Cleveland State Law Review

Volume 20
Issue 3 *Symposium on School Law*

Article

1971

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Probationary Teachers and the "Expectancy of Continued Employment"

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THE ATTAINMENT OF TENURE STATUS for a teacher (professor)[1] is a coveted award. The state or private employers who have created this contractual position believe in its merit. There is very little question that the recipients of tenure benefits also consider it to be of value.

The probationary period is the trial period preceding the tenure award. The belief in the value of this trial period is unquestioned both as to the right of the employers to so require, and as to its propriety as a legitimate function related to maintaining the quality and integrity of the teaching staff of the schools (university).[2]

Although the specific benefits of any tenure system will vary, there is general agreement that it will provide at least appropriate due process and a contractual expectancy of continued employment subject to the usual dismissal for cause provision. These provisions in education contracts are similar to the usual civil service benefits, and the appointment-for-good-behavior for appointed judiciary. The principal benefit of tenure is the guarantee or practical expectancy of continued employment, with the other benefits, such as due process, flowing from this. Without the expectancy, due process rights are greatly diminished, to a virtually useless procedural exercise. Of late, probationary teachers have found success in admitting their status, but alleging this expectancy of continued employment as a basic right, a constitutional right, or an extra contractual right arising from surrounding circumstances. Once a court agrees to recognize this expectancy of the probationer, other tenure benefits will follow. It is a relatively new development, almost exclusively available in the federal courts, where (at least in pre *Younger v. Harris* era[3]) the use of injunctive relief against impending or final "state action" of university trustees of public school boards was readily available.

This article will investigate the extent to which the tenure benefits of due process are available to petitioners who can establish an "expectancy of employment." This due process, as to dismissal, includes notice, opportunity for a hearing and reasonable cause.

Traditionally, the probationer's employment expectancy follows the master-servant rule that ". . . absent statutory or contractual provision to the contrary, an employer enjoys an absolute power of dismissing his employee, with or without cause.[4]" As to public school teachers, the

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[1] For the purposes of the issue of the article, the terms teacher and professor have no significant difference in meaning and will be considered synonymous.

[2] The issues involved indicate no significant distinction between school, college, and university, and such the terms will be considered as interchangeable.

[3] Younger v. Harris, 91 S. Ct. 746 (1971).

[4] Jones v. Hopper, 410 F. 2d 1323, 1328 (10th Cir. 1969); *cf.* DeCanio v. School Comm. of Boston, 260 N.E. 2d 676 (Sup. Jud. Ct. Mass. 1970), *U.S. App. Pending;* Sinderman v. Perry, 430 F. 2d 939 (5th Cir. 1970); Fooden v. Board of Governors, 268 N.E. 2d 15 (Ill. 1971).

Schultz case indicates also, ". . . in absence of legislation [government employment] can be revoked at the will of the appointing officer. Also, as a general rule, no person, school teacher or otherwise, has a constitutional right to public employment.[5] "

Other courts further indicate the dismissed probationer's limitation of rights: ". . . because the college may base its decision not to reemploy a teacher without tenure or a contractual expectancy of reemployment upon any reason or upon no reason at all . . . [since it] would have the legal effect of improperly denying to colleges freedom of contract to employ personnel on a probationary basis or annual contracts which are unfettered by any reemployment obligation. Every teacher would thus be granted substantial tenure rights by court edict. Courts do not make contracts for colleges or teachers any more than for any other litigants." [6]

As to the requirements of a hearing, *Thaw v. Board of Public Instruction* states that it ". . . would be too much to ask the school board to hold a hearing every time it determines not to renew the contract of a probationary teacher . . . [as it would] nullify the probationary system whose purpose is to provide the school board a short term test during which the fledgling teacher may be examined, evaluated, and, if found wanting for any constitutional reason, not rehired." [7] It appears today, however, that the traditional fine line between tenured and probational has widened to a broad space on an expanding continuum. Although there are jurisdictional differences as to legal basis and specific contractual differences as to benefits, there appears to be a definite growth of probationers' legally protected rights, especially where an expectancy of continued employment or a violation of constitutional rights can be found.

