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ABSTRACT

Many states have begun to use independent or outside hearing officers in public educator termination efforts, curtailing the exclusive role of local school boards as fact finders and judges. This paper reports the findings of a two-part study that: (1) investigated the statutory codes of all 50 states to determine the current procedural methods for dealing with public educator termination; and (2) conducted a case study regarding the use of the hearing examiner provisions of the Utah Orderly Termination Procedures Act. Findings indicate that there has been a growing national trend to limit the role of local school boards in public educator termination actions and that many diverse governance models exist. Less than 50 percent of Utah school districts use hearing examiners, for the following reasons: to provide due process; to achieve an unbiased decision; to obtain greater impartiality and fairness; and to comply with the conditions of their negotiated agreement. Original sponsors of the Utah law generally felt that the final version had not contained what they envisioned. The Utah Orderly Termination Procedures Act lacks provisions regarding the qualifications, training, licensing, selecting, compensating, operation of, and reporting of hearing examiners in educator termination actions. Legislators, school district officials, teacher association leaders, and hearing examiners regard impartially, fairness, being unbiased and objectivity as the most significant qualities to be looked for in a hearing examiner. The control and autonomy of local boards of education is a powerful underlying issue. Recommendations to state policy makers are offered. Four tables are included. (LMI)

The Use of Hearing Officers in Public Educator Termination Actions

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THE USE OF HEARING OFFICERS IN PUBLIC EDUCATOR TERMINATION ACTIONS

by
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Preface

The last twenty years has been a period of substantial change as it pertains to issues of employment and employment security in public schools. Increasingly, both legislative bodies and the courts have been called upon to define and clarify rights and responsibilities. One aspect of this phenomena is the procedural processes governing termination. Historically, local boards of education enjoyed near exclusive freedom and autonomy in this domain. However, the evolution of public policy in this arena over the past two decades has resulted in an erosion or in some cases a near total loss of this independence. The exclusive use of local boards as fact finders and judges in termination action is giving way in many states to the use of and/or substitution of independent or outside hearing officers in public educator termination actions.

This paper reports the findings of a two part study that (1) investigated the statutory codes of all 50 states to determine the current procedural method(s) for dealing with public educator termination; and (2) conducted a case study regarding the use of the hearing examiner provisions of the Utah Orderly Termination Procedures Act. Some general conclusions and observations are also presented which should be of interest to public education policy makers.

Highlights

1. In the last twenty years, there has been a growing trend nationally to limit the role of local boards of education in public educator termination actions despite strong United States Supreme Court support for their involvement in the process.

* Nearly 60 percent of the states have modified the conventional pattern of local boards handling termination actions by having adopted alternative hearing procedures and/or having added appellate review requirements. This has had the effect of reducing the traditional power and role of school boards in educator termination.

* Modifications seem to be occurring in order to assure greater impartiality and fair play in due process procedures; to reduce the threat or potential of school board bias; to obtain greater efficiency and effectiveness in termination actions; and to address the increased litigation, legal maneuvering, and legal sophistication that has been entering the process.

2. There is an amazingly diverse set of patterns operating in the United States relative to due process procedures being employed in educator termination actions.

* No single "best model" appears to have emerged as the accepted alternative for replacing local boards of education as the key decisionmaking and/or fact finding body in educator termination actions. Fourteen distinct patterns are currently in operation within the nation.

* Alternative models are relying heavily on independent or outside hearing officers and/or hearing panels to serve as fact finders. In these instances local school boards are being shifted from this traditional role into reviewers of fact (an appellate procedure) or in some cases being removed from the process entirely.

* With the increasing use of outside or independent fact finders, there is a marked increase in the use of legally trained and licensed personnel in the traditional "informal administrative review" process. At least one-third of all states now employ and require administrative law judges, lawyers, or certified arbitrators to play a significant part in this process.

3. Utah was one of the first states in the nation to include the use of hearing examiners in the process of educator termination.

* The state is unique among the 50 states in making the use of outside hearing examiners in educator termination actions an optional choice for local school districts and in allowing each local school district the privilege and responsibility of establishing their own orderly termination policy.

* The use of outside hearing examiners by local school districts in Utah is quite limited. Less than 50 percent of the districts include the option within their termination policies and only 9 districts have made use of hearing examiners in the last five years. No district within the state allows hearing examiner recommendations to be binding upon the board.

