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ABSTRACT

This chapter provides an overview of legislation and litigation relating to reduction in force (RIF) with a focus on cases decided since 1980. State statutes continue to be the primary source of the law concerning RIF, so a table is provided for these statutes and their various provisions. These statutes include the dismissla-type, and the less numerous layoff-type, with provisions for recall or restoration. The most common statutory reasons for RIF are enrollment decline, followed by fiscal or budgetary constraints, reorganization or consolidation of school districts, reduction in the number of teaching positions, curricular changes, and the catchall provision, "other good or just cause." Nonstatutory reasons for RIF may be included in collective bargaining agreements. Courts have made clear, however, that they will not tolerate school boards' use of RIF as a fictitious pretext for discharging a teacher on other grounds. Once a bona fide reason for RIF is established, the next decision is the proper order of RIF. Criteria in various statutes include tenure status, seniority, and other formulae such as seniority-plus-merit. Limits on these criteria include realignment clauses, sex balance, and affirmative action. Other issues discussed include due process requirements for RIF and recall rights. The chapter concludes with nine summary generalizations about the legal status of RIF. (TE)

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The Law on Reduction In Force: An Overview and Update

Perry A. Zirkel

A 1980 monograph provides a detailed analysis of legislation and litigation relating to reduction in force (RIF).[1] This chapter will provide an overview of the prior material covered in the monograph and a focus on cases decided since 1980.

A glance at the literature reveals that the widespread problem of and local response to RIF have remained matters of substantial concern.[2] The incidence of reported court cases further reflects the expanding interest in this area. A reading of these court decisions also reveals that state statutes continue to be the primary source of the law concerning RIF. Thus they are an appropriate starting point for this chapter. Other sources of law, such as constitutional protections and collective bargaining agreements, will be included in the summary of the relevant case law.

The primary focus of the chapter will be on the loss of positions by public school teachers for nonpersonal reasons (in contrast to such personal reasons as incompetency, immorality, or insubordination).[3] Related actions, such as the demotion of administrators based on budgetary cutbacks, will be included only as they relate to the primary focus.

Overview of RIF Statutes

Although seldom labeled expressly as "reduction-in-force" requirements, such provisions are often found in tenure laws or other

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teacher employment statutes. The scope and specificity of these provisions vary considerably. A primary distinction exists between those statutes that permanently say "adiós" through terms like dismissal, nonrenewal, or termination, and those that, more hopefully, say "hasta la vista" through terms like suspension, layoff, leave, or furlough. Statutes in the dismissal-type category include those of Alabama, Colorado, Connecticut, Delaware, Kansas, Maine, Massachusetts, Nevada, and Virginia. Less numerous are statutes in the suspension-type category, such as those in Kentucky, Minnesota, Pennsylvania, and Rhode Island, which typically have provisions for recall or restoration.

Table 1 (pages 174-175) shows the variations in the RIF statutory pattern across the 50 states. For a more complete interpretation, readers are urged to examine the specific wording of their respective state statutes in consultation with an appropriate attorney.

A large majority of states (42) have some form of statutory RIF provisions, and some of these statutory reasons for RIF overlap. The most common statutory reason for RIF is decline in enrollment (22). Other reasons are fiscal or budgetary constraints (7); reorganization or consolidation of school districts (10); change in the number of teaching positions (8); curtailment or alteration of program or services (6); discretion of the school board (9); and the catchall category of "good or just" cause (16).

The order of release is statutorily specified in 18 states. Six states specify that nontenured employees must be released before their tenured colleagues within their area(s) of qualification. Ten states have statutes that require that RIF be accomplished within the same area(s) of qualification in inverse order of seniority. No state statutorily specifies merit as the sole, overriding criterion for determining who will be released; therefore, most statutes leave the matter of merit up to local policy or bargained agreement and to the common law of the courts. The six states in the "other" column have legislated special provisions for order of release. For example, California's statute formerly called for a lottery method in situations where two persons had the same seniority, but this method was replaced recently with an amendment that stipulates the determination be based on "the needs of the district and students." Rhode Island's statute provides a limited exception to seniority for teachers needed in technical subjects. Florida's statute lists several merit-type criteria such as efficiency and capacity to meet the educational needs of the community as among the criteria to be used, but otherwise leaves the order of release to local school board discretion. Louisiana's statute specifically states that seniority is not relevant. Oregon's legislation does not specify an order for release but has a seniority-plus-merit formula for the transfer of employees in RIF situa-

tions. Missouri provides for merit as the criterion for retention among tenured teachers.

Sixteen of the "hasta la vista" statutes establish the order for recalling suspended teachers, should vacancies arise for which they are qualified. Eight states have mandated that suspended teachers be given first consideration for subsequent vacancies in their area(s) of qualification. However, 11 states are more strict, specifying inverse seniority as the determining factor for recall to such vacancies. Michigan and Minnesota provide that suspended teachers be reinstated for the first vacancy for which they are qualified. Missouri accords tenured teachers who were laid off priority for recall over nontenured teachers.

These various legislative patterns take on specific meaning in terms of what they do and do not state when subject to litigation. Below are summarized court decisions, with an emphasis on cases decided since 1980, in the areas of reasons for RIF, order of release, and order of recall, plus one other major area — due process procedures. Within each of these four areas, other nonstatutory contexts, such as relevant constitutional provisions and local collective bargaining agreements, will also be discussed.

Statutory Reasons for RIF

Enrollment Decline. In a Pennsylvania case that tested that state's requirement of a "substantial enrollment decline" as a reason for RIF, an intermediate appellate court ruled that a five-year reduction in school district population from 3,443 to 3,064 (10%) was sufficient to meet the statutory standard.[4] Although not cited by this court, previously recorded decisions on this issue provided a range of enrollment declines, which the facts of this case fit.[5] Thus the judicial deference typical to this area was consistent, although not extended, with this decision.

California's RIF statute is complex. A decline in average daily attendance is one of two permissible reasons under the statute. The second — reduction or discontinuance of particular kinds of services — is discussed in a subsequent section.[6] Previous cases have held that positively assured attrition must be considered when calculating the number of certified employees who can be laid off due to a decline in average daily attendance.[7] In a recent California case the intermediate appellate court held that certified employees laid off because of the second statutory reason does not affect the number of such employees who can be laid off based on the attendance-decline reason.[8]

Fiscal or Budgetary Basis. Although there have not been any new decisions in this area, two relatively recent cases decided prior to 1980 illustrate two important lessons. In a Pennsylvania case, the intermediate appellate court reversed the trial court decision that had sustained the

Table 1. OVERVIEW OF STATE STATUTORY PROVISIONS FOR RIF

	Proper Reasons							Order of Release			Order of Restoration		
	Enrollment	*Fiscal*	*Reorganization*	*Elim. of Position*	*Curric. Change*	*Board Discretion*	*Other*	*Nontenured First*	*Inverse Seniority*	*Other*	*Preference List*	*Inverse Seniority*	*Other*
Alabama						X							
Alaska	X												
Arizona	X	X										X	
Arkansas							X						
California	X				X			X	X	X		X	
Colorado				X			X	X					
Connecticut				X			X						
Delaware	X				X								
Florida			X			X				X			
Georgia	X				X								
Hawaii	X						X	X			X	X	
Idaho						X							
Illinois						X		X			X		
Indiana						X							
Iowa							X						
Kansas													
Kentucky	X		X						X			X	
Louisiana						X				X			
Maine				X									
Maryland													
Massachusetts	X						X						
Michigan							X						X
Minnesota	X	X	X•	X					X		X	X•	X