The recent cases on this expectancy issue of fact begin in the allegations of *Jones v. Hopper*[8] which classified it as an injury to an interest which the law will protect against invasion by acts in violation of federal rights and cited *Bomar v. Keyes*[9] as authority. Petitioner was unsuccessful, as the court noted that *Bomar* was an action in tort, based on tortious interference with a contract, and the *Jones* court found no interest to be protected or remedied where the alleged tortfeasor was in performance of a legal duty.[10]

The dissent held the opinion to be an error, alleging that the expectancy of continued employment could be found as a fact existing ". . . outside any specific contractual or statutory provision. . .".[11] This interest ". . . could very well arise from other sources, or be based on school rules,

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[5] Schultz v. Palmberg, 317 F. Supp. 659, 661 (D. Wyo. 1970); *accord,* Vitorelli v. Seaton, 359 U.S. 535 (1959); Parker v. Board of Educ., 237 F. Supp. 222 (D. Md. 1965), *cert. denied,* 382 U.S. 1030 (1966), *reh. denied,* 383 U.S. 939 (1966).

[6] Sinderman v. Perry, 430 F. 2d 939, 944 (5th Cir. 1970).

[7] 432 F. 2d 98, 100 (5th Cir. 1970).

[8] 410 F. 2d 1323, 1327 (10th Cir. 1969), *cert. denied* 397 U.S. 991 (1970).

[9] 162 F. 2d 136 (2d Cir. 1947).

[10] Jones v. Hopper, 410 F. 2d 1323, 1327 (10th Cir. 1969).

[11] *Id.* at 1330.

practice, or custom, . . . and we must assume on this appeal that the fact elements are capable of proof unless there is some legal bar." [12]

The view of the dissent was somewhat vindicated one month later in *Green v. Howard University* where the court said: "Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt in this non-commercial context." [13] The court found the "expectancy" which required the university to provide a hearing on the charges before making these charges the occasion of nonrenewal of the probationer's contract.[14] Even so, the court did not use that expectancy for injunctive relief as to reinstatement, but remanded for determination of monetary damage attributable to the non-reappointment.[15] The court evidently based its theory of "expectancy of continued employment" as a legally protected interest on the same basis as *Bomar*—tortious interference with contract rights, with damages as the remedy.

The *Greene* Court did not admit or deny the expectancy as a constitutional right, possibly because it may have felt the remedy at law to be adequate,[16] while a later case, *Gouge v. Joint School District No. 1,* would not admit to an action in damages, and insisted that injunctive relief for reinstatement was the only available remedy.[17]

A later case, *Miller v. Parsons*[18] attempted a novel approach to teachers' rights, alleging the "civil right to teach." The court avoided a direct decision on the claim, and dismissed without prejudice, with leave to amend. Petitioner's pleadings were evidently defective in that he had not properly stated a cause of action (insufficiency of the claim). That specific claim thus remains open for future use.

Three months after *Jones,* a different circuit court (5th) relied on *Bomar* to recognize that "legally protected interest," but by some mysterious metamorphosis, it had become a civil right involving constitutional protection for first amendment rights. To reach this conclusion, the Court cited various cases to the effect that dismissals for exercise of first amendment rights is improper.[19] These cases involved improper dis-

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[12] *Id.* at 1332.

[13] Greene v. Howard Univ., 412 F. 2d 1128, 1135 (D.D.C. 1969).

[14] *Id.* at 1135.

[15] *Id.* at 1136.

[16] *Id.* at 1135.

[17] Gouge v. Joint School Dist. No. 1, 310 F. Supp. 984 (W.D. Wisc. 1970) and Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wisc. 1970), were decided together in the same court by the same judge. They have been cited as authority in this area although they are founded on a personal philosophy: "The time is past in which public employment is to be regarded as a privilege. . . ." (*Roth* at 979), and a collection of unrelated cases which give at least apparent weight to the rationale of the new decisional law. The judge then decreed rights to non-tenured teachers, and enforced them by decree. As precedent, the cases are there; as law they are questionable. These cases as used in this article are citations, not examples of law.

