hearing is determined to be erroneous as long as the statement was made in good faith. The superintendent shall present evidence and argument on all issues involved and the teacher may cross-examine, respond and present evidence and argument in his or her behalf relevant to all issues involved. Evidence may be by stipulation of the parties

and informal settlement may be made by stipulation, consent, or default or by any other method agreed upon by the parties in writing. The board shall employ a certified shorthand reporter to keep a record of the private hearing. The proceedings or any part thereof shall be transcribed at the request of either party with the expense of transcription charged to the requesting party.

The presiding officer of the board may administer oaths in the same manner and with like effect and under the same penalties as in the case of magistrates exercising criminal or civil jurisdiction. The board shall cause subpoenas to be issued for such witnesses and the production of such books and papers as either the board or the teacher may designate. The subpoenas shall be signed by the presiding officer of the board.

In case a witness is duly subpoenaed and refuses to attend, or in case a witness appears and refuses to testify or to produce required books or papers, the board shall, in writing, report such refusal to the district court of the county in which the administrative office of the school district is located, and the court shall proceed with the person or witness as though the refusal had occurred in a proceeding legally pending before the court.

The board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, but it shall hold the hearing in such manner as is best suited to ascertain and conserve the substantial rights of the parties. Process and procedure under this section shall be as summary as reasonably may be.

At the conclusion of the private hearing, the superintendent and the teacher may file written briefs and arguments with the board within three days or such other time as may be agreed upon.

If the teacher fails to timely request a private hearing or does not appear at the private hearing, the board may proceed and make a determination upon the superintendent's recommendation, which determination in that case shall be not later than April 10, or not later than five days after the scheduled date for the private hearing, whichever is applicable. The board shall convene in open session and by roll call vote determine the termination or continuance of the teacher's contract.

Within five days after the private hearing, the board shall, in executive session, meet to make a final decision upon the recommendation and the evidence as herein provided. The board shall also consider any written brief and arguments submitted by the superintendent and the teacher.

The record for a private hearing shall include:

1. All pleadings, motions and intermediate rulings.
2. All evidence received or considered and all other submissions.
3. A statement of all matters officially noticed.
4. All questions and offers of proof, objections and rulings thereon.
5. All findings and exceptions.
6. Any decision, opinion, or conclusion by the board.
7. Findings of fact shall be based solely on the evidence in the record and on matters officially noticed in the record.

The decision of the board shall be in writing and shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts and supporting the findings. Each conclusion of law shall be supported by cited authority or by reasoned opinion.

When the board has reached a decision, opinion, or conclusion, it shall convene in open meeting and by roll call vote determine the continuance or discontinuance of the teacher's contract. The record of the private conference and findings of fact and exceptions shall be exempt from the provisions of chapter 68A. The secretary of the board shall immediately mail notice of the board's action to the teacher.

279.17 Appeal by teacher to adjudicator

If the teacher is no longer a probationary teacher, the teacher may, within ten

days, appeal the determination of the board to an adjudicator by filing a notice of appeal with the secretary of the board. The notice of appeal shall contain a concise statement of the action which is the subject of the appeal, the particular board action appealed from, the grounds on which relief is sought and the relief sought.

Within five days following receipt by the secretary of the notice of appeal, the board or the board's legal representative, if any, and the teacher or the teacher's representative, if any, may select an adjudicator who resides within the boundaries of the merged area in which the school district is located. If an adjudicator cannot be mutually agreed upon within the five-day period, the secretary shall notify the chairperson of the public employment relations board by transmitting the notice of appeal, and the chairperson of the public employment relations board shall within five days provide a list of five adjudicators to the parties. Within three days from receipt of the list of adjudicators, the parties shall select an adjudicator by alternately removing a name from the list until only one name remains. The person whose name remains shall be the adjudicator. The parties shall determine by lot which party shall remove the first name from the list submitted by the chairperson of the public employment relations board. The secretary of the board shall inform the chairperson of the public employee relations board of the name of the adjudicator selected.

If the teacher does not timely request an appeal to an adjudicator the decision, opinion, or conclusion of the board shall become final and binding.

Within thirty days after filing the notice of appeal, or within further time allowed by the adjudicator, the board shall transmit to the adjudicator the original or a certified copy of the entire record of the private hearing which may be the subject of the petition. By stipulation of the parties to review the proceedings, the record of the case may be shortened. The adjudicator may require or permit subsequent corrections or additions to the shortened record.

The record certified and filed by the board shall be the record upon which the appeal shall be heard and no additional evidence shall be heard by the adjudicator. In such appeal to the adjudicator, especially when considering the credibility of witnesses, the adjudicator shall give weight to the fact findings of the board; but shall not be bound by them.