Mississippi														
Missouri	X	X	X					X		X	X			X
Montana						X								
Nebraska				X			X							
Nevada	X		X											
New Hampshire														
New Jersey	X	X	X				X		X					
New Mexico							X		X					
New York	X	X		X					X		X	X		
North Carolina	X		X	X							X			
North Dakota						X								
Ohio	X		X				X	X	X			X		
Oklahoma														
Oregon	X	X			X					X				
Pennsylvania	X		X		X				X			X		
Rhode Island	X									X		X		
South Carolina														
South Dakota														
Tennessee	X						X				X			
Texas				X					X					
Utah	X	X	X		X									
Vermont							X							
Virginia							X							
Washington							X							
West Virginia						X					X	X		
Wisconsin	X								X†			X†		
Wyoming	X						X							
District of Columbia	(X)		(X)		(X)		(X)			(X)	(X)			
TOTALS	22	7	10	8	6	9	16	6	10	6	8	11	3	

*O[illegible] first-class city districts

†O[illegible] vaukee

suspension of a business education teacher based on the school board's purported managerial right to release employees for reasons of economy. Pointing out that the governing statute specified three reasons for RIF, which do not include fiscal grounds, the court reinstated the teacher with back pay, commenting:

> We can fully appreciate the unwillingness of the hearing court to reach a result in this case where a teacher whose . . . services are no longer needed, and who will have no scholars to teach must be paid his salary indefinitely. However, according to the decided cases, the legislature has so commanded.[9]

The judgment was affirmed by an equally divided Pennsylvania Supreme Court.[10] The lesson from this case is that if the state statute expressly enumerates proper reasons, they should be strictly followed.

Where fiscal grounds are specified in the statute and followed, the question becomes a matter of proof, i.e., whether the actual circumstances meet the statutory standard for fiscal justification. For example, Missouri statutes specify "insufficient funds" as a reason for RIF. In interpreting this language, a Missouri appellate court held that a local board had satisfied this standard when it placed 10 nontenured teachers on leave because of an "erosion of expected sources of revenue."[11] Thus, as in the college and university sector where RIF is commonly termed "fiscal exigency," courts tend to give local authorities the benefit of the doubt.[12]

Reorganization or Consolidation of School Districts. When a new district is created by the consolidation of former school districts, the question arises as to whether tenured teachers carry their permanent status into the new district. Even where statutes attempt to provide the answer, courts have split in interpreting cases where ambiguity exists. For example, the New Mexico Supreme Court interpreted an earlier version of its present statute in such a way that the consolidated district was considered a continuation of the constituent districts, thus requiring the preservation of tenure rights.[13] In contrast, the Maine Supreme Court held that where a new regional school district was created by special legislation rather than the general laws of the state, teachers in the constituent area schools had no tenure rights with respect to the new school district.[14]

Where reorganization rather than consolidation is the reason for RIF, teachers may seek refuge in a strict interpretation of the statute. Such an approach was successful in a recent case, where an equally divided Pennsylvania Supreme Court upheld the reinstatement of two full-time and two part-time teachers suspended in a discretionary district reorganization. The reorganization was found not to qualify as a curricular alteration or required reorganization as specified in Pennsylvania's statute.[15]

Reduction in the Number of Teaching Positions. Elimination of position as a rationale for RIF inevitably leaves ambiguity in statutes that specify it as a basis. Inasmuch as elimination of a position could result from a variety of reasons, the scope of board discretion becomes the critical question. For example, in a recent case in Maine a local school board voted to limit its budget for the academic year to a two-mill increase, which resulted in the elimination of two teaching positions. In rejecting the suit of a tenured teacher whose position had been eliminated, the state's highest court ruled that:

> In reserving to the school board the right to terminate a contract when changes in local conditions warrant the elimination of the teaching position for which the contract was made, [Maine's statute] imposes on the board only an implied duty to exercise that reserved power in good faith for the best interests of education in the district.[16]

The Connecticut Supreme Court similarly sustained a local board's discretion in demoting a reading supervisor and refusing to hear her arguments as to the educational value of her position.[17] The result in other jurisdictions may differ from this posture, depending on such factors as the specific legislative language and history and the particular factual circumstances.

Other cases based on the elimination of position often involve administrators and specialists who allege that their positions have been merely disguised rather than dissolved. Although results again vary across statutory jurisdictions, in general, courts tend to accept the board's purported abolition of a position where the duties were largely redistributed to existing personnel; but they have looked with disfavor when the duties are allocated in the form of one or more functionally equivalent new administrative positions.[18] Similarly, courts have tended to look with disfavor on the elimination of teachers' positions when new teachers are hired for suspiciously similar positions.[19]

Curricular Changes. California continues to take the lead in this specific area of litigation. Its statute provides as reason for RIF the "reduction or discontinuance of particular kinds of services." In one recent case a California appeals court refused to interpret this phrase as permitting a school district to terminate a group of school nurses by transferring some of their particular services (e.g., health instruction) to other employees.[20] The court indicated that RIF could be justified by a difference in the method of providing such services or in the services themselves, but that merely a change in the persons providing these services was not sufficient to constitute such a difference. In a more recent case the appellate court did interpret the provision more broadly, allowing for its applicability to a curricular offering that could not be eliminated but could be reduced to a minimum level according to state requirements.[21]

Pennsylvania is another of the relatively few states providing a cur-

riculum curtailment reason for RIF. In a long-litigated case two teachers filed a grievance challenging their suspension under a collective bargaining agreement that incorporated the RIF legislation. The school district contended that the matter was not arbitrable, but the Pennsylvania Supreme Court ultimately ordered the district to submit the issue to arbitration.[22] After the arbitrator upheld the suspension, the local teachers association challenged his decision because the suspensions were not prompted by a substantial decrease in enrollment. The state's intermediate appellate court upheld the arbitrator, based on his finding that the suspensions were in conformity with the specific requirements of the curriculum curtailment provision of the RIF statute.[23]

Other Good or Just Cause. Although board discretion as a reason for RIF has not been reported in recent court decisions, the other catchall provision in many state statutes, "other good or just cause," has been the basis for continuing litigation. Courts have tended to interpret such umbrella phrases broadly. For example, the Massachusetts Court of Appeals held that a school committee possessed the power under the statute's "good cause" provision to abolish a physical education teacher's position on fiscal grounds.[24] Similarly, Iowa's courts have interpeted the statutory term "just cause" to encompass not only personal faults as grounds for dismissal but also RIF reasons, such as budgetary needs.[25]

Nonstatutory Reasons for RIF

Collective Agreements. Local collective bargaining agreements sometimes specify reasons for RIF.[26] For example, a collective bargaining agreement for a school district in Michigan permitted a reduction in staff in the event of a reduction in financial resources. However, according to the state intermediate court of appeals, the phrase "reduction in financial resources" in this context did not apply to a reduction in the projected surplus of the district but rather applied when there was a shortfall in revenue.[27] In another case the collective agreement required the local board to negotiate procedures in the event of RIF, but it did not specify the justifying reasons. Looking to the statutory backdrop, the court concluded that RIF provisions in the contract referred to the decrease in teachers due to circumstances such as declining enrollments, not voluntary retirements or resignations. Inasmuch as the latter circumstances were at issue in this case, negotiations were not required.[28]