[18] 313 F. Supp. 1150 (M.D. Pa. 1970).

[19] Keyishian v. Board of Regents, 385 U.S. 589 (1967); Wieman v. Updegraff, 344 U.S. 183 (1952); Slochower v. Board of Higher Educ. of New York City, 350 U.S. 551 (1956).

missals for non-compliance with New York's Feinberg Law (loyalty oath), but no expectancy interest. Also cited was *Pickering v. Board of Education,*[20] an educational variation of *New York Times v. Sullivan.*[21] How these are related to the legally-protected interest of the "expectancy" is at least vague, albeit a question of an improper first amendment dismissal, and the court merely confused the issue by citing the *Bomar* tort theory as precedent on the one hand, then noting: "What is at stake is the vindication of constitutional rights." [22]

The court additionally cited additional authorities for the already established legal fact that first amendment rights are available to teachers as well as students.[23] It would have been difficult to find such teacher rights issues in these cases, as they involved student rights, not teacher rights, such that any discussion of teacher rights would have to be dicta. Apparently, this court had a predetermined conclusion, and was furiously citing for weight, purposes to justify its conclusion in creation of new decisional law.

The *Jones-Greene-Pred* theory was followed by an Illinois Supreme Court decision, *Fooden v. Board of Governors,*[24] where it was found that the alleged expectancy of continued employment did not exist in fact, contract, the Constitution or Civil Rights Act, and cited *Jones* as authority. This state court decision had little or no impact or influence on the march of the federal courts toward completion of the metamorphosis. *Ferguson v. Thomas*[25] appears to be the critical point. This court cited *Pred* as a basis for the proposition that a limited contract gives no (contractual) right to additional employment,[26] but then cited *Greene*:

> But a college can create an obligation as between itself and an in-instructor where none might otherwise exist under the legal standards for the interpretation of contract relationships regularly applied to transactions in the marketplace if it adopts regulations or standards of practice governing nontenured employees which create an expectation of reemployment. . . . [The College] conceded that under prevailing practices a decision not to offer such an instructor a renewal contract of employment required a showing of cause. Their treatment was sufficient to create for Dr. Ferguson an expectancy of reemployment that required that his termination be accomplished under procedures which would accord him the fundamentals of due process. Indeed, this presupposes the right to notice and a hearing, Freeman vs. Gould Special School District, 405 F2d 1153 (8th Cir. 1969.) [27]

Thus, where such expectancy can be found as a fact, then that ". . . teacher may neither be dismissed, or not be rehired for constitutionally

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[20] 391 U.S. 563 (1968).

[21] 376 U.S. 254 (1964).

[22] Pred v. Board of Pub. Instruction, 415 F. 2d 851, 856 (5th Cir. 1969).

[23] Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969); Blackwell v. Board of Education, 363 F. 2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966).

[24] 268 N.E. 2d 15 (Ill. 1971).

[25] 430 F. 2d 852 (5th Cir. 1970).

[26] *Id.* at 856.

[27] *Id.* at 856.

impermissible reasons such as race, religion or the assertion of rights guaranteed by the constitution. This rationale would even apply to a teacher without either tenure, or an expectancy of reemployment." [28] The court remanded for a further hearing as to the exact cause for dismissal, since the facts seemed to indicate mixed reasons, with instructions that if upon hearing it were found that valid non-discriminatory reasons did exist, then the dismissal would be proper.[29]

This case is significant in that it is a landmark case for the new proposition that where the expectancy of reemployment can be found as a fact, then the termination must be accomplished by appropriate minimum due process, a benefit formerly not available to probationers. The court then indicated that the appropriate due process to include a statement of cause, names and nature of testimony, a reasonable time for a defense and a fair tribunal.[30] In short, dismiss the probationer if you will, but not if it violates his first amendment rights, is discriminatory, or does not provide "minimum due process."