* As a general rule, the larger the district the more termination cases, the more sophisticated the policy, and the more likely they will utilize outside hearing examiners.

* Those districts that utilize hearing examiners support and value them more than those that do not. Districts utilizing hearing examiners report the following as their primary reasons for doing so: (1) to provide due process; (2) to achieve an unbiased decision; (3) to obtain greater impartiality and fairness; and (4) to comply with the conditions of their negotiated agreement.
* Districts not utilizing or making provisions for the use of hearing examiners report their reasons for not doing so as: (1) the lack of sufficient cases; (2) preference on the part of the board to not

involve outside hearing examiners; and (3) cost.

* Original sponsors of the Utah law generally felt that the final version of the hearing examiner portion of the Act had not contained what they had envisioned. Critical features such as mandatory use of hearing officers, binding use of hearing officers rulings, provisional teachers being part of the Act, the lack of a state-wide uniform policy, and the lack of detailed procedures relating to the use, selection, and training of hearing examiners were all noted as items having been stripped from the legislation in favor of providing autonomy to local boards. Many original sponsors still harbor the view that there is a serious problem with local school boards making decisions on termination because of board loyalty to the superintendent.

4. The Utah orderly termination procedures act lacks any provisions regarding the qualifications, training, licensing, selecting, compensating, operation of, and reporting of hearing examiners in educator termination actions.

* Despite the lack of regulatory provisions pertaining to hearing examiners in educator termination actions, districts that have utilized them are generally quite satisfied with their services.

* Legislators, school district officials, teacher association leaders, and hearing examiners regard impartiality, fairness, being unbiased, and objectivity as the most significant qualities to be looked for in a hearing examiner. Although these items were important to all four groups of individuals, they were almost exclusively the only things mentioned by legislative and school district officials. Association officials considered skill areas such as the ability to listen, write, and to verbally articulate a point as equally if not more important. Hearing examiners noted several other qualities not mentioned by other groups. These included: (1) patience; (2) sense of commitment; (3) courage; and (4) helpfulness.

* Legislators, school district officials, teacher association leaders

and hearing examiners all had a different view as to the single most important qualification needed by a hearing examiner. For legislative officials knowledge of employee relations was most critical. Among association leaders it was skill in negotiation and mediation. School district officials felt that previous experience as a hearing examiner was the most critical qualification, and hearing examiners themselves most often mentioned the ability to control and conduct the meeting.

5. Things to be considered by state policy makers.

* On the surface the optional hearing examiner provision of the Utah Orderly Termination Procedures Act seems to be working well. This feature is unique among the 50 states and is generally regarded as the type of legislative enactment that strengthens the hand of local boards of education. This is in marked contrast to the national trend that seems to be limiting rather than strengthening the position of local boards in educator termination actions. It is a public policy that demands highly responsible behavior on the part of local school board members.

* State level policy makers should carefully monitor developments in other states pertaining to the reduced involvement of local boards of education in educator termination actions.

* As the state grows in population and school districts become larger, public school employment issues can be expected to become increasingly more complex. As this happens greater reliance on outside hearing examiners in educator termination actions can be anticipated and the press for more unified state level provisions can be projected.

* Serious consideration should be given by the legislature to direct the Utah State Board of Education to adopt some guidelines and/or provisions providing for the selection, training, and assisting of those serving as hearing examiners in public school termination actions.

THE USE OF HEARING OFFICERS IN PUBLIC EDUCATOR TERMINATION ACTIONS

Introduction

Historically, the power to hire and fire public school educators has been delegated to local school boards by state legislatures. This empowerment has been noted and characterized in the following manner by the United States Supreme Court:

> State law vests the governmental, or policymaking, function exclusively in the School Board and the State has two interests in keeping it there. First, the Board is the body with overall responsibility for the governance of the school district; it must cope with the myriad day-to-day problems of a modern public school system including the severe consequences of a teachers' strike; by virtue of electing them the constituents have declared the Board members qualified to deal with these problems, and they are accountable to the voters for the manner in which they perform. Second, the state legislature has given to the Board the power to employ and dismiss teachers, as a part of the balance it has struck in the area of municipal labor relations; altering these statutory powers as a matter of federal due process clearly changes the balance. Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law.[1]