Bad Faith/Pretext. Whether the permissible bases of RIF stem from statutes, collective bargaining agreements, or other sources, courts have made clear that "we could not countenance a subterfuge by which an unscrupulous school board would use a fictitious necessity for discharging a teacher."[29] Proving pretext is not an easy matter. Courts tend not to probe aggressively for underlying impermissible motives if there

seems to be sufficient evidence supporting the stated permissible reasons. For instance, in response to the plaintiff-teacher's claim that the real reason for his nonrenewal was the personal antagonism of the board members toward him rather than declining enrollment and diminishing funds, the Supreme Court of North Dakota stated:

> [Our precedent] requires only that the reasons for nonrenewal be sufficient to justify the contemplated action. That there may be other additional reasons for nonrenewal is immaterial.[30]

Similarly, an Iowa appellate court found preponderant evidence of justifiable reasons, reversing the trial court's finding of subterfuge.[31] Further, a federal district judge overturned a jury verdict in favor of a kindergarten teacher who claimed that she would not have been released except for the fact that she had filed a grievance against the superintendent. In strong language, the judge accused the jury of "twisted logic" and the plaintiff of "point[ing] to a phantom constitutional 'pea' under a hastily shifted shell," and concluded: "Perversions of the Constitution, like violations of the Constitution, should not be tolerated."[32] However, when faced with an RIF case (called "excessing" in New York City) involving a school district business administrator, who was also in the middle of protracted proceedings to terminate him for alleged incompetency and improper conduct, New York's intermediate appellate court found that there was no showing of a budgetary need for eliminating his position and that the proceeding against him instead stemmed from a personal dispute with the superintendent. Thus the court awarded him back pay and reinstatement and reminded the school authorities that "[e]xcessing may not be used as a device to resolve disciplinary problems."[33]

Some other courts have also found RIF to be a pretext for a violation of constitutional rights, statutory protections, or collective bargaining rights. Thus a federal appeals court upheld the reinstatement of a teacher found to be released in retaliation for her exercise of First Amendment rights.[34] A Michigan state appellate court upheld the reinstatement of a teacher found to be released based on his leadership of the local bargaining unit.[35] Statutory rights also extend to federal antidiscrimination legislation, as exemplified by recent decisions finding the Title VII claims of reassigned female plaintiffs sufficient to at least go to the jury.[36]

Order of Release

Once a bona fide reason for RIF is established, the next decision is the proper order of RIF. As stated earlier, some statutes clearly provide the order of RIF in terms of tenure, seniority, or other criteria. For example, 10 states by statute give teachers "bumping" rights over their less

senior colleagues within the same area of qualification. The interpretation of these criteria has caused a spate of litigation.

Tenure Status. In cases involving the order of RIF between tenured and nontenured teachers where the statute is silent or ambiguous, the overwhelming majority of courts have accorded tenured teachers a priority.[37] However, the Maine Supreme Court recently ruled that the state statute, which is silent on this matter, does not implicitly require that probationary teachers be terminated before tenured teachers.[38]

Where local districts attempt to fill the statutory void by board policy or collective agreements, exceptions to the overall trend favoring tenured teachers must be clearly specified and applied. For example, a school board in South Dakota established a policy giving priority to continuing contract teachers over those not on continuing contract, with an exception for staff members needed to maintain an existing program. When a teacher with 11 years of service was released and a teacher not on continuing contract was assigned to part of the math program that the released teacher had instructed, the state supreme court held that the school board failed to support the exception with sufficient evidence.[39]

Inverse Seniority.[40] Where statutes are ambiguous on the order of RIF, courts have tended to favor a seniority standard within or across the tenured and nontenured categories.[41] Unlike the trend favoring tenured over nontenured teachers, courts have not markedly moved to read inverse seniority into statutes that are silent on the matter.[42] Further, courts have refused to carry over the seniority standard of RIF statutes to cases of demotion and transfer.[43]

A California appellate court departed from a strict seniority standard in its interpretation of a statutory provision that prohibits termination of senior employees "while any probationary employee, or any employee with less seniority, is retained to render a *service which said permanent employee is certificated and competent to render* [emphasis added]." The court construed this statutory language to authorize not only the bumping of junior employees by senior employees possessing the same skills, but also the retention of junior employees and administrators if they possessed a "special credential or needed skill."[44] In other cases administrators were similarly protected from the application of the seniority standard in California's complex RIF statute, based on a confidential relationship or special credential.[45] However, a California court recently rejected a local board's extension of "skipping rights" to junior teachers who were competent in Spanish but were not employed in a bilingual program, reasoning that such language needs applied to the statute's tie-breaking standard rather than to its "certificated and competent" language.[46]

Other Criteria. In 1979 Pennsylvania amended its statute to eliminate the merit portion of a seniority-plus-merit formula that had been used as

the basis for determining the order of teacher layoffs. Under the old formula, seniority was quantitatively combined with merit when there was a substantial difference in teacher efficiency ratings, but seniority was used alone when there was no substantial difference in ratings. A case that after several years recently reached the Pennsylvania Supreme Court illustrates some of the difficulties of applying the old statutory standard. In this case the court held that two teachers were improperly released, because an eight-point difference in unweighted efficiency ratings was not found to be a substantial basis for suspending one of the plaintiff-teachers and because the efficiency rating for the other plaintiff-teacher was neither supported by anecdotal records nor based directly on classroom observations.[47] Further, a lower appeals court in Pennsylvania interpreted the old statutory provision as authorizing the use of seniority as the sole criterion where there was no substantial difference between prior performance evaluations and none was completed for the current year.[48]

As stated earlier, some state statutes still retain at least a limited role for merit. Oregon's statute requires the board, prior to RIF, to "make every effort" to transfer teachers, based on merit and seniority, to other positions for which they qualify. Under this statute, the state's intermediate appellate court held that the board failed to meet its burden when it "retained a teacher with factual but not legal qualifications while dismissing a permanent teacher with legal qualifications."[49] The plaintiff-teacher had certification in industrial arts but his experience in this area was limited to teaching woodworking and drafting courses, which were experiencing declining enrollments. The retained teacher, who had less seniority than the plaintiff, had college training and teaching experience in mechanical industrial arts courses, which were fully enrolled, but he had certification only in social studies. Thus seniority prevailed where merit was perhaps factual, but not legal.

In an Iowa case both merit and seniority were used in an RIF provision in a collective bargaining agreement. Under this provision the least qualified teacher was to be released first, but in the event of relatively equal qualifications, the teacher with least seniority in the affected area was to be released. The appellate court upheld the board's discretion in defining qualifications objectively by according points to years of experience and training, thus allowing seniority a partial role in the merit step, as well as the exclusive role in the second step, of the contractual sequence.[50]

Some authorities advocate that in the absence of statutory or contractual limitations, the school board should adopt an RIF policy that utilizes other factors than strict seniority to determine who will be released.[51] Illustrative of such an approach is a school board in Nebraska that adopted a list of several criteria in priority order for determining

RIF. The board's list included contribution to the district's extracurricular program and accorded it a higher priority than seniority. The state supreme court upheld the board's discretion to use contribution to the activity program as an RIF criterion in the absence of statutory or contractual restrictions.[52]

Scope of Bumping. Determining who will be released depends on not only the criteria for retention but also the scope of their application. Bumping rights are typically limited to the area(s) in which the affected teacher is qualified. In addition to legal qualification, another issue is whether and to what extent boards have a duty to realign their staff to effectuate bumping rights. A final issue is the relationship of RIF requirements to affirmative action mandates.