Progress took a short breather in another state supreme court decision, *DeCanio v. School Committee of Boston*,[31] where petitioner contended her rights of due process were denied due to a lack of a statement of charges and hearing. Even though petitioner cited *Roth*[32] and *Gouge*,[33] the Massachusetts Supreme Court was not impressed by the argument of "a United States District Court Judge in Wisconsin," and admitted it was not persuaded by the reasoning of that court, nor sure of the precise constitutional basis for the holding of the district court in *Lucia*.[34] The court chose instead to rely on its own statutes and the holdings of *Cafeteria and Restaurant Workers Local 473 v. McElroy*,[35] *Vitorelli v. Seaton*,[36] *Nostrand v. Little*,[37] *Nelson v. County of Los Angeles*,[38] *Davis v. School Committee of Somerville*,[39] *Leonard v. School Committee of City of Springfield*,[40] *and Frye v. School Committee of Leicester*,[41] in stating that "In doing so, it has abridged no constitutional right of a probationary teacher." [42]

Meanwhile, back in the Federal courts, *Orr v. Trinter*[43] preferred to rely on the other federal decisions of *Gouge* and *Roth* to require an Ohio

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[28] *Id.* at 857.

[29] *Id.* at 860.

[30] *Id.* at 856.

[31] 260 N.E. 2d 676 (Sup. Jud. Ct. Mass. 1970).

[32] Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wisc. 1970).

[33] Gouge v. Joint School Dist. No. 1, 310 F. Supp. 984 (W.D. Wisc. 1970).

[34] Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969).

[35] 367 U.S. 886 (1961).

[36] 359 U.S. 535 (1959).

[37] 368 U.S. 436 (1962).

[38] 362 U.S. 1 (1960).

[39] 307 Mass. 354, 30 N.E. 2d 401 (Sup. Jud. Ct. Mass. 1940).

[40] 241 Mass. 325, 135 N.E. 459 (Sup. Jud. Ct. Mass. 1922).

[41] 300 Mass. 537, 16 N.E. 2d 41 (Sup. Jud. Ct. Mass. 1938).

[42] DeCanio v. School Comm. of Boston, 260 N.E. 2d 676 (Sup. Jud. Ct. Mass. 1970).

[43] 318 F. Supp. 1041 (S.D. Ohio 1970); *accord,* Poddar v. Youngstown State Univ., C-71-227 (N.D. Ohio, April 8, 1971).

school board to provide minimum due process for a dismissed probationer who was given no reason for the non-renewal of his limited teaching contract. This court's concept of minimum due process for probationers included a written statement of reasons, adequate notice of a hearing, an (adversary) hearing, and the final statement of reason (cause) for the dismissal. With only slight differences, it may be stated that the minimum due process provisions of *Ferguson* and *Orr* are substantially the same.

The court did not discuss the expectancy theory, but appeared to rely on the balance of rights theory, in arriving at an interesting swing point, the ". . . interest of plaintiff in his professional standing and reputation [is] separate and apart from any interest in a particular job." Such an interest has been recognized by courts as being a determining factor in whether members of other professions are entitled to a due process hearing before their dismissal from a job requiring professional competence.[44] It is difficult to properly place this right into any existing category. This interest is at least, unique, as it is available in that jurisdiction, although it may be later cited as authority since it cited the tenuous and vague *Roth* and *Gouge* cases as authority. (*Le loi, c'est moi!*)

Evidently, the *Orr* court could not rely on the "expectancy," as its metamorphosis from tort (*Bomor-Jones-Greene-Pred*) to basic constitutional right had not been completed at this time. If it did rely on that theory, then it may have had to rely on monetary damages. In order to reach its desired result of injunctive relief, the court had to ignore the expectancy theory and rely on the balance theory which allows each judicial interpreter to cite the same balances but arrive at a purely personal, subjective, unpredictable, and pre-determined result.

After its discussion of the balance theory, the court found ". . . the interests of the school board and those of the teacher would both be fully protected by a procedure which advises the non-tenured teacher of a proposed purpose not to renew his contract and affords him a hearing at which the legitimacy of the reasons compelling such action is determined." [45] (Note how the court indicated "the legitimacy of the reasons" which may indicate a reservation that it intends to subject those reasons to further judicial review.)