The above declaration was included in the opinion of a case where the United States Supreme Court was ruling on the question of whether or not a school board vested by law with the power to employ and dismiss teachers can also serve as an impartial hearing body. In deciding on this important question, the court ruled:

> Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not . . . disqualify a decisionmaker . . . Nor is a decision-maker disqualified simply

> because he has taken the position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances.[2]

Thus, the high court concluded that a school board was a proper hearing body in termination actions as long as the board maintained an open view to the facts presented them. The position of the court has not been well received in all quarters. There has been rather widespread concern and serious discontent on the part of some relative to the appropriateness of local boards of education serving in what appears to be a "prosecutor, judge, and jury" role in educator termination actions. Many believe there is too great of a risk of actual bias, conflict(s) of interest, partiality, and prejudice emerging from this type of system. Indeed, the intensity of this concern has caused courts in several states to re-examine, at the insistence of complaining parties, essentially the same question(s) initially posed to the United States Supreme Court. The issue of bias has become a frequent charge in cases where local boards are involved in termination hearing procedures, and in some cases the accusations have been upheld.

Although state courts have essentially been unwilling to alter the public policy positions and balance of powers spoken of by the United State Supreme Court, the legislatures of many states have not been so hesitant. Interestingly enough the Utah legislature actually gave consideration to this issue three years prior to the Hortonville decision by enacting the 1973 "Utah Orderly School Termination Procedures Act." This piece of legislation was largely in response to two United States Supreme Court cases[3] which had been decided the previous year and which had clarified the termination due process rights of teachers under the United States Constitution. One provision within the Utah law gave local school boards the authorization, if they so chose, to delegate their authority in termination actions through the appointment of hearing examiners to conduct hearings on the termination of educators. Local boards were also given the right, again if they so chose, to make the decisions of hearing examiners binding upon both the educator and the board. The law expressly did not limit the right of the board or the educator to appeal the decision of a hearing examiner to an

appropriate court of law.

Although this provision of the Utah law has existed for over twenty years, no one has systematically examined its original intent, its implementation, utilization, impact, or effectiveness. A simple survey conducted in 1993 by the Utah Education Policy Center and involving the state's 40 school districts revealed that only 17 of the reporting school districts (38 out of 40) included the possible use of a hearing examiner within their orderly termination policies. Of the 17 only 9 had actually made use of an outside hearing examiner within the past 5 years, and not one of the districts allowed hearing examiner's recommendations to be binding upon the board.

Following the results of this survey, Consuelo Lopez, a doctoral student in the Department of the Educational Administration and a graduate assistant working with the Utah Education Policy Center, undertook a multi-dimensional examination of the use of hearing examiners in public education termination actions. Her three part study (1) investigated the statutory codes of all 50 states to determine the current procedural method(s) for dealing with public educator termination; (2) analyzed recent case law pertaining to the use of hearing examiners in public educator termination actions; and (3) conducted a case study of the hearing examiner provisions of the Utah law. Selected results of parts one and three of this dissertation are presented in the material that follows.

Limiting the use of local boards of education in public educator termination actions through the growing use of hearing officers: A comparative examination of state statutes

Methodology

The state statutory codes housed in the University of Utah Law Library and the Brigham Young University Law Library were used as the data source for examining and comparing across state statutes. This was done during the summer of 1993. Utilizing the statutory indices, appropriate statutory provisions were located. Applicable statutes were found for all 50 states. In the majority of states, a single act was identified. However, in some states there

were separate acts for different classes of employees such as classified, teacher, administrators, etc. Since the focus of the investigation was to only examine the termination procedures used with professional employees, those state statutes dealing exclusively with classified or other nonprofessional employees were eliminated from analysis.

Once obtained, the statutes were read with an eye to determine two things: First, what form of due process procedures or formats had been established in the 50 states and secondly, what common topics or elements were addressed in the statutory provisions. All of the topics identified relative to this second objective are displayed in Table 1. However, only two topics are addressed in this particular paper. These include the qualifications or prerequisites required of those utilized as hearing officers and the methods used in selecting such hearing officers.