Courts have varied considerably in the interpretation they have accorded to the term "qualified" as it relates to RIF. They are generally agreed that certification is necessary, but some courts have not regarded it as sufficient. Thus, as the aforementioned Oregon case illustrates, factual and legal qualifications are not necessarily synonymous.[53]

Some courts have taken a restrictive view of legal qualification, limiting it solely to certification. For example, the Iowa Supreme Court interpreted the phrase "skill, ability, competence and qualifications" in a collective bargaining agreement RIF clause as distinguishing "qualifications" from the preceding terms, "skill, ability, competence," and thus limiting it to state certification. Inasmuch as the two released teachers in this case were certified to teach junior high as well as elementary school, the board was held to violate the collective bargaining contract by comparing them only to teachers in grades K-6 rather than those in K-8.[54] Similarly, the Minnesota Supreme Court interpreted "other positions . . . for which [the teacher] is qualified" in the RIF statute as intending bumping cross-departmentally where said teacher has more than one license, thus equating qualification with certification.[55]

The scope of the qualified comparison group becomes more complex with the introduction of the concept of "tenure area" in New York's seniority-based RIF statute. Some courts have used distinctions such as vertical (special) versus horizontal (academic) tenure areas to restrict the scope of bumping,[56] whereas other courts have been more expansive in interpreting New York's complex statutory scheme.[57]

In other contexts, some courts have gone beyond certification areas to require a higher standard for legal qualification. In a Pennsylvania case the intermediate appellate court upheld the additional consideration of maintaining a balance between male and female physical education teachers.[58] Similarly, courts in Illinois and Iowa have upheld the consideration of academic training as an element of legal qualification based on state education department regulations and collective bargaining agreement language, respectively.[59]

A related issue impinging on the scope of bumping rights is whether and to what extent a school board has a duty to realign staff to retain teachers on the basis of seniority as required by statute or bargaining agreement. Pennsylvania is a leading jurisdiction for development of this issue, starting with a 1956 decision by the state supreme court wherein this duty was established,[60] and extending through a recent amendment to the RIF statute, which requires the school district to "realign its professional staff so as to insure that more senior employees are provided with the opportunity to fill positions for which they are certified and which are being filled by less senior employees."[61] Intervening lower court decisions have generally interpreted the supreme court's *Welsko* decision restrictively. For example, in upholding the board's rejection of various realignment plans submitted by senior teachers who were slated for RIF, the intermediate appellate court stated: "*Welsko* does not require the board to realign teachers where such realignment is impractical, and we may not substitute our judgment for that of the School Board in this respect."[62] In another case the court allowed considerations of factual qualifications to determine whether realignment was practical. The court upheld the board's rejection of the two plans proferred by the plaintiff based on the fact that under both of them the plaintiff would be bumping another teacher into a position for which the other teacher was certified but had little or no recent experience.[63] In a case decided after the enactment of the aforementioned amendment, the court rejected an unrestricted reading of the new statutory provision, incorporating instead the limitations of the preceding case law. Thus emphasizing the impracticality of realignment across multiple certifications, the court concluded that "its effect on the educational process within the school district must be considered."[64]

Oregon's statute explicitly places a similar duty on boards facing RIF, stating that "[s]chool districts shall make every effort to transfer teachers of courses scheduled for discontinuance to other positions for which they are qualified."[65] An Oregon appeals court interpreted this statute as requiring only a reasonable effort, not extending to creating a vacancy by reshuffling, which the teacher could only fill after upgrading his qualifications, and also not extending to transferring him to a classified position that did not require teaching.[66]

Courts in Illinois have also faced the realignment issue, but without the benefit of statutory language explicitly establishing such a duty. In the absence of such language, the intermediate courts have found a limited realignment duty applicable to boards in RIF situations. In two recent cases Illinois appellate courts rejected realignment to preserve the positions of tenured plaintiffs where they were not strictly qualified under Illinois certification regulations for the reassignments that they proposed.[67] In a third case another judicial district of the same appellate

level found failure to carry out realignment to be "palpably arbitrary and capricious" since "[t]he simple transposition of one class in English for one class in journalism [for which there was no special certification] would have had the effect of enabling each of the then existing faculty members to maintain a full class load without the necessity of dismissing [any of them]."[68]

Courts in other jurisdictions have varied in their resolution of this issue; although in the absence of applicable statutory or local contract language, they have not read in a substantial realignment duty. In a South Dakota case the state's highest court interpreted the school district's RIF policy to require reassignment of one course to effectuate the bumping rights of a tenured teacher.[69] Conversely, an Iowa appellate court rejected the plaintiff's proposed shifting of two other teachers to vacancies caused by resignations, finding the RIF clause in the collective bargaining agreement did not place "an affirmative duty on the Board to perform a wholesale arrangement of teaching assignments every time a vacancy occurs."[70]

A third possible limit on the effectuation of traditional RIF criteria, such as seniority and tenure status, is the principle of affirmative action in employing minority teachers.[71] Under a last-hired-first-fired RIF procedure, minority teachers would often be affected disproportionately due to earlier discriminatory barriers to their securing positions. There has been limited litigation, all of recent vintage, to reach an accommodation between these principles.

The leading cases have arisen within the context of court-ordered desegregation plans that incorporate percentage goals for the employment of minority educators. In a series of decisions by a federal district court in Michigan, the subordination of statutory and contractual seniority standards to a court-ordered, constitutionally mandated desegregation remedy was made clear.[72] The court based its reasoning on the educational interests of the students, concluding that the priority on attaining and retaining a goal of 20% of black teachers (where the student body was 28.5% black but the layoff had reduced the proportion of black teachers to 8.9%) in the Kalamazoo school district (where only 2% of the staff was black when the 1973 desegregation remedy was mandated) was needed to "provide the students with role models . . . [and] to prove to its Black students that Blacks are not always the ones who will bear the brunt of layoffs during times of financial hardship."[73] This role-model rationale was maintained through two successive rounds of layoffs in 1980-81 and 1981-82, and through the intervening grievances by the teacher association and individual nonminority teachers. However, in 1983 the Sixth Circuit Court of Appeals vacated and remanded the district court's decision in the *Kalamazoo* case. The appeals court ruled

that a racial remedy may override seniority and tenure rights only where it is necessary, not merely reasonable.[74]

The rationale and result of the lower court's *Kalamazoo* decision were followed in an intervening opinion by the First Circuit Court of Appeals, affirming an order by District Judge Arthur Garrity, Jr. The opinion was that when RIF became necessary in the Boston schools, the school committee was required to maintain the current percentage of black teachers and administrators, many of whom had been hired in response to an affirmative action decree entered in the Boston school desegregation case.[75] The Boston Teachers Union, with the support of the American Federation of Teachers, asked the U.S. Supreme Court to review the First Circuit Court's decision, but in an October 1982 decision the Court declined to do so.[76] In a less publicized reverse discrimination case, a federal district court in New York similarly cited the *Kalamazoo* case and upheld the subordination of contractual and statutory dictates to those of a court-ordered desegregation remedy that mandated the hiring, recall, and promotion of underrepresented black teachers and administrators.[77] In light of the reversal of the Sixth Circuit Court's decision and the absence of a Supreme Court decision, this area of the law is in a state of flux.