The court based its findings on the previously mentioned unique theory of the legally protected interest of a professional. It cited this theory as it applied to a medical doctor, then applied it for the first time to a teacher.[46] Obviously, no teacher is going to disagree with this view, much less a law professor, and it is merely noted here as being a unique contribution to the growing rights of probationers. If adopted generally, teaching can be "expected" to be viewed by the courts as a professional career, along with law, medicine and the clergy. In many school districts and to many college administrators this novel view may have some shock

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[44] *Id.* at 1045.

[45] *Id.* at 1046.

[46] *Id.* at 1045; *accord,* Birnbaum v. Trussell, 371 F. 2d 672 (2d Cir. 1966).

value. Finally, the *Orr* court invoked the injunctive remedy of reinstatement in the event the school did not provide the minimum requisite of due process within thirty days.[47]

The judicial fiat of grey area tenure now consists of injunctive relief for violation of first amendment rights, or of fifth amendment rights, where an expectancy of employment ("a tenuous sort of tenure" [48]) can be found as a fact, or even when not so found, when a constitutional right has been alleged to be in issue. Since in both cases it is injunctive relief being sought, it is the judge who will determine the finding of fact to his satisfaction. If the unprofessional, troublesome and incompetent teacher, has become so as a *result* of extra curricular speech association, or activity, the success of administrative authorities in removing the incompetent teacher will vary with the personal philosophy of the judge in the exercise of his equity discretion. Since it is an exercise of equity discretion, it is appropriate to use "judge" instead of "court."

Where the exercise of the first amendment rights have created a situation that would otherwise cause a teacher to be dismissed, a "mixed reasons" situation, some judges will prevent dismissal; others will permit the dismissal because of the non-constitutional reasons, as long as the latter reasons are not spurious.

Lucas v. Chapman[49] is probably the best case to show a situation that would cause the expectancy to arise as an extra contractual right. In *Lucas,* a teacher's employment without tenure, after eleven years in the system, was terminated without a statement of cause.

> Lucas had no tenure and his one year contract was not breached. But his long employment in a continuing relationship through the use of renewals of short-term contracts was sufficient to give him the necessary expectancy of reemployment that constituted a protectable interest.[50]

After finding the necessary expectancy, the court applied the benefit of this status: "Lucas' termination did not meet the minimum standards of procedural due process" which the court indicated as a statement of cause, names of witnesses, and a hearing.[51] The court cautioned however, that the "holding should not be misunderstood," in that the reason for his finding is based on a "possible collision with Lucas' first amendment rights," [52] and should have a hearing to so determine. This caution indicated an attempt to limit the scope of rights. The caution, however, was short lived when the court then went on to complicate the issue:

> Also, even in the area of non-constitutional reasons, the board's decision must not be wholly unsupported by evidence else it would be so arbitrary as to be a constitutional violation.[53]

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47 318 F. Supp. 1041 (S.D. Ohio 1970).

48 Jones v. Hopper, 410 F. 2d 1323, 1332 (10th Cir. 1969).

49 430 F. 2d 945 (5th Cir. 1970).

50 *Id.* at 947.

51 *Id.*

52 *Id.*

53 *Id.* at 948.

This may be a whole new approach to constitutional law—a constitutional violation of a non-constitutional matter. In his special concurring opinion, it is interesting to note that Judge Jones objected to the decision being based on the grounds of practicability and common sense fairness.[54] The case reached an obviously fair decision, but the attempts to produce a rationale for it, and to create new decisional law through dicta would have been better left out.

The *Lucas* court found the expectancy as a fact due to the teacher's having received eleven successive contracts, and thereby acquired the expectancy as a result of university policy. This case agrees with prior cases as to the benefits of the statement of cause and hearing, but like *Orr,* added the further tenure benefit of judicial review as to the reasonableness of the non-constitutional grounds. The grey area is consuming the continuum.