The other topics not addressed in this paper focus upon questions related to the hearing process such as whether or not the hearing should be open or closed, the utilization of affirmation oaths, the determination of who should bear the expenses of the hearing and so forth. Obviously, these are important to the operation of the hearing but are ancillary to the essence of this paper.

Forms of Due Process Proceedings

The statutes of all 50 states were examined to determine the due process procedures currently being employed in educator termination actions by the 50 states. It was somewhat surprising to find 14 distinct patterns operating within the country (see Table 2). Not too surprising, however, was the finding that the most popular model (21 states) was the traditional process where the board serves as the hearing body with the educator having the right of appeal to a court of law. It is also interesting to note, that less than a majority of states now employ this pattern; and even among some states utilizing this model, some modifications or adjustments have been made. For example, the state of Indiana, obviously to assure a more ordered proceeding, allows the governing body to appoint an agent who is not an employee of the school corporation but who may be a member of the governing body or an attorney retained to

Table 1 DUE PROCESS INVOLVING PUBLIC EDUCATOR TERMINATION

State Comparisons - Form of Proceedings and Elements Addressed in Statutory Provisions

			Qualifications			Pre-Hearing Rights			Pre-Hearing Procedures		Records			Expenses			
STATE	State Code Reference	Form of Due Process Procedures	Expertise	Education	Restrictions	Deposition	Subpoena	Open/Closed Hearing	Oath/Affirmation	Evidence	Recording	Decision	Record/Transcript	H.O. Expenses	Attorney Expenses	Witness Expenses	Hearing Expenses
Alabama	Volume 13, Title 16, Section 16-24-9 Volume 19A, Title 36, 36-26-105	G				x	x	x	x		x	x				x	
Alaska	Volume 3, Section 14.20.180	A					x	x	x		x	x					
Arizona	Volume 6A, Part I, Section 15-541	A						x			x	x	x				
Arkansas	Volume 4, Title 6, Section 6-17-1509	A						x			x						
California	Volume 27B, Chapter 4, Sections 44800-50999	B	x						x	x		x		x	x		x
Colorado	Volume 9, Section 22-63-117	E	x				x	x	x	x		x	x				
Connecticut	Volume 3, Section 10-151 (7)(c)	L						x				x	x	x			x
Delaware	Volume 8, Chapter 14, Section 1413	A					x	x	x	x	x	x					
Florida	Volume 11, Section 231.36; APA 120.65	J	x							x		x	x				
Georgia	Volume 17, Title 20, Section 20-2-940	N	x				x		x	x		x	x				x
Hawaii	Volume 6, Title 17-18, Section 297-12	J					x	x	x			x	x				
Idaho	Volume 6A, Section 33-1209 &33-1215	A					x		x	x		x	x				
Illinois	Chapter 122, Section 24-12	D	x		x		x	x	x	x	x	x	x	x			x
Indiana	Title 20.6.1-4-11	A	x				x			x		x					
Iowa	Volume 13, Section 279.16 &279.24	H			x		x	x	x	x		x	x				
Kansas	Volume 5A (1992), Section 72.5433-5443	D	x	x	x	x					x	x	x	x	x	x	x

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Kentucky	Volume 7A, Section 161.790 (1992 Supplement)	B	x				x	x	x		x	x	x	x			x
Louisiana	Volume 13A, Chapter 2, Section 17-443-462	A					x	x	x	x							x
Maine	Title 20A, Chapter 503, Section 13202	A											x				
Maryland	Section 6-202 & 203 (1992) Ann. Code of MD	M	x									x	x				
Massachusettes	Chapter 71, Section 42	A						x									
Michigan	Section 15.2004	G					x	x	x	x	x	x					
Minnesota	Volume 10A, Section 125.12	J	x				x	x	x		x		x		x		
Mississippi	Title 37, Section 27-9-111, Ann. Code Miss.	J			x	x	x			x	x		x				x
Missouri	Volume II, Section 168.118	A					x	x	x		x	x	x		x		x
Montana	Title 20, Section 20-4-204, Ann. Code Mont	F										x					
Nebraska	Volume 5, Section 79-1254.02	A								x		x					
Nevada	Volume 11, Section 391.3161	E	x	x					x	x		x	x	x			
New Hampshire	Chapter 15-16, Title 189:14a Ann. Code NH	M										x					
New Jersey	Title 18A, Sect 18a:6-11 to 6-25, Ann. Code NJ	M					x	x	x	x		x				x	
New Mexico	Volume 22, Section 22-10-17	H	x		x	x	x		x	x			x	x			
New York	Volume 16, Section 3020:a	C	x					x	x	x	x	x	x	x			x
North Carolina	Section 115C-325, General Statutes of NC	A					x	x		x		x	x			x	