Before the date set for hearing a petition for review of board action, which shall be within ten days after receipt of the record unless otherwise agreed or unless the adjudicator orders additional evidence be taken before the board, application may be made to the adjudicator for leave to present evidence in addition to that found in the record of the case. If it is shown to the adjudicator that the additional evidence is material and that there were good reasons for failure to present it in the private hearing before the board, the adjudicator may order that the additional evidence be taken before the board upon conditions determined by the adjudicator. The board may modify its findings and decision in the case by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions, with the adjudicator and mail copies of the new findings or decisions to the teacher.

The adjudicator may affirm board action or remand to the board for further proceedings. The adjudicator shall reverse, modify, or grant any appropriate relief from the board action if substantial rights of the teacher have been prejudiced because the board action is:

1. In violation of a board rule or policy or contract; or
2. Unsupported by a preponderance of the competent evidence in the record made before the board when that record is viewed as a whole; or
3. Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

The adjudicator shall, within fifteen days after the hearing, make a decision and shall give a copy of the decision to the teacher and the secretary of the board. The decision of the adjudicator shall become the final and binding decision of the board unless either party within ten days notifies the secretary of the board that the decision is rejected. The board may reject the decision by majority vote, by roll call, in open

creation of a probationary status for teachers,⁸¹ and, 3) the addition of a "just cause" requirement.⁸²

meeting and entered into the minutes of the meeting. The board shall immediately notify the teacher of its decision by certified mail. The teacher may reject the adjudicator's decision by notifying the board's secretary in writing within ten days of the filing of such decision.

All costs of the adjudicator shall be shared equally by the teacher and the board.

279.18 Appeal by either party to court

If either party rejects the adjudicator's decision, the rejecting party shall, within thirty days of the initial filing of such decision, appeal to the district court of the county in which the administrative office of the school district is located. The notice of appeal shall be immediately mailed by certified mail to the other party. The adjudicator shall transmit to the reviewing court the original or a certified copy of the entire record which may be the subject of the petition. By stipulation of all parties to the review proceedings, the record of such a case may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional cost. The court may require or permit subsequent corrections or additions to the shortened record.

In proceedings for judicial review of the adjudicator's decision, the court shall not hear any further evidence but shall hear the case upon the certified record. In such judicial review, especially when considering the credibility of witnesses, the court shall give weight to the fact findings of the board; but shall not be bound by them. The court may affirm the adjudicator's decision or remand to the adjudicator or the board for further proceedings upon conditions determined by the court. The court shall reverse, modify, or grant any other appropriate relief from the board decision or the adjudicator's decision equitable or legal and including declaratory relief if substantial rights of the petitioner have been prejudiced because the action is:

1. In violation of constitutional or statutory provision; or
2. In excess of the statutory authority of the board or the adjudicator; or
3. In violation of a board rule or policy or contract; or
4. Made upon unlawful procedure; or
5. Affected by other error of law; or
6. Unsupported by a preponderance of the competent evidence in the record made before the board and the adjudicator when that record is viewed as a whole; or
7. Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

An aggrieved or adversely affected party to the judicial review proceeding may obtain a review of any final judgment of the district court by appeal to the supreme court. The appeal shall be taken as in other civil cases, although the appeal may be taken regardless of the amount involved.

81. *Id.* § 279.19 reads as follows:

279.19 Probationary period

The first two consecutive years of employment of a teacher in the same school district are a probationary period. However, a board of directors may waive the probationary period for any teacher who previously has served a probationary period in another school district and the board may extend the probationary period for an additional year with the consent of the teacher.

In the case of the termination of a probationary teacher's contract, the provisions of sections 279.15 and 279.16 shall apply.

The board's decision shall be final and binding unless the termination was based upon an alleged violation of a constitutionally guaranteed right of the teacher or an alleged violation of public employee rights of the teacher under section 20.10.

82. This addition is part of the requirement that "[t]he notification and recommendation

Under the new law the procedural components of termination are four: 1) notice to the teacher that the superintendent has recommended termination and the board will consider the recommendation,⁸³ 2) a private hearing with a definite evidentiary structure,⁸⁴ 3) an opportunity to appeal to an adjudicator subsequent to an unfavorable decision,⁸⁵ and 4) appeal from the adjudicator's decision to a state district court.⁸⁶ An examination of the statutory prescriptions for these four components leads to two conclusions. First, the detail of these procedures is very comprehensive, perhaps as comprehensive as legally feasible. For example, section 279.16, which provides for a private hearing before the board, prescribes rules for the following items: 1) participants in the hearing; 2) evidentiary format; 3) cross-examination of witnesses; 4) costs; 5) oaths and subpoenas; and 6) format for a record of the hearing and the board's decision.⁸⁷ Second, and perhaps most important, the detail of these statutory procedures will most likely change the focus of litigation resulting from the termination of teachers' contracts.