A variation of competing interests in RIF actions occurs when the collective bargaining agreement incorporates an affirmative action layoff plan.[78] In such a case a federal district court in Michigan dismissed the constitutional and statutory claims of nonminority teachers, ruling that a prior judicial finding of race discrimination is not a prerequisite where there is substantial and chronic underrepresentation of minority teachers.[79]

It is less clear what the resolution of the competing interests would be in the absence of a court-ordered or contractual affirmative action provision.[80] In Cambridge, Mass., the school district adopted an affirmative action policy as part of a voluntary desegregation plan. However, the collective bargaining agreement called for seniority-based RIF. When the conflict between the policy and the contract arose in the form of a suit, the parties negotiated an out-of-court settlement whereby the affirmative action goals and procedures were supported.[81]

Guidance about these competing interests, particularly in the circumstances of a conflict between court-ordered affirmative action and statutorily established seniority systems, was expected from the Supreme Court as a result of its decision to hear the case of *Boston Firefighters Union* v. *Boston NAACP*,[82] in which the lower courts prohibited the police and fire departments from reducing the percentage of blacks and Hispanics below the level obtaining at the commencement of RIF despite a seniority-based state civil service statute; but the Court subsequently found the case to be moot.

Procedural Due Process

In addition to the questions of "why" and "who" in RIF policies, there is the issue of "how." Most states statutorily provide some form of procedural due process for educational personnel who are to be dismissed, namely, proper notice and the right to a hearing. These provisions typically are found in tenure statutes or administrative procedure acts rather than in statutory RIF policies. Thus the issues involved are whether the statutory due process provisions are applicable to RIF and, if not, whether the due process clause of the Constitution provides protection in such circumstances.

As discussed in chapter 4, the Supreme Court has established a two-part test relative to constitutional protections: 1) whether constitutional due process applies depends on whether the plaintiff shows either an objective "property" right in continued employment or a sufficient "liberty" interest in terms of his or her reputation, and 2) how much such process is due depends in part on the nature of the individual's interest at stake. Generally, the tenure and administrative procedure acts as well as the constitutional due process clause are not interpreted expansively in favor of RIF plaintiffs because 1) RIF statutes assume discontinuity rather than continuity in employment; 2) RIF is considered to be impersonal, that is, primarily attributable to the school district's condition rather than the merits of the individual teacher; and 3) under some statutes RIF implicates a lesser individual interest, i.e., suspension rather than dismissal. The bulk of the case law in this area is covered elsewhere;[83] only the issues raised in recent cases are summarized below.

Two recent decisions serve as examples of the threshold statutory and constitutional issues. In a Massachusetts case the state supreme court read the RIF legislation as an exception to the procedural requirements of the tenure statute. Thus the plaintiff, a tenured physical education teacher, was held to be entitled neither to the procedural guarantees of the tenure act nor — absent a statutory or contractual right to expect continued employment — to those of the U.S. Constitution.[84] In an Ohio case the federal district court dismissed the constitutional claims of two high school principals who had been demoted due to declining enrollments, finding that the RIF statute negated any property right to continued employment.[85] The court relied on an earlier decision by the Ohio Supreme Court, which held that the due process procedures of the tenure act were not applicable to suspensions under the RIF statutes and that the suspension procedure did not deprive the suspended teacher of a protected property interest.[86] Other recent decisions tend to deal with issues of notice or hearing requirements.

Notice. Lack of statutory compliance was alleged in two recent cases concerning proper notice. In a Michigan case the court of appeals held

that the state's fair dismissal act, which requires that a nontenured teacher receive notice of unsatisfactory service at least 60 days prior to nonrenewal, does not apply to the nonrenewal of a nontenured teacher based solely on economic grounds.[87] Even where statutory nonrenewal procedures are applicable, notice requirements in some cases may not be strictly enforced in favor of suspended teachers. For example, in an Arkansas case, where the board of education accidentally sent a reappointment letter to a guidance counselor on the RIF list because of a computer programming error, the Eighth Circuit Court of Appeals upheld the district court's finding of "substantial compliance" with the statutory requirement of written notice within 10 days of the close of the school term. The court found such compliance because of two meetings and a letter within the required time period in which administrative personnel explained the mix-up and offered the guidance counselor a teaching position.[88] Because the counselor declined the teaching contract and signed and returned the counseling contract before the end of the school term, the plaintiff was left without any position as a result of the court's decision.

Hearing. The legitimacy of postsuspension hearings and mass hearings under Pennsylvania statute was recently tested at the intermediate appellate court level. In the postsuspension hearing case, the court found that both the tenured and nontenured employees had an enforceable expectation of continued employment, i.e., a property right under state law, entitling them to due process protection. Turning to the question of what process is due, the court analyzed the respective interests, alluded to the nonstigmatizing effect of impersonal reasons, and ruled as follows: "On balance, we conclude that a postsuspension hearing comports with due process by providing a reasonable accommodation of the competing interests."[89] In the other case the court upheld the legality of a mass hearing for 242 tenured employees demoted because of Philadelphia's budget crisis and refused to interpret the demotion statute strictly since the board provided the teachers with the opportunity for an individual postsuspension hearing.[90]

Another Pennsylvania case held that the exclusion of certain expert testimony at a suspended teacher's hearing constituted harmless error since it was merely cumulative to other testimony concerning whether budget cuts could be accomplished in a different way.[91] Other state courts have upheld RIF hearings against challenges to school boards' impartiality.[92] A California court similarly sustained the hearing procedures of a local school board with regard to challenges based on statutory requirements for an open meeting and for reading the transcript and seemed to look to substantial, rather than technical, compliance by the board.[93]

A statement of specific reasons is a related due process safeguard required in some circumstances. Although courts have generally found a requirement to state and support the reasons for undertaking RIF,[94] they have not tended to infer a requirement that boards articulate the reasons for selecting one teacher over another in implementing RIF. For example, the North Dakota Supreme Court refused to interpret that state's statutory requirement that school boards give "maximum consideration to basic fairness and decency" as requiring them to state the reasons for selecting one teacher over another in responding to financial difficulty.[95] Faced with a more explicit statutory scheme, California's intermediate appellate court held that a failure to give a written statement concerning the order of termination did not expand the legal rights and interests of suspended employees.[96]

In one of the few recently reported decisions that produced at least a partial victory on due process grounds for an RIF plaintiff, the Minnesota Supreme Court interpreted the statutory requirement for specific findings of fact and supporting evidence of reasons for RIF to preclude the board from introducing at a belated hearing evidence that occurred after the statutory deadline.[97]

Recall Rights

Due to ample coverage elsewhere,[98] only a sampling of recent cases relating to the recall of teachers subject to RIF will be treated in this section. Litigation in this area generally stems from suspension-type, rather than dismissal-type, RIF statutes. As summarized in Table 1, some statutes specify a preference or priority status for suspended teachers. A larger number specify that recall follows inverse order of seniority among qualified teachers when a vacancy arises. Interpretation of such statutory provisions accounts for the bulk of litigation concerning recall rights. Two recent decisions by the Minnesota Supreme Court are illustrative. In one case a suspended teacher argued that the requirement in the RIF statute for cities of the first class (e.g., Minneapolis) that teachers subject to RIF be given "first consideration" for vacant positions for which they are qualified should be interpreted as requiring recall in inverse seniority order. The teacher pointed out that the standard for layoffs in the same statute was inverse seniority and so was the standard for recall in the statute for cities not of first-class size. The Minnesota Supreme Court disagreed, accepting instead the school district's interpretation that "the statute requires it simply to evaluate a more senior teacher before considering other applicants but that the district retains discretion, when filling a special position, to reject a more senior teacher in favor of one who has the special qualifications required for that position."[99] In the other Minnesota case, the court held that a full-time

teacher who had been suspended and then accepted a part-time position in the district remains on statutory recall status to the extent of the remainder of the full-time position.[100] Here, the teacher had accepted a three-fifths position in one of his areas of certification, physical education. Under Minnesota's statute for cities not of first-class size, the state supreme court held, upon rehearing, that he was entitled to reinstatement to a two-fifths opening in a girls' physical education position over a less experienced teacher, who was female and new to the district. As a comparison to analogous release rights cases reveals,[101] recall rights decisions are roughly but not exactly parallel.