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North Dakota	Volume 3B, Section 15-47-38	A					x	x	x	x		x	x				
Ohio	Title 33, Section 3319.16	J	x		x		x	x	x		x		x	x			
Oklahoma	Title 70, Section 6-103.4 to 6-103.12	B	x			x	x		x			x	x	x	x		x
Oregon	Volume 7, Title 30, Section 342.895 to 342.915	G	x				x	x	x	x		x					x
Pennsylvania	Title 24, Section 12-1257 to 12-1263	I						x				x					
Rhode Island	Volume 3A, Section 16-12-Q, 16-12.1-4	A						x	x	x	x						
South Carolina	Volume 20, Title 59, Section 59-25-460, 470	A					x	x		x	x	x					x
South Dakota	Volume 5, Section 13-42-11 & 13-43-10 to 10.1	A						x	x	x		x					
Tennessee	Volume 9, Section 49-5-512	A					x	x	x		x	x				x	x
Texas	Education Volume 1, Section 13.103-112	I						x		x		x					
Utah	53A-8-101 to 107, Ann. Code Utah	J					x		x	x							
Vermont	Title 16, Chapter 53, Section 1752	A						x				x					
Virginia	Volume 5, Title 22.1-305 to 313	K	x							x	x	x		x			x
Washington	28A, 405-310 (1993 Supplement)	D	x			x	x	x		x		x	x		x		
West Virginia	Volume 7, Section 18A-2-6	A										x					
Wisconsin	Section 118.23, Wis Statutes Annotated	A						x			x	x					
Wyoming	Section 21-7-105	A							x	x	x	x					

Table 2

FORMS OF DUE PROCESS PROCEEDINGS

CODE	FORM	STATES
A	BOARD - COURTS	Alaska, Arizona, Arkansas, Delaward, Idaho, Indiana, Louisiana, Maine, Massachusettes, Missouri, Nebraska, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin, Wyoming
B	HEARING PANEL - COURTS	California, Kentucky, Okalhoma, Oregon
C	HEARING PANEL - STATE EDUCATION COMMISSIONER - COURTS	New York
D	HEARING OFFICER - COURTS	Illinois, Kansas, Washington
E	HEARING OFFICER - BOARDSS - COURTS	Colorado, Maryland (Baltimore City and some counties), Nevada
F	BOARD - COUNTY SUPERINTENDENT - STATE SUPERINTENDENT - COURTS	Montana
G	BOARD - STATE TENURE COMMISSION - COURTS	Alabama, Michigan
H	BOARD - ADJUDICATOR - COURTS	Iowa, New Mexico
I	BOARD - STATE SUPERINTENDENT - COURTS	Pennsylvania, Texas
J	BOARD/SINGLE HEARING OFFICER - COURTS	Florida, Hawaii, Mississippi, Ohio, Utah, Minnesota
K	BOARD/PANEL - BOARD - COURTS	Virginia
L	BOARD/SUBCOMMITTEE OF BOARD OR PANEL OR SINGLE HEARING OFFICER - BOARD - COURTS	Connecticut
M	BOARD - STATE BOARD - COURTS	Maryland, New Hampshire, New Jersey
N	BOARD/HEARING PANEL - BOARD - STATE BOARD - COURTS; OR STATE PROFESSIONAL PRACTICES COMMISSION BOARD - COURTS	Georgia

administer the hearing proceedings. Another innovation is found in North Carolina where the state maintains a professional review committee. An educator facing a scheduled termination hearing before his local board may ask the professional review committee to appoint a five member panel to review the local superintendent's termination recommendation. The local superintendent may, after reviewing the panel's findings and recommendation, drop the charges or continue to press forward with a board hearing.