In the past, much of the litigation was centered on a determination of what the basically undefined statutory procedure actually required.⁸⁸ For example, in *Flanders v. Waterloo Community School District*,⁸⁹ one of the issues was whether "notification" was satisfied upon the mailing of a certified letter or upon the personal receipt by the teacher. The new law clearly provides that "notification shall be complete when received by the teacher,"⁹⁰ thus removing any necessity for interpretation. Another critical and frequently litigated issue which has been at least partially resolved by the new law relates to the impartiality of the tribunal or agency which makes termination decisions. This issue may arise under constitutional due process⁹¹ or statutory due process grounds.⁹² There have been cases which suggest that an impartial tribunal is a requirement of procedural due process.⁹³ However, there are also cases which indicate that there are circumstances in which

to terminate shall contain a short and plain statement of the reasons, which shall be for just cause" IOWA CODE § 279.15 (1977).

83. IOWA CODE § 279.15 (1977). See note 80 *supra*.

84. *Id.* § 279.16. See note 80 *supra*.

85. *Id.* § 279.17. See note 80 *supra*.

86. *Id.* § 279.18. See note 80 *supra*.

87. *Id.* § 279.16.

88. See generally Note, *Teacher Tenure in Connecticut: Due Process Rights and "Due Process" Responsibilities*, 8 CONN. L. REV. 690 (1976).

89. 217 N.W.2d 579, 582 (Iowa 1974) (court held that personal receipt of notice by teacher was required).

90. IOWA CODE § 279.15(2) (1977).

91. *Arnett v. Kennedy*, 416 U.S. 134 (1974) (appeal based, *inter alia*, on the contention that a federal civil service employee was entitled to a hearing before an impartial agency officer).

92. *Keith v. Community School Dist.*, 262 N.W.2d 149 (Iowa 1978) (appeal based, *inter alia*, on a contention that the school board was not impartial as required by statute).

93. See, e.g., *In re Murchison*, 349 U.S. 133 (1955). In *Murchison*, the Supreme Court held that constitutional due process considerations prohibited a judge who cited a grand jury witness for contempt from also presiding at the contempt trial because an impartial tribunal was required.

impartiality is not required.⁹⁴

The Iowa Supreme Court determined that impartiality of a school board at a private hearing was a requirement under the pre-1976 Iowa statute.⁹⁵ It is submitted that impartiality, at least for non-probationary teachers, will no longer be an issue because the new law specifically requires this element. The new act grants non-probationary teachers the right to appeal from an adverse board decision to an adjudicator who by implication will be impartial.⁹⁶ Assuming that under the doctrine of the exhaustion of administrative remedies a non-probationary teacher would have to proceed through this step in the termination process, the issue of school board bias should not be one which will reach the courts.

The second significant change in the new law is the creation of a probationary status, and by implication a non-probationary status, for Iowa teachers.⁹⁷ Under the prior law there was no such status. The new law provides for a probationary period of two years unless it is either waived for a teacher who has previously served such a period or extended beyond the two year period by mutual agreement of the board and the teacher.⁹⁸ The primary, if not the only, distinction between probationary and non-probationary teachers is that probationary teachers do not have access to adjudication before an impartial tribunal or judicial review of a termination dispute.⁹⁹ However, section 279.19 does provide that the termination of a probationary teacher's contract is to be conducted according to the statutory notice requirements of section 279.15. Section 279.15 requires that notice to a teacher include a short statement of the "just cause" reasons for the termination recommendation.¹⁰⁰

The final significant change in the new law is the addition of a "just cause" requirement, a finding of which must accompany the termination decision.¹⁰¹ Prior to these amendments, the Iowa law made no reference to the substantive basis for the termination decision.¹⁰² This requirement of "just cause," as discussed above, is applicable to all teachers.

94. See, e.g., *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976), where the Court held that a school board did not violate the requirement of impartiality in conducting disciplinary hearings on teachers who had engaged in an unlawful strike subsequent to the breakdown of collective bargaining negotiations.

95. *Keith v. Community School Dist.*, 262 N.W.2d 249, 261-62 (Iowa 1978).

96. IOWA CODE § 279.17 (1977). See note 80 *supra*.

97. See *id.* § 279.19. See also note 81 *supra*.

98. *Id.*

99. *Id.* Section 279.19 does provide, however, that a probationary teacher may seek judicial review for violation of a constitutional right or the public employee rights under Iowa's collective bargaining statute.

100. *Id.* § 279.15.

101. See notes 80, 82 *supra*.

102. However, "cause" was a requirement for the discharge of a teacher during the term of a contract. IOWA CODE § 279.24 (1975). The new law reduced the number of "causes" for discharge to one: "just cause." IOWA CODE § 279.27 (1977). See note 63 *supra*.