Sinderman v. Perry[55] may shed some light on one rationale for the metamorphosis when it quoted *Pred:*

> . . . the right sought to be vindicated is not a contractual one, nor could it be, since no right to reemployment existed. What is at stake is the vindication of constitutional rights—the right not to be punished by the state or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendment rights. (415 F2 at 856)[56]

As to tenure benefits as a result of a finding of expectancy, the rationale of its use is not as vague as its judicial origins. In fact, considering there are still some state and private schools with no tenure benefits at all, the protection of the expectancy is all that is available.

Thaw v. Board of Public Instruction,[57] two weeks later, shed a definitive light on the completion of the metamorphosis process by merging the *Greene-Pred-Ferguson-Lucas-Sinderman* theories into its apparent final stage:

> The authority in this Circuit requires school boards to provide notice and hearing before dismissing a public school teacher or college professor in either of two types of cases. The first type is that of a school teacher who has "tenure" or a reasonable expectation of reemployment. Ferguson vs. Thomas, 5th Cir. 1970, 430 F2d 852. A public school teacher falling into this category may not be dismissed unless the school board first affords him a hearing at which the reasons for his termination are stated and the teacher is given an opportunity to refute the charges against him. This basic requirement protects the public schoolteacher who has been led to expect that he will be reemployed from being arbitrarily dismissed.
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> The second type of case in which a school board has been required to provide a hearing is that of a schoolteacher who has no tenure or expectancy of reemployment, but who asserts that he has been dismissed for constitutionally impermissible reasons, either solely because of race or religion, or because he has attempted to exercise his

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[54] *Id.*

[55] 430 F. 2d 939 (5th Cir. 1970).

[56] *Id.* at 942.

[57] 432 F. 2d 98 (5th Cir. 1970).

first amendment rights. Pred. vs. Board of Public Instruction, 5th Cir. 1969, 415 F2d 851.[58]

Voila! The butterfly! The reasonable expectation of reemployment as a contractual fringe benefit for probationers is now a completed fact, where it can be found as a fact by a jury or a judge in equity.

Thaw cited Ferguson to the effect that tenure and the expectation of reemployment provide the same benefits as to notice and hearing, but then denied petitioner claims for such due process because there was no allegation of violation of constitutional rights (*Pred* theory). Petitioner wanted a judicial hearing to determine whether there may be an unconstitutional basis. Possibly the court would not go this far (as did *Roth* and *Gouge*), since it noted that this board dismissed 1487 probationers that year, and that would be "an intolerable burden on the board."[59] There were no other facts, situations, customs, or practices alleged that would warrant a finding of an expectancy, and since the court did not wish to require the board to go through intolerable procedures merely to determine *whether* they were constitutional, especially when petitioners didn't even *allege* any, the dismissal was affirmed.

Then, two weeks later, *Schultz v. Palmberg*[60] cited *Jones, Parker, Freeman* and, of all things, *Greene,* to frustrate this apparent finality of the theory in support of its finding that:

> The conclusion by the Court in Freeman is inescapable if one desires to preserve the tenure system. School Boards should have a wide range of discretion in the management and operation of a school district, including the employment procedures of hiring and rehiring. A teacher who has not had the privileges of tenure incorporated in his teaching contract simply cannot claim the benefit of tenure if such a system is to survive with any merit at all. The implementation of tenure is within the exclusive realm of the legislative process and it is not within the province of this Court to establish tenure at community colleges in the state of Wyoming.
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> The plaintiffs do not have a right of tenure or continued employment at Central Wyoming College, hence the denial of their request for a formal hearing was not a deprivation of a right, privilege or immunity secured by the Federal Constitution and laws. Also from the face of the complaint, it is abundantly clear that the Board in declining to offer plaintiffs teaching contracts for a third year, did not prevent these plaintiffs from exercising their rights of free expression and association as secured by the First Amendment. Just as other First Amendment guarantees, the right of free speech and expression is not absolute.[61]

Possibly, this decision may have been the result of defective pleadings, since, "The plaintiffs have made no allegation in their complaint which would demonstrate an abuse of discretion on behalf of the Board."[62] Whether this would be of significance is difficult to determine in light of

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[58] *Id.* at 99.

[59] *Id.* at 100.

[60] 317 F. Supp. 659 (D. Wyo. 1970).