In five of the categories (F, G, H, I, and M) or operating in 10 states is the mandatory provision that creates an appellate-like review of a board's decision before the matter is appealed to a court of law. The difference in the five categories is to whom the appeal is taken. The single most common is the State Board of Education (3 states, category M). Other options include the State Superintendent (2 states, category I), a state established Tenure Commission (2 states, category G), and a specially appointed adjudicator or arbiter (2 states, category H). In one of those states (New Mexico) the arbiter actually conducts a hearing de novo. One state (Montana, category F) has two appellate levels prior to the courts. These include the County Superintendent and the State Superintendent.

Four additional categories (J, K, L, N) allow the process to begin with the local board, but it is not mandatory that it happen that way. Each of these categories provides an alternative process. For example, in category J, the process may begin with the local board of education or a hearing officer. However, among the six states within this category are some distinct differences as to how this process is implemented. In Utah, for instance, it is the local board's choice as to whether or not the hearing officer option is even used. Thus, some districts within the state make it available while others do not. The manner of appointing the hearing officer varies from state to state, and in two of the states (Ohio and Minnesota) the hearing officer's (referee or arbitrator) recommendation is final and appealable to the courts. In the other four states, the hearing officer's report must be acted upon by the local board of education before it becomes appealable to a court of law. Categories K, L, and N are somewhat similar; but rather than using a single hearing officer, they provide for other options. Category K allows for either the board or a hearing panel to hear the case. If it is before a panel,

the recommendation must be acted upon by the board before court review. The state of Connecticut (Category L) basically follows the same pattern as Category K with respect to nontenured faculty. However, with tenured educators, the hearing may initially take place before the board, a subcommittee of the board, or a single hearing officer. Recommendations are made to the full board and then appealable to the courts. The state of Georgia (Category N) provides an even more exotic set of options. The hearing may be held before the board or a panel (called a tribunal) which makes recommendations to the board. It can then be appealed to the State Board of Education before being subject to court review. The local board also possesses another option. Rather than having a panel examine the case, the board may refer the matter to the State's Professional Practices Commission.

In the remaining categories, the process definitely does not begin with the local board; and in all instances, except category E, the board is not involved. In category E (two states and parts of Maryland), the process begins with a hearing officer who conducts the hearing and then makes a recommendation to the board. As in all cases, it is then subject to court review. In category B (4 states), the case is heard by a hearing panel, and the decision is final unless appealed to the courts. In one of the four states in this category (Oregon), the local board actually reviews the case in the first instance but does not conduct a hearing. If an appeal is made, the first actual hearing is held before a state level panel called the Fair Dismissal Appeals Board. In three other states (category D), a review takes place before a single hearing officer rather than a panel. Here again, the decision becomes final and binding unless appealed to an appropriate court of law. The last category is similar to those states in categories B with the exception that after the panel has acted, the case may be appealed to the State Education Commissioner before being subject to court review.

Qualifications and Patterns of Selection

The statutes of those states utilizing an independent or outside hearing officer/panel were examined to address the questions regarding qualifications and selection. This included the laws of 21 states (Categories B, C, D, E, J, K, L, and N). The state of Maryland

from category M was also included because some counties and the city of Baltimore may make use of outside hearing officers. New Mexico (category H) was likewise inserted because the appeal to the adjudicator in that particular state becomes a hearing de novo.

Qualifications and/or Prerequisites For Those Serving As Outside Hearing Officers

Precise qualifications are seldom mentioned in the statutes relative to particular skills or specific training required to serve as an outside hearing officer. However, the statutes of two states do stipulate definite educational requirements that must be met in order to be on an approved list of hearing officers. In the state of Kansas, attorneys wishing to serve as hearing officers must first demonstrate that they have completed 10 hours of continuing legal education credit in the area of education law, due process, administrative law, or employment law within the past five years. In Nevada, approved hearing officers must have completed a course of instruction in administrative law relative to the provisions of the termination statute as offered by the staff of the state board of education. This course must consist of at least four hours of instruction in a classroom.

Some statutes provide a general guide or standard for those making the selection of hearing officers. For example, the Virginia statute states that the hearing officer should "possess knowledge and expertise in public education and education law and shall be deemed by the judge capable of presiding over an administrative hearing." Similarly, the Washington state statute reads, "the . . . hearing officer. . . shall, in the judgment of such presiding judge, be qualified to fairly and impartially discharge his or her duties." Adjudicators in New Mexico must be "versed in employment practices and school procedures."