2. Teachers' Rights to Procedural Due Process

The substantiality of the foregoing changes to Iowa's continuing contract law raises the question regarding the effect these changes will have on the rights of Iowa public school teachers to procedural due process under the dimensions previously discussed, *i.e.* 1) constitutional, 2) statutory and 3) contractual.¹⁰³ Although the eventual judicial resolution of these questions will be primarily important in the context of collective bargaining negotiations, the resolutions will also be of significant concern to individual teachers.

The first issue to be addressed is whether teachers have been granted a constitutionally protected property interest in continued employment by the new provisions of Chapter 279. Certainly at least non-probationary teachers now have such a protected interest. The law still provides for one-year contracts, and, thus, such statute is not a tenure law in a strictly technical sense.¹⁰⁴ However, as previously explained,¹⁰⁵ it is not the formal nature of the contractual relations which is the critical element in finding the existence of a protected property interest. Rather, under the *Roth-Perry* standard, the critical element is whether the statute creates a legitimate entitlement to continued employment. This entitlement is derived from a "just cause" restriction on the school board's authority to terminate an employment contract.¹⁰⁶ The new Iowa law does provide that termination shall be for "just cause,"¹⁰⁷ and thus, a non-probationary public school teacher in Iowa has the right to expect that a contract will be renewed absent "just cause" for termination. Therefore, non-probationary teachers may expect, at a minimum, that the constitutional protections of the fourteenth amendment will be provided in the event of termination.

Probationary teachers present a different question. By implication, in both *Roth*¹⁰⁸ and *Perry*,¹⁰⁹ probationary teachers did not have an expectancy which rose to the level of a property interest. If, however, the critical element for the existence of a protected property interest is a "just cause" restraint on the decision to terminate, then the probationary status under Iowa law is different from that contemplated in *Roth* and *Perry*. The Iowa law clearly provides that probationary teachers may be terminated only for "just cause."¹¹⁰

This exact issue has been presented in at least one other jurisdiction. Like the Iowa law regarding probationary teachers, the California Education Code restricts the substantive basis for the termination of probationary

103. See text accompanying notes 3-10 *supra*.

104. Tenure in a strict sense connotes a permanence of contract without the necessity for a new one each year. See Brown, *supra* note 8, at 280-81.

105. See text accompanying notes 27-31 *supra*.

106. See text accompanying notes 35-36 *supra*.

107. IOWA CODE § 279.15 (1977). See also *id.* § 279.27, providing a "just cause" requirement for terminations within the contract year.

108. 408 U.S. at 567.

109. 408 U.S. at 600.

110. IOWA CODE § 279.15 (1977).

teachers to "just cause."¹¹¹ In *Turner v. Board of Trustees*,¹¹² a probationary teacher appealed his discharge, claiming a protected property right which could only be deprived by means consistent with the guarantees of the fourteenth amendment. The court concluded that "[b]y labelling the position probationary, the Legislature had clearly advised the employee that the position [was] neither vested nor permanent."¹¹³ This rationale has two major flaws, however.¹¹⁴ First, a legislative labelling process does not *per se* create legal rights. Secondly, a statutory right vests when a person is in a position to be entitled to the protections of a statute. It could be concluded then, in spite of *Turner*, that a probationary teacher in Iowa would have a vested property right to a "just cause" termination upon commencement of employment.

Unfortunately, the above analysis does not completely resolve the problem. By creating a probationary status, the Iowa legislature, like the California legislature, clearly intended to make a distinction between non-probationary and probationary teachers. That intent is reflected in the fact that only non-probationary teachers have access to the adjudicatory stage¹¹⁵ and the judicial review stage for resolving an allegation of unlawful termination.¹¹⁶ However, if probationary teachers have a protected property interest, they, too, would have access to judicial review of the board's decision and the only distinction between the two categories would be the question of access at the adjudication stage. Surely the legislature did not intend such a result. The legislative mandate that the board's decision shall be final and binding indicates that it was not contemplated that judicial review would be available for probationary teachers.¹¹⁷ Thus, from one perspective it is arguable that the intent of the Iowa legislature was not to give a probationary teacher a claim of entitlement to continued employment equal to that of the non-probationary teacher; rather, the legislative intent seems to have been to place probationary teachers on a lesser footing than non-probationary teachers in terms of the practical rights afforded to each group.