Conclusions

With appropriate cautions for jurisdictional variations, certain generalizations seem to emerge concerning legal aspects of RIF:

1. RIF is primarily a matter of state statutes, thus the specific legislative provision should not be neglected in ascertaining legal developments nationally.
2. Statutory RIF reasons vary within a predictable pattern, ranging from enrollment decline to a catchall "good cause" category.
3. Where an RIF reason is statutorily specified, it should be strictly followed and factually supported.
4. Courts tend to defer to the evidence and decisions of local school boards unless the plaintiff-teacher can show the proferred reason to be a subterfuge for an impermissible basis (e.g., race discrimination or union activity).
5. A minority of statutes specify criteria with respect to the order for RIF. Where such criteria are specified, seniority and tenure status predominate; merit is given a relatively limited role.
6. Where statutes are silent or ambiguous about the order of release, courts tend liberally to read in an inverse seniority standard, to be more restrictive about inferring a tenure priority, and to allow but not generally require other criteria, such as merit.
7. Bumping rights provided by these criteria are limited by the court-construed contours of legal qualification, realignment duty, and affirmative action. Legal qualification generally is interpreted to mean certification; realignment duty is typically limited; and affirmative action tends to take priority over traditional RIF criteria.
8. Courts have tended not to interpret statutory and constitutional procedural due process protections expansively in relation to RIF plaintiffs.
9. Recall rights are legislated and litigated less than release rights, with roughly although not exactly parallel results.

Footnotes

1. P. Zirkel and C. Bargerstock, *The Law on Reduction-in-Force*, (Arlington, Va.: Educational Research Service, 1980). For a less statutory approach and one that formulates a sample local policy, *see* R. Phay, *Reduction in Force: Legal Issues and Recommended Policy* (Topeka, Kans.: National Organization on Legal Problems of Education, 1980).
2. *See, e.g.*, "Record Number of Teachers Face Layoffs," *Instructor* 92 (Sept. 1982):8. For a more conservative report, *see* Toch, "Survey Finds as Few as 6,500 Teacher Layoffs," *Education Week*, 8 September 1982, p. 1. *See also*, Johnson, "Seniority and Schools," *Phi Delta Kappan* (December 1982): 259-64; Toch, "Virginia District's Lay-Off Policy Gives Discretion to Principals," *Education Week*, 28 April 1982, p. 6.
3. E.g., Illinois RIF legislation refers to "honorable dismissal."
4. Andresky v. West Allegheny School Dist., 437 A.2d 1075 (Pa. Commw. 1981).
5. *See e.g.*, Phillippi v. School Dist., 367 A.2d 1133 (Pa. Commw. 1977) (district had a 27% decline over six years); Smith v. Board of School Dir., 328 A.2d 883 (Pa. Commw. 1974) (district had a 15.7% decline over 10 years).
6. *See* notes 20-21 accompanying text.
7. *See, e.g.*, Lewin v. Board of Trustees, 133 Cal. Rptr. 385 (Cal. App. 1976).
8. Brough v. Governing Bd., 173 Cal. Rptr. 729 (Cal. App. 1981).
9. Theros v. Warwick Bd. of School Dir., 401 A.2d 575, 577 (Pa. Commw. 1979); *cf.* Providence Teachers Union v. Donilon, 492 F. Supp. 709 (D.R.I. 1980). The *Donilon* court ordered a more specific statement of reason and, upon request, a hearing where the board suspended teachers for "program reorganization" under the Rhode Island statute, which specifies only declining enrollments as a reason.
10. Warwick Bd. of School Dir. v. Theros, 430 A.2d 208 (Pa. 1981); *see also* Eastern York School Dist. v. Long, 430 A.2d 267 (Pa. 1981) (equally divided state supreme court upheld reinstatement of teacher where reported reason of curriculum curtailment was not sufficient ground); Cumberland-Perry Area Vocational-Technical School Joint Operating Comm. v. Brinser, 430 A.2d 276 (Pa. 1981) (equally divided state supreme court upheld reinstatement of teacher suspended for solely economic reasons).
11. Frimel v. Humphrey, 555 S.W.2d 350, 352 (Mo. App. 1977).
12. *See. e.g.*, VanGieson and Zirkel, "The Law and Fiscal Exigency," *Journal of Teacher Education* 32 (1981):39-40. The term used generically in Great Britain is "redundancy."
13. Hensley v. State Bd. of Educ., 376 P.2d 968 (N.M. 1962); *see also* Nyre v. Joint School Dist., 45 N.W.2d 614 (Wis. 1951); *cf.* Acinapuro v. Board of Coop. Educ. Serv., 455 N.Y.S.2d 275 (Sup. Ct. App. Div. 1982). In this decision a special takeover statute was interpreted broadly to preserve tenure rights.
14. Beckett v. Roderick, 251 A.2d 427 (Me. 1969); *cf.* In re Closing of Jamesburg High School, 415 A.2d 896 (N.J. 1980). The court ruled that

where a school is closed for not meeting state standards and pupils are sent to other districts, tenured teachers have no carryover rights absent agreement by the receiving school districts.

15. Lake Lehman School Dist. v. Cigarski, 430 A.2d 274 (Pa. 1981).
16. Paradis v. School Administrative Dist. No. 33, 446 A.2d 46 (Me. 1982).
17. Yaffe v. Board of Educ., 380 A.2d 1 (Conn. Super. 1977).
18. *Compare, e.g.*, Ryan v. Ambach, 419 N.Y.S.2d 214 (Sup. Ct. App. Div. 1979) (upheld absorption of assistant principal's duties by existing personnel), *with* Board of Educ. v. Niagara Wheatfield Teachers Ass'n, 388 N.Y.S.2d 459 (Sup. Ct. App. Div. 1976) (rejected abolition of a nurse's position where no economy was achieved through the hiring of several health aides).
19. *See, e.g.*, Moser v. Board of Educ., 283 N.W.2d 391 (Neb. 1979).
20. Santa Clara Fed'n of Teachers, Local 2393 v. Governing Bd., 172 Cal. Rptr. 312 (Cal. App. 1981).
21. California Teachers Ass'n v. Board of Trustees, 182 Cal. Rptr. 754 (Cal. App. 1982); *see also* Palos Verdes Faculty Ass'n v. Governing Bd., 179 Cal. Rptr. 572 (Cal. App. 1982).
22. Rylke v. Portage Area School Dist., 375 A.2d 692 (Pa. 1977).
23. In re Portage Area Educ. Ass'n, 432 A.2d 1170 (Pa. Commw. 1981); *see also* Cedonic v. Northern Area Special Purpose Schools, 426 A.2d 186 (Pa. Commw. 1981).
24. School Comm. of Foxborough v. Koski, 391 N.E.2d 708 (Mass. App. 1979); *cf.* NEA Valley-Center v. Unified School Dist., 644 P.2d 381 (Kan. 1982); Sells v. Unified School Dist. No. 429, 644 P.2d 379 (Kan. 1982) (reorganization of special education services was good cause for nonrenewal).
25. Briggs v. Board of Dir., 282 N.W.2d 740 (Iowa 1979); Von Krog v. Board of Educ., 298 N.W.2d 339 (Iowa App. 1980).
26. The negotiability of RIF varies from state to state. *See, e.g.*, Zirkel, note 1, at 42; Pisapia, "What's Negotiable in Public Education?" *Gov't Union Rep.* 3 (1982):99. For recent cases, *see, e.g.*, Boston Teachers Union v. School Comm., 434 N.E.2d 1258 (Mass. 1982) (job security clause held enforceable for no more than one fiscal year); Board of Educ. v. Cam/Voc Teachers Ass'n, 443 A.2d 756 (N.J. App. 1982) (negotiability of impact of RIF to be decided by PERC).
27. Port Huron Area School Dist. v. Port Huron Educ. Ass'n, 327 N.W.2d 413 (Mich. App. 1982).
28. Stow Teachers Ass'n v. Stow Bd. of Educ., No. 9985 (Ohio App. June 17, 1981).
29. Hagarty v. Dysart-Geneseo Commun. School Dist., 282 N.W.2d 92, 98 (Iowa 1979).
30. Reed v. Edgeley Pub. School Dist., 313 N.W.2d 775, 779 (N.D. 1981). For related reasoning by the Supreme Court, *see* the discussion of the *Mt. Healthy-Givhan* line of cases in Chapter 3.
31. Von Krog v. Board of Educ., 298 N.W.2d 339, 342 (Iowa App. 1980).
32. Renfroe v. Kirkpatrick, 549 F. Supp. 1368, 1371 n.5 & 1373 (N.D. Ala. 1982).