In several instances, the statutes place restrictions eliminating some who might wish to serve. A common restriction is that the hearing officer may not be a resident of the district (see Illinois and Iowa statutes). In Kansas an attorney may not serve as a hearing officer if he or she has been employed to represent a board or a teacher in a due process hearing within the preceding five year period. Mississippi specifically prohibits the hearing officer from

being a staff member responsible for the initial decision to not reemploy. The New Mexico statute is probably the most comprehensive one on stipulating specific reasons for non service. It reads: "No person shall be appointed to serve as the independent arbitrator who has any direct or indirect financial interest in the outcome of the proceeding, has any relationship to any party in the proceeding, is employed by the local school board or governing authority or is a member of or employed by any professional organization of which the certified school employee is a member." The state of Ohio also has some firm restrictions. These include: "No referee shall be a member of, an employee of, or teacher employed by the board of education nor related to any such person by consanguinity or marriage. No person shall be appointed to hear more than two contract termination cases in any school year."

Perhaps the most significant element relative to qualifications is the emergence of four distinct patterns or groups of individuals designated to serve as hearing officers. These include administrative law judges, attorneys, certified members of the American Arbitration Association, and knowledgeable lay or professional people who are often associated with or closely linked to the educational community. The first three of these groups involve individuals who have had extensive legal training. It is not too surprising to find that 14 of the 21 states require or provide for the use of these categories of individuals to conduct their hearings. Among the seven others, at least one (Oregon) assigns someone from the state attorney general's office to assist with the process.

Although too early to designate it as a major national trend, the use of administrative law judges to conduct or participate in educator termination hearings has recently emerged. Two states (California and Colorado) have now adopted this model. It will be interesting to see if others states follow. Three states (Illinois, Minnesota, and New Mexico) exclusively utilize qualified or certified arbitrators; and two other states (Kansas and Nevada) have it as an option. New York utilizes a certified American Arbitrator Association (AAA) arbiter as the chair of their hearing panels. In Washington, the chair on their hearing panels may be either an AAA arbiter or an attorney. The use of qualified attorneys is the primary source of hearing examiners in the states of Florida, Kansas, parts of Marylarid, Nevada, Ohio, and Oklahoma. Only the states of

Connecticut, Georgia, Hawaii, Kentucky, Mississippi, Oregon, Utah, and Virginia refrain from stipulating that the hearing officer must be someone legally trained. In the absence of a qualified and available attorney, the Florida Division of Administrative Hearings may designate a layperson.

Methods of Selecting the Hearing Officer

Methods of selecting hearing officers vary widely among the states. Although six discernible patterns emerge, even within the groupings unique elements exist. The most common process involves some designated state level official or unit of government providing the parties with a list of possible hearing officers from which they may select. In four of the states (Kansas, Nevada, Ohio, and Oklahoma), it is the chief state school officer. In Colorado, it is the Division of Administrative Hearings in the Department of Administration. In Illinois, it is the State Board of Education, and in Minnesota it is the Bureau of Mediation Services. The number of qualified hearing officers provided the parties varies from 21 in Oklahoma to 3 in Colorado and Ohio. The process of actual reducing the number to 1 varies among the states but is generally a process of the parties alternately striking names beginning most commonly with the teacher. However, some statutes call for a coin flip to determine who shall go first. In Ohio, the striking system isn't employed. If the parties can't agree on one of the three candidates, the State Superintendent makes the choice. In Kansas, Minnesota, and Nevada, no list becomes necessary if the parties mutually agree on a hearing officer. Also, in Nevada each party may challenge not more than five members of the state's list of hearing officers with these particular names then not being included on the list provided.

In two states (Kentucky and Oregon) where a panel has to be appointed, this is done directly by the State Superintendent of Public Instruction. In five other states (Georgia, Hawaii, Maryland, Mississippi, and Utah), the local board of education designates the hearing officer or panel as is the case in Georgia. The fourth relatively common method operates in four states (California, Connecticut, New York, and Virginia). In each of these states, a three member hearing panel is assembled by both parties initially

appointing a person of their choice. The third member, who serves as chair, is appointed in a different manner in each of the states. In California, the third panelist who is the administrative law judge is appointed by the state office of administrative hearings. The third panelist in Connecticut is appointed by the other two panelists. New York's third panelist is appointed by the other two panelists from an AAA approved list. If the two can't agree on someone, then the New York State Education Commissioner appoints the third panelist. Finally, in Virginia, the two panelists select the third. If they can't agree on a name, the chief judge of the circuit court of appeals makes the appointment.