Assuming that the new Iowa law does create a protected property interest for both probationary and non-probationary teachers, the next question is what effect such a conclusion will have on teachers' rights to procedural due process. As the court in *Roth* made clear, the implication of a property interest under state law means that a teacher is protected by the procedural due process requirements of the fourteenth amendment.¹¹⁸ However, the procedures prescribed by the Iowa statute unquestionably meet the minimum

111. CAL. EDUC. CODE § 13442 (West 1978).

112. 16 Cal. 3d 818, 129 Cal. Rptr. 443, 548 P.2d 1115 (1976).

113. *Id.* at —, 129 Cal. Rptr. at 447, 548 P.2d at 1119.

114. *Id.* at —, 129 Cal. Rptr. at 450-52, 548 P.2d at 1122-24 (Tobriner, J., dissenting).

115. See note 80 *supra* (setting forth Iowa CODE § 279.17 (1977)).

116. See note 80 *supra* (setting forth Iowa CODE § 279.18 (1977)).

117. Iowa CODE § 279.19 (1977). This section does provide for judicial review for alleged violations of constitutional rights of the teacher, but this provision was likely referring to liberty rights and first amendment rights. See note 42 *supra*.

118. 408 U.S. at 569-70.

procedural due process requirements of the Constitution.

The basic requirements of constitutional due process are that an individual be given notice of possible deprivation of a property interest and an opportunity to be heard on the matter.¹¹⁹ The Iowa law definitely provides for notice and a hearing.¹²⁰ Indeed, the Iowa law goes far beyond the minimum due process requirements and specifies in detail the nature of both the notice and the hearing. By so specifying, the Iowa law satisfies other incidental considerations regarding hearing and notice which have been considered minimum due process requirements in certain circumstances. The Iowa law provides that the teacher be given notice prior to March 15 and gives the teacher a five day period within which to request a private hearing.¹²¹ This gives the teacher the opportunity to respond *before* a decision is reached by the board.¹²² The law also provides that during the private hearing the respective parties may be represented by counsel, witnesses may be cross-examined and all relevant evidence may be presented.¹²³ These are elements which some courts have required in various circumstances.¹²⁴ Finally, by providing for an adjudication or arbitration stage for non-probationary teachers, the potential issue of impartiality is eliminated.¹²⁵

Thus, even if the statute does create a property interest, at least the procedures prescribed adequately satisfy constitutional requirements. However, this conclusion is based on a major assumption: that the statutory procedures must be applied without modification to the termination of teachers' contracts. If, contrary to the above assumption, the statutory procedures are subject to modification by contractual arrangement, whether a protected property interest existed would be dependent on whether the particular contract retained the indices of the property interest created by the statute.

The question of the possibility of contractual modification of the statu-

119. *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (public school students faced with suspension were to be accorded some type of notice and some type of hearing); *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972) (protected interest requires some type of prior hearing); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) ("root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest").

120. IOWA CODE §§ 279.15-.16 (1977).

121. *Id.*

122. A hearing prior to the board's decision is not a definite requirement of constitutional due process. However, in some cases it has been required. *See, e.g., Vance v. Chester County Bd. of School Trustees*, 504 F.2d 820 (4th Cir. 1974).

123. IOWA CODE § 279.16 (1977).

124. *See, e.g., Brouillette v. Board of Directors*, 519 F.2d 126, 128 (8th Cir. 1975) (finding statutory due process to include opportunity to present testimony on teacher's behalf and to hear charges of adverse witnesses); *Vance v. Chester County Bd. of School Trustees*, 504 F.2d 820, 824 (4th Cir. 1974) (requiring opportunity to confront witnesses); *Ferris v. Special School Dist. No. 1*, 367 F. Supp. 459, 464 (D. Minn. 1973) (requiring right to counsel and cross-examination).

125. IOWA CODE § 279.17 (1977). Since the adjudication stage does not apply to probationary teachers, the issue of impartiality is seemingly open. However, the recent decision of the Iowa Supreme Court in *Keith v. Community School Dist.*, 262 N.W.2d 249 (Iowa 1978), requiring impartiality of the board under the prior law would appear to be applicable to the new law, thus closing this issue even for probationary teachers.

tory termination procedures has two components: 1) the authority of the school board to prescribe terms of a contract; and 2) the legislative intent as to the application of the law. Under the prior continuing contract law, the Iowa Supreme Court held that the statute *did* allow school boards and teachers to modify the statutory scheme.¹²⁶ The new law contains two provisions which have been carried over from the old law which suggest that the school board and teacher may contractually modify the statutory procedures. First, school boards are authorized to contract with teachers concerning "any . . . matters as may be mutually agreed upon."¹²⁷ Absent any provision which might restrict this affirmative authority as to the statutory procedures, it would seem that such procedures may be modified pursuant to this section. Secondly, the statute provides that the "contract shall remain in force and effect for the period stated in the contract and shall be automatically continued for equivalent periods except as modified or terminated by mutual agreement of the board of directors and the teacher or as terminated in accordance with the provisions specified in this chapter."¹²⁸