33. Green v. Board of Educ., 433 N.Y.S.2d 434, 436 (Sup. Ct. App. Div. 1980); *see also* Currier v. Tompkins-Seneca-Tioga Bd. of Coop. Educ. Serv., 438 N.Y.S.2d 605 (Sup. Ct. App. Div. 1981); Genco v. Bristol Borough School Dist., 423 A.2d 36 (Pa. Commw. 1980); *cf.* Perlin v. Board of Educ., 407 N.E.2d 792 (Ill. App. 1980) (board's good faith as an issue subject to trial).
34. Zoll v. Eastern Allamakee Commun. School Dist., 588 F.2d 248 (8th Cir. 1978); *see also* Knapp v. Whitaker, No. 81-1185 (C.D. Ill. 1983), *cited in Nolpe Notes* 18 (April 1983):6.
35. Freiburg v. Board of Educ., 283 N.W.2d 775 (Mich. App. 1979).
36. *See, e.g.*, Padway v. Palches, 665 F.2d 915 (9th Cir. 1982); Rodriguez v. Board of Educ., 620 F.2d 362 (2d Cir. 1980). *But see* Gillespie v. Board of Educ., 528 F. Supp. 433 (E.D. Ark. 1981) (rejected sex discrimination pretext claim), *aff'd on other grounds*, 692 F.2d 529 (8th Cir. 1982).
37. *See, e.g.*, Witt v. School Dist. No. 70, 273 N.W.2d 391 (Neb. 1979); Fedele v. Board of Educ., 394 A.2d 737 (Conn. C.P. 1977); Coats v. Unified School Dist. No. 353, 662 P.2d 1279 (Kan. 1983).
38. Paradis v. School Administrative Dist. No. 33, 446 A.2d 46 (Me. 1982).
39. Schnabel v. Alcester School Dist., 295 N.W.2d 340 (S.D. 1980).
40. Litigation about the calculation of seniority is not covered in this chapter due to space limitations. *See, e.g.*, Andreaky v. West Allegheny School Dist., 437 A.2d 1075, 1079 (Pa. Commw. 1981); Berland v. Special School Dist. No. 1, 314 N.W.2d 808, 814 (Minn. 1982).
41. *See, e.g.*, Lezette v. Board of Educ., 319 N.E.2d 189 (N.Y. 1974); State ex rel. Ging v. Board of Educ., 7 N.W.2d 7 (Minn. 1942); *cf.* Dinerstein v. Board of Educ., 408 N.E.2d 670 (N.Y. 1980) (upheld seniority right across areas of certification).
42. *See, e.g.*, Hill v. Dayton School Dist. No. 2, 532 P.2d 1154 (Wash. 1975); *cf.* Fercho v. Montpelier Pub. School Dist., 312 N.W.2d 337 (N.D. 1981) (upheld suspension of teacher who had nine years of tenure where there was no factual allegation of violation of contractual seniority standard).
43. *See, e.g.*, Bohmann v. Board of Educ., 443 N.E.2d 176 (Ohio 1983) (transfer or reassignment); Green v. Jenkintown School Dist., 441 A.2d 816 (Pa. Commw. 1982) (promotion).
44. Moreland Teachers Ass'n v. Kurze, 167 Cal. Rptr. 343, 347 (Cal. App. 1980).
45. Palos Verdes Faculty Ass'n v. Governing Bd., 179 Cal. Rptr. 572, 575 (Cal. App. 1982) ("often intimate and confidential relationship"); Santa Clara Fed'n of Teachers v. Governing Bd., 172 Cal. Rptr. 312, 317 (Cal. App. 1981) ("special credential or needed skill").
46. Alexander v. Delano Joint Union High School Dist., 188 Cal. Rptr. 705 (Cal. App. 1983). For a description of California's tie-breaking standard, *see* Overview of RIF Statutes section in this chapter.
47. Carmody v. Board of Dir., 453 A.2d 965 (Pa. 1982); *cf* Sto-Rox School Dist. v. Horgan, 449 A.2d 776 (Pa. Commw. 1982) (substantial difference test applicable only to unweighted ratings).
48. Fatscher v. Board of School Dir., 417 A.2d 287 (Pa. Commw. 1980).