The final two patterns are unique to their individual states. In the state of Washington both parties appoint an individual, and the two appointees jointly appoint a hearing officer. If they are unable to agree on someone, the presiding judge of the superior court makes the appointment. Lastly, in New Mexico the two parties are to select an arbitrator. If they can't agree, then the presiding judge in the judicial district in which the public school of the teacher involved is located makes the selection.

General Conclusions and Observations

1. There is an amazingly diverse set of patterns operating in the United States relative to the due process procedures being employed in educator termination actions.

2. Nearly 60 percent of the states have modified the conventional pattern of local boards handling termination actions by having adopted alternative hearing procedures and/or having added appellate review requirements. This has had the effect of reducing the traditional power and role of local school boards in educator termination. Why has this occurred? Although beyond the purview of this particular portion of the study, reasoned speculation (based partially on the language of statutes, court case notes, etc.) would suggest that the modifications have and are occurring in order to assure greater impartiality and fair play in due process procedures; to reduce the threat or potential of school board bias; to obtain greater efficiency and effectiveness in termination actions; and to address the increased litigation, legal maneuvering, and legal sophistication that has been entering the process.

3. No single "best model" appears to have emerged as the

accepted alternative for replacing local boards of education as the key decisionmaking and/or fact finding body in educator termination actions. Comparative studies need to be undertaken to evaluate the effectiveness, efficiency, and desirability of the wide array of original and creative models now operating in so many different states.

4. Alternative models are relying heavily on independent or outside hearing officers and/or hearing panels to serve as fact finders. In these instances local school boards are being shifted from this traditional role into reviewers of fact (an appellate procedure) or in some cases being removed from the process entirely. Where local school boards remain finders of fact and other appellate bodies are being inserted into the process, it is primarily chief school officers and state level tenure review or professional practice panels that are being asked to serve this role.

5. With the increasing use of outside or independent fact finders, there is a marked increase in the use of legally trained and licensed personnel in the traditional "informal administrative review" process. At least one-third of all states now employ and require administrative law judges, lawyers, or certified arbitrators to play a significant part in this process. One can only assume that this will continue to complicate and add sophistication to the process. Indeed, the concept of informal administrative review by "laymen" may be on the way to becoming something of the past. If the trend is toward a more formal, sophisticated system and if the original purpose of the informal administrative hearing was to reduce costs, eliminate unnecessary court cases, and promote rapid and efficient justice, the time may well be at hand when a closer examination of what is happening and what other alternatives might be available needs to take place.

6. With some exceptions, it appears that it is the lesser populated states that are holding to more traditional practices and less complicated termination procedures.

The Use of hearing officers in Utah public school termination proceedings

Introduction

A case study involving questionnaires and interviews was undertaken to investigate perceptions regarding the hearing examiner provision of the "Utah Orderly School Termination Procedures Act." Four groups of individuals were contacted and five pre-set categories of inquiry were investigated. The individuals included (1) legislative sponsors of the original bill; (2) officials of the Utah Education Association (the UEA was a major advocate of the legislation); (3) local school district officials; and (4) individuals who have served as hearing examiners in Utah public education termination actions. The categories of inquiry are systematically identified and treated under "Selected Findings" which is presented next.

Selected Findings

Category I: Attitudes Regarding the Hearing Examiner Portion of the Utah Orderly School Termination Procedures Act

The great majority of legislators that were sponsors and advocates of the legislation and who were living and available to participate in the study generally felt that the act had not accomplished what it had originally set out to do. Many felt that the teeth within the original act had been stripped away before passage leaving local districts to do what they pleased. Specifically, it was pointed out that the use of hearing examiners had become optional, the rulings of hearing examiners weren't made to be binding, nontenured teachers were not a part of the act, and the entire orderly termination process became something to be developed at the local level rather than through a uniform state policy. In short, it politically spoke to the Roth and Sindermann decisions without seriously disrupting what was actually going on. Although most felt that a strength of the act was to be found in the fact that districts were required to establish a process