Thus, the apparent legislative intent was to provide school boards and teachers with the option of proceeding under the statute or under a contractual agreement modifying the statutory procedures. On the other hand, in section 279.19 the law seems to place some affirmative restraints on the terms of the contractual agreement: "[i]n the case of the termination of a probationary teacher's contract, the provisions of section 279.15 [notice] and 279.16 [private hearing] apply."¹²⁹ If probationary teachers must be terminated under the notice and hearing requirements, it would not seem likely that the legislature intended to provide non-probationary teachers less protection. Additionally, it may be argued that the requirement of "just cause" for termination places an affirmative restraint on the parties' ability to modify the statutory provisions, i.e., to insert a contractual provision which would allow for termination upon less than a "just cause" finding.

The recent case of *Moravek v. Davenport Community School District*¹³⁰ indicated that under the old law, the statutory termination procedures could not be altered by agreement between the parties. In *Moravek* a conflict existed between the statutory termination procedures of section 279.13 of the Iowa Code, 1975, and the master contract the school district had with its teachers. The master contract contained a grievance arbitration procedure

126. *Ashby v. School Township of Liberty*, 250 Iowa 1201, 1214, 98 N.W.2d 848, 857 (1959) (providing that the teacher's contract could be terminated upon a decrease in enrollment to less than six students); *Miner v. Lovilia Independent School Dist.*, 212 Iowa 973, 234 N.W. 817 (1931) (by mutual assent, the contract authorized the school board to terminate the teacher's contract for any reason upon giving 30 days notice to the teacher). See also *Keith v. Community School Dist.*, 262 N.W.2d 249 (Iowa 1978).

127. IOWA CODE § 279.13 (1977).

128. *Id.* The prior law was phrased differently: "shall be automatically continued except as modified." IOWA CODE § 279.13 (1975).

129. IOWA CODE § 279.19 (1977).

130. 262 N.W.2d 797 (Iowa 1978).

which the teacher chose to utilize, in place of the statutory procedures, upon termination.

The court held that, because the effect of arbitration of a termination dispute was to remove the power to terminate from the school board, that particular contract was an infringement on the statutory grant of authority to the school board and, therefore, violative of the public policy embodied in section 279.13.¹³¹

Another case decided on the basis of the pre-1976 law further indicated that the statutory scheme for termination procedures could not be altered. In *Kruse v. Board of Directors*,¹³² the Iowa Supreme Court held that the statutory time sequence for termination had to be strictly complied with. The decision was based on the premise that the primary purpose of section 279.13 was to provide the opportunity for both teachers and the school board to plan ahead, and that any modification of the time sequence would frustrate that purpose.¹³³

While both *Moravek* and *Kruse* were decided on the basis of the pre-1976 law, the changes which were made in the law should not affect the rationales of those cases. Therefore, it would appear that the statutory termination procedures of sections 279.13-.18 are strictly mandated and not subject to any contractual modifications.

The question still remains, notwithstanding the above analysis, whether the parties may agree to a contract which provides for termination for less than "just cause." There is little doubt that under the pre-1976 law the parties could provide for termination at the will of the school board.¹³⁴ The specific issue thus becomes whether the addition of the "just cause" requirement in section 279.15 places an affirmative restraint on the scope of "such other matters as may be agreed upon"¹³⁵ by the parties.

An analysis of section 279.13, its predecessor sections and cases construing those sections leads one to conclude that the parties may be able to contractually eliminate the "just cause" requirement. Prior to the 1976 amendments, the only place a "just cause" requirement appeared was with respect to terminations during the contract year.¹³⁶ In *Miner v. Lovilia Independent School Dist.*,¹³⁷ the school board and teacher had entered into an employment contract which provided that either party could terminate the contract upon giving twenty days notice to the other party.¹³⁸ The teacher, properly terminated pursuant to the contract procedure, claimed that the

131. *Id.* at 804-05.

132. 231 N.W.2d 626, 632 (1975).

133. 231 N.W.2d at 632.

134. See *Ashby v. School Township*, 250 Iowa 1201, 98 N.W.2d 848 (1959) (contract provided that the teacher was to be terminated if enrollment fell below six); *Miner v. Lovilia Independent School Dist.*, 212 Iowa 973, 234 N.W. 817 (1931) (contract provided that the teacher could be terminated on 20 days notice).

135. IOWA CODE § 279.13(2) (1977).

136. See generally IOWA CODE § 279.24 (1954); IOWA CODE § 4237 (1931); note 63 *supra*.

137. 212 Iowa 973, 234 N.W. 817 (1931).