49. Cooper v. Fair Dismissal Appeals Bd., 570 P.2d 1005, 1008 (Ore. App. 1977).
50. Von Krog v. Board of Educ., 293 N.W.2d 339, 343 (Iowa App. 1980).
51. *See, e.g.*, Phay, note 1, at 17.
52. Dykeman v. Board of Educ., 316 N.W.2d 69 (Neb. 1982).
53. *See* note 49 and accompanying text.
54. Ar-We-Va Commun. School Dist. v. Long, 292 N.W.2d 402, 403 (Iowa 1980); *cf.* Coats v. Unified School Dist. No. 353, 662 P.2d 1279 (Kan. 1983). The *Coats* court required, based on the board's past practice, comparison across K-12 rather than merely 9-12).
55. Berland v. Special School Dist. No. 1, 314 N.W.2d 809, 812-13 (Minn. 1982).
56. *See, e.g.*, Kelley v. Ambach, 442 N.Y.S.2d 616 (Sup. Ct. App. Div. 1981); Cole v. Board of Educ. 457 N.Y.S.2d 547 (Sup. Ct. App. Div. 1982); Rohin v. Board of Educ., 443 N.Y.S.2d 192 (Sup. Ct. 1981).
57. *See, e.g.*, Dinerstein v. Board of Educ., 408 N.E.2d 670 (N.Y. 1980); Oltsik v. Board of Educ., 450 N.Y.S.2d 518 (Sup. Ct. App. Div. 1982).
58. Fatscher v. Board of School Dir., 417 A.2d 287 (Pa. Commw. 1980).
59. *See, e.g.*, Newman v. Board of Educ., 424 N.E.2d 1331 (Ill. App. 1981); Von Krog v. Board of Educ., 298 N.W.2d 339 (Iowa App. 1980).
60. Welsko v. Foster Twp. School Dist., 119 A.2d 43 (Pa. 1956).
61. 24 P.S. § 11-1125.1(c). It is not settled whether this provision applies to promotions as well as suspensions. *Compare* Shestak v. General Braddock Area School Dist., 437 A.2d 1059 (Pa. Commw. 1981) *with* Green v. Jenkintown School Dist., 441 A.2d 816 (Pa. Commw. 1981).
62. Andresky v. West Allegheny School Dist., 437 A.2d 1075, 1078 (Pa. Commw. 1981); *see also* Sto-Rox School Dist. v. Horgan, 449 A.2d 796, 802 (Pa. Commw. 1982).
63. Proch v. New Castle Area School Dist., 430 A.2d 1034 (Pa. Commw. 1981).
64. Godfrey v. Penns Valley Area School Dist., 449 A.2d 765, 769 (Pa. Commw. 1982).
65. ORS 432.865 (1)(j). In such circumstances, as mentioned in the Overview of RIF Statutes section, this statute requires the determination to be based on merit and seniority. *See* note 49 and accompanying text.
66. Shandy v. Portland School Dist. No. 1, 634 P.2d 1377 (Ore. App. 1981).
67. Higgins v. Board of Educ., 428 N.E.2d 1126 (Ill. App. 1981); Herbach v. Board of Educ., 419 N.E.2d 456 (Ill. App. 1981). For references to Illinois' training-based regulations, *see* note 59 and accompanying text.
68. Peters v. Board of Educ., 435 N.E.2d 814, 817 (Ill. App. 1982).
69. Schnabel v. Alcester School Dist., 295 N.W.2d 340 (S.D. 1980).
70. Von Krog v. Board of Educ., 298 N.W.2d 339, 343 (Iowa App. 1980); *cf.* Fercho v. Montpelier Pub. School Dist. No. 14, 312 N.W.2d 337 (N.D. 1981) (realignment prior to notice is sound management but not a legal requirement).
71. This section focuses on reverse discrimination cases. For direct discrimination decisions, *see* note 36 and accompanying text. There is also a line of

cases starting with *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1121 (5th Cir. 1970), *cert. denied*, 396 U.S. 1032 (1970), requiring the use of nonracial objective criteria for conducting RIF in districts undergoing court-ordered desegregation. Such cases are covered in Chapter 2.

72. Oliver v. Kalamazoo Bd. of Educ., 498 F. Supp. 732 (W.D. Mich. 1980); 510 F. Supp. 1104 (W.D. Mich. 1981); 526 F. Supp. 131 (W.D. Mich. 1981).
73. 498 F. Supp. at 755.
74. 706 F.2d at 763.
75. Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982), *cert. denied*, 103 S.Ct. 62 (1982); *see also* separate affirmance in this case, 687 F.2d 510 (1st Cir. 1982).
76. *But see* note 81 and accompanying text.
77. Arthur v. Nyquist, 520 F. Supp. 961 (W.D.N.Y. 1981).
78. *Cf.* M. Ware, "Reduction in Force: The Legal Aspects," in *School Law in Changing Times*, ed. M. McGhehey (Topeka, Kans.: National Organization on Legal Problems of Education, 1982), pp. 132-141. This discusses a proposal by the director of NEA's Teacher Rights Programs for a partial exception provision requiring that proportional employment of an underrepresented group be, as nearly as possible, no less at any level after a layoff than what it was before the layoff.
79. Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195 (E.D. Mich. 1982).
80. Minnesota provides some direction by statute, permitting seniority to give way where it places the district in violation of its affirmative action program. MINN. STAT. ANN. 125.12(6b)(c)(1974).
81. *See* "Settlement Reached in Teacher Layoff and Minority Hiring Case," *Center for Law and Education Newsnotes* (August-September 1982):7.
82. 103 S.Ct. 293 (1982). The NEA filed a brief in support of the affirmative action plan in these circumstances. *See Education Week*, 9 February 1983, p. 7.
83. *See, e.g.*, Zirkel, note 1, at 33-39; Phay, note 1, at 33-42.
84. Milne v. School Comm., 410 N.E.2d 1216 (Mass. 1980); *see also* Boston Teachers Union v. School Comm., 434 N.E.2d 1258 (Mass. 1982). *But cf.* Ward v. Viborg, 319 N.W.2d 502 (S.D. 1982), which held that the due process procedures of the tenure statute are applicable where board policy incorporates them by reference.
85. Lacy v. Dayton Bd. of Educ., 550 F. Supp. 835 (S.D. Ohio 1982).
86. Dorian v. Euclid Bd. of Educ., 404 N.E.2d 155 (Ohio 1980).
87. Dailey v. Board of Educ., 327 N.W.2d 431 (Mich. App. 1983).
88. Gillespie v. Board of Educ., 692 F.2d 529, 531 (8th Cir. 1982); *cf.* Williams v. Seattle School Dist. No. 1, 643 P.2d 426, 432 (Wash. 1982). The *Williams* court stated: "We follow a functional analysis of the adequacy of notice."
89. Andresky v. West Allegheny School Dist., 437 A.2d 1075, 1078 (Pa. Commw. 1981); *see also* Sto-Rox School Dist. v. Horgan, 449 A.2d 796, 799 (Pa. Commw. 1982).
90. School Dist. of Philadelphia v. Twer, 447 A.2d 222 (Pa. Commw. 1982).

91. Chester Upland School Dist. v. Brown, 447 A.2d 1068 (Pa. Commw. 1982). Like the decision in note 90, this case arose under Pennsylvania's demotion, not RIF, legislation.
92. Reed v. Edgeley Pub. School Dist. No. 3, 313 N.W.2d 775 (N.D. 1981); Fercho v. Montpelier Pub. School Dist. No. 14, 312 N.W.2d 337 (N.D. 1981); Von Krog v. Board of Educ., 298 N.W.2d 339 (Iowa App. 1980); Nagy v. Belle Vernon Area School Dist., 412 A.2d 172 (Pa. Commw. 1980).
93. Santa Clara Fed'n of Teachers v. Governing Bd., 172 Cal. Rptr. 312, 319 (Cal. App. 1981).
94. *See e.g.*, Providence Teachers Ass'n v. Donilon, 492 F. Supp. 709 (D.R.I. 1980), in which the court ordered more specific reasons for RIF and, on request, a hearing where the board used "program reorganization" for a reason under Rhode Island statute, which only lists declining enrollment as a reason for RIF; Freeman v. School Bd., 382 So. 2d 140 (Fla. Dist. Ct. App. 1980), in which the court ordered a hearing if plaintiff can show that the reason was pretextual.
95. Reed v. Edgeley Pub. School Dist. No. 3, 313 N.W.2d 775 (N.D. 1981).
96. Palos Verdes Faculty Ass'n v. Governing Bd., 179 Cal. Rptr. 572 (Cal. App. 1982).
97. Herfindahl v. Independent School Dist. No. 126, 325 N.W.2d 36 (Minn. 1982).
98. *See* Beckham, "Reduction-in-Force: A Legal Update," in *School Law Update 1982*, ed. T. Jones and D. Semler (Topeka, Kans.: National Organization on Legal Problems of Education, 1983).
99. Berland v. Special School Dist. No. 1, 314 N.W.2d 809, 816 (Minn. 1982).
100. Walter v. Independent School Dist. No. 457, 323 N.W.2d 37 (Minn. 1982).
101. *See* note 58 and accompanying text.