[61] *Id.* at 663.

[62] *Id.* at 664.

the court's previous statement *(supra)* of denial of any tenure benefits to a probationer, one of which is judicial review for abuse of discretion. In effect, this case adds fuel to "this as yet unresolved conflict between circuits." [63]

An interesting compromise was reached in *Drown v. Portsmouth School Dist.*,[64] where a non-tenured teacher was not afforded a statement of cause or a hearing for a dismissal that followed proper statutory notice of non-renewal. The court observed that "Courts are divided on the issue of the administrative procedural rights to which a non-tenured public school teacher is entitled when he is not rehired" [65] and cited authority for the major opposing views, and also for those who are in the middle of the road where there is an allegation of a constitutionally impermissible cause. The court did not rely on, nor note the expectancy of reemployment theory, but instead relied on the balance of interests approached [66] to develop an interesting middle of the road split as proposed by King Solomon when faced with his, one baby—two alleged mothers problem. The court first granted petitioners request for a statement of cause:

> From the viewpoint of the school board, a requirement that it state its reasons for not rehiring a non-tenured teacher would impose no significantly administrative burden. Nor would it significantly inhibit the board in ridding itself of incompetent teachers. The workability of such a requirement is evident from the fact that several states presently require their school boards to do so. . . . We therefore hold that the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention, along with access to evaluation reports in the teacher's personnel file.[67]

The court then denied petitioner's request for a formal hearing:

> It is obvious that the kind of hearing sought by appellant . . . would involve the full trappings of counsel, cross-examination, rules of evidence, a verbatim record, and a decider other than the school board. Not only would the invoking of such adjudicative apparatus be an added, expensive and unfamiliar obligation for the school district, but the very existence of the right of a non-tenured teacher to such a hearing would have two side effects, equally unfortunate.
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> In the first place, administrators would be less likely to recommend that teachers not be rehired if they knew that such a decision might require them to go through the time expense, and often the personal discomfort of a full scale hearing. In such circumstances, the school board is more likely to tolerate incompetent teachers. At the same time, administrators would, to avoid these difficulties in the future, follow a counsel of over-caution in their hiring practices. The innovative teacher would have a more difficult time finding employment if school districts fear they cannot afford to take a chance on him.

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[63] Sinderman v. Perry, 430 F. 2d 939, 940 (5th Cir. 1970).

[64] Drown v. Portsmouth School Dist., 435 F. 2d 1182 (1st Cir. 1970).

[65] *Id.* at 1183.

[66] *Id.* at 1184.

[67] *Id.* at 1185.

> And the schools would be left with a teaching force of homogenized mediocrities.[68]
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> . . . Under the circumstances, we hold that a hearing is not required and that the interests of society, in promoting a better school system, and in protecting the rights of the individual, are best served by the solution we put forth.[69]

Although this decision is not directly founded on the expectancy theory, it is quite relevant to it. The court cited cases that rely on that theory and cases that rejected it, but this court could not mention it. It was obvious at an early stage in the opinion that the Court was to find for the teacher, even though the New Hampshire Law and the contractual dismissal procedures in question were properly followed, and, in fact, it should be noted that neither were declared unconstitutional. To so find, this court could not admit the expectancy theory, as the teacher was only employed for two years in that system, and there was no other basis for the finding of an expectancy as a fact. To have a rationale for its predetermined judgment the court had to rely on the purely subjective balance theory.

Thus, although this case does not mention or rely on the expectancy theory, it can be cited for the fact of its existence by the manner in which the court so precisely avoided facing it in order to have a rationale for a pre-determined judgment. To recognize the theory of expectancy as it existed in the case citations it so carefully listed, would prevent its pre-determined judgment. Further, it at least provides the probationer a compromise in the form of a guarantee of an expectancy of a statement of cause, which is a major benefit of tenure or an expectancy of continued employment. If the probationer finds the administrative cause is constitutionally impermissible, he may then resort to the judicial process. The court felt this use of administrative remedies prior to the resort to the judicial process important in light of *Dunham v. Crosby*.[70] This case is particularly interesting as to expectancy rights of the probationer in that it creates the mathematical improbability of placing the first (circuit) exactly halfway between the fourth (circuit) and the tenth (circuit); it modifies the minimum due process of Ferguson and Orr to include notice and cause, but not a formal hearing; it has excluded the initial judicial formal hearing, but seems to encourage an informal hearing at that point in time between the statement of charges and the possible resort to the judicial process; it arrives at a similar due process benefit as is available by the expectancy theory, without recognizing the existence of that theory; it provides something for everyone, the liberals, conservatives, moderates, teachers, administrators and school boards (trustees), any one of which may cite this case as authority for their view. It is, in effect, a case for all men.