138. *Id.* at 977, 234 N.W. at 818.

contractual provision was void, being contrary to the public policy embodied in section 4237 of the Iowa Code, 1927, which imposed a "good cause" requirement for teacher dismissals. The court held that the "good cause" requirement was not affirmatively prohibitory and hence, the parties could agree to termination for less than "good cause" pursuant to the language of section 4229, the predecessor of the present-day section 279.13, which provided that the contract was to be in writing, etc., and was to include "such other matters as may be agreed upon."¹³⁹ The court held that contractually providing for less than "good cause" termination was permitted by the above-quoted clause. The rationale for this determination was that since section 4229 anticipated that the parties could voluntarily terminate the contract once it was formed, it followed that the parties had the same power when the contract was entered into, notwithstanding the existence of section 4237.¹⁴⁰

Much like *Miner, Ashby v. School Township*¹⁴¹ involved a determination of whether the school board and teacher could agree, consistent with sections 279.13 and 279.24 of the Iowa Code, 1954, that the teaching contract would terminate upon the occurrence of an event which was not deemed to constitute statutory "good cause." In *Ashby* the contract provided that if enrollment fell below six, the contract would be terminated.¹⁴² The court construed the provision in section 279.13 of the Iowa Code, 1954, providing that the contract was to remain in force "except as modified or terminated by mutual agreement of the board of directors and the teacher" to mean that the "good cause" requirement could be contracted away.¹⁴³ The court adopted the *Miner* court's reasoning that the parties should be able to agree beforehand on contract termination if they could agree to it after the contract was entered into.¹⁴⁴ The *Ashby* court also analyzed the changes which had been made to section 279.13 and its predecessors since the *Miner* decision and concluded that the statutory changes did not alter the reasoning and conclusion of *Miner*.¹⁴⁵

The issue thus becomes whether the 1976 amendments to section 279.13 undermine the precedential value of the *Miner* and *Ashby* decisions. On first blush it would appear that *Miner* and *Ashby* are still good law. Section 279.13 still contains the language which was dispositive in *Ashby*:

[t]he contract shall remain in force and effect for the period stated in the contract and shall be automatically continued for equivalent periods except as modified or terminated by mutual agreement of the board of directors and the teacher or as terminated in accordance with the provisions specified in this chapter.¹⁴⁶

139. *Id.* at 978-79, 234 N.W. at 819.

140. *Id.* at 979-80, 234 N.W. at 819-20.

141. 250 Iowa 1201, 98 N.W.2d 848 (1959).

142. *Id.* at 1203, 98 N.W.2d at 851.

143. *Id.* at 1209-14, 98 N.W.2d at 855-58.

144. *Id.*

145. *Id.* at 1212-14, 98 N.W.2d at 856-57.

146. IOWA CODE § 279.13 (1977) (emphasis added).

Given the similarity of language between the prior section 279.13 and the current one, it would appear that, on the basis of *Miner* and *Ashby*, the parties may still provide for less than "just cause" terminations. This conclusion is reinforced by the additional language which was added by the 1976 amendments, italicized above, which provides that termination is to be *either* by mutual agreement of the parties *or* pursuant to the statutory mandates of chapter 279, which require that termination be for "just cause." Surely, given the *Miner* and *Ashby* cases as precedent, had the legislature intended in the 1976 amendments to make "just cause" a requirement for all terminations, it would not have phrased the above-quoted portion of section 279.13 in the disjunctive.

While *Miner* and *Ashby* seem to be clearly on point on the issue of statutory construction, *Moravek v. Davenport Community School District*¹⁴⁷ suggests that the Iowa Supreme Court is going to look closer to legislative intent in construing chapter 279. In *Moravek* the court held that the specific part of section 279.13 of the Iowa Code, 1975, which granted contractual power as to all "such other matters as may be agreed upon," *did not* permit contracting for a *method* of termination other than that mandated by chapter 279.¹⁴⁸ The court reasoned that there was a legitimate legislative purpose in setting up a termination procedure which would be thwarted if it could be eliminated contractually.¹⁴⁹ Similarly, the Iowa legislature in 1976 had a specific goal in mind in enacting sections 279.14-.19, that goal being to protect teachers from arbitrary terminations. Thus, much like *Moravek*, should it be possible to eliminate the "just cause" requirement by the simple expedient of a contractual clause, the legislative intent in providing these procedural protections will be undermined. Additionally, as previously indicated,¹⁵⁰ probationary teachers may only be terminated pursuant to the requirements of section 279.15. Thus, probationary teachers would, under the *Ashby-Miner* analysis above, receive more procedural protection than non-probationary teachers, clearly something which the legislature could not have intended. Hopefully, the Iowa Supreme Court will, when presented with the issue, either overrule the *Ashby-Miner* line of cases or limit them to their specific facts and only apply their reasoning to terminations within the contract year which are now covered by section 279.27.

IV. CONCLUSION

The possibility of the termination of a teaching contract is fraught with tension, whether it be in the context of an actual termination or in the development of procedures with which to execute all such terminations. On the one hand is the interest of the teacher in the immediate teaching position and, perhaps, in a future career in teaching. On the other hand, there is the

147. 262 N.W.2d 797 (Iowa 1978).

148. *Id.* at 805.

149. *Id.*

150. See text accompanying notes 108-14 *supra*.

concern of the school district for its control over what is perhaps the most critical component of its statutory duty: personnel administration. The new Iowa continuing contract law has arguably struck the balance on the side of the teacher's interest, at least in relation to the prior law. In whatever fashion the judiciary resolves the extent of a teacher's right to procedural due process under Iowa law, unless it is determined that complete modification of the "just cause" basis for terminations is possible, public school teachers in Iowa will now have greater job security than ever. Whether the manner in which the legislature has struck the balance will result in an uneven scale thus remains to be seen.

The comprehensiveness and detail of this law, if fully applied, may have the desirable effect of shifting the focus from procedural issues to the true issue in termination proceedings: the substantive basis for a school board's decision. By placing the contract termination process in a demanding procedural context the legislature placed a heavy burden on school boards to proceed to termination only with "just cause." Teachers will in turn be more assured that the substantive basis for terminations are adequately protected. Perhaps the ultimate effect, and even the test of the law's usefulness, will be a reduction in the volume of litigation arising from the termination of teachers' contracts.

Clifford S. Swartz

COPYRIGHTED MUSICAL COMPOSITIONS: "PUBLIC PERFORMANCE FOR PROFIT" AS AFFECTED BY THE 1976 ACT

I. INTRODUCTION

Article I, section 8 of the United States Constitution expressly gives Congress the following power: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹ Pursuant to this express constitutional power, the 1790 Congress passed its first copyright law "for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."² The coverage of the 1790 Act was extended in 1802 to include "arts of designing, engraving, and etching historical and other prints."³ In 1831, a revision of the copyright law was passed which repealed the 1790 and 1802 Acts and extended copyright protection to musical compositions.⁴ The next major revision of the copyright law was made in 1870.⁵ Yet another major revision of the copyright law was made in 1909.⁶ In 1947, the 1909 Act and its amendments were codified as Title 17 of the United States Code.⁷

Until January 1, 1978, copyright law in the United States was governed by the Copyright Act of 1909. Due to the great technological advancements of this century, a new, updated copyright law was found to be necessary.⁸ After many years of study and proposed revisions, Congress passed the Copy-

1. U.S. CONST. art. I, § 8, cl. 8.

2. Act of May 31, 1790, ch. 15, 1 Stat. 124.

3. Act of April 29, 1802, ch. 36, 2 Stat. 171.

4. Act of February 3, 1831, ch. 16, 4 Stat. 436.

5. Act of July 8, 1870, ch. 230, 16 Stat. 198. Between the 1831 revision and the passage of the 1870 Act, the following acts were passed which related to the Copyright Law: Act of June 30, 1834, ch. 157, 4 Stat. 728 (recordation of deeds or instruments or writing for the transfer or assignment of copyrights); Act of August 18, 1856, ch. 169, 11 Stat. 138 (extending coverage to prevent unauthorized performance of any dramatic composition); Act of February 5, 1859, ch. 22, 11 Stat. 380 (shifting copyright recordation duties from the Department of State to the Department of the Interior); Act of February 18, 1861, ch. 37, 12 Stat. 130 (providing a right for writ of error or appeal to the United States Supreme Court); Act of March 3, 1865, ch. 126, 13 Stat. 540 (extending coverage to photographs and negatives); Act of February 18, 1867, ch. 43, 14 Stat. 395 (providing penalty for failure to timely deposit a copy of copyrighted article with the Library of Congress).

6. Act of March 4, 1909, ch. 320, 35 Stat. 1075. The Act of 1870 was carried into Title IX, Chapter 3 of the Revised Statutes of 1874, §§ 4948-71. There were several amendments to the Revised Statutes prior to the major enactment of the 1909 law. The 1909 Act repealed and superseded all prior copyright laws, increased the copyright renewal period from 14 to 18 years and established the Office of Register of Copyrights under the Librarian of Congress.

7. Copyright Act of July 30, 1947, ch. 391, 61 Stat. 652. Title 17 was entitled "Copyrights."

8. The Register of Copyrights sponsored a series of thirty studies on the law and proposed revisions. A summary of the studies appears in STAFF OF HOUSE COMM. ON THE JUDICIARY, 87th CONG., 1st SESS., REPORT ON COPYRIGHT LAW REVISION (Comm. Print 1961).