In any event, the expectancy theory appears to be an existing legally enforceable right available in Federal courts, with the only unresolved

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[68] *Id.*

[69] *Id.* at 1188.

[70] 435 F. 2d 1177 (1st Cir. 1970).

local issues being the extent of benefits conferred on the probationer, which at this time vary with the district and circuit. Conclusions, in an unsettled and rapidly growing decisional law area are impractical. Observations, or definitive trends are appropriate, and are subject to the usual errors of prophesy. The cited cases appear to be the extent of such cases that directly recognize the expectancy of continued employment theory, either by admission, or denial, or by direct and deliberate avoidance of it in order to rationalize a foregone conclusion. It appears certain, based on the unequivocal state court decisions of *Decanio* and *Fooden,* that the expectancy theory has little hope of a future in state court proceedings. Teachers who rely on it must seek their remedy in federal courts. The exact basis for federal jurisdiction is rather vague, and the judge in equity, who prefers flexibility can to an extent rely on the circuit of his choice, and follow the existing trend of creating his own law by decree. Citations are available to support any view on the spectrum.

As a trend, there is little question that time will favor the teachers to the extent that the initial contract of employment will be tantamount to judicial tenure.[71] The new judicial tenure under the expectancy theory appears to have reached a point of development such that certain benefits are descriptive and vested. Assuming non constitutional violations, probationers who can establish the expectancy as a fact can at least expect adequate notice and a statement of cause. Whether this has to be in writing is still questionable,[72] but it is at least advisable to do so.

The issues of a necessity for and type of hearing are somewhat cloudy, possibly due to the variety of types:

a) an informal administrative hearing;

b) a formal administrative hearing;

c) a judicial hearing to determine whether there was a proper administrative hearing (due process);

d) a judicial hearing to determine cause (substantive);

e) a judicial hearing to determine the validity of the stated administrative cause (discretion and judgment of the board).

At the very least there should be an informal administrative hearing to discuss and advise as to cause. If the teacher so requests, depending on the jurisdiction, a formal hearing may or may not be advisable. This absolute equivocation is the result of the present state of uncertainty in this area of developing subjective decisional law.

Beyond this, the advice of *Ferguson, Drown,* and *Orr* would best be followed by any administration such that in the event of a federal suit, there is adequate documentation (*sine qua non*). Fortunately, the adequate documentation recommendation protects both the teacher and the

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[71] *See* Committee on Academic Freedom and Tenure, *Procedural Standards in the Renewal or Non-Renewal of Faculty Appointments,* 56 A.A.U.P. BULL., Spring 1970, at 21. Note: These standards were adopted in substance at the A.A.U.P. meeting in the Spring of 1971.

[72] Henson v. City of St. Francis, 322 F. Supp. 1034 (E.D. Wis. 1970).

administration. The merely incompetent teacher would be advised to engage in some sort of political activity in order to assure himself of at least a "mixed reasons" situation, which, in some federal courts will prevent dismissal at all. Under certain conditions faculty activists may migrate to favorable federal jurisdictions to assure the application of the expectancy theory. School administrators, after a series of initial shocks will of course be quick to learn and adapt—the survival law of nature. The most obvious projected course will be to draft more specific faculty rules and more precise written contractual specifications that will be "judicial-proof." They will begin to keep more detailed records of the teacher's day to day activities. If it appears that the societal reaction to more liberalism is more repression, such is the course of human nature and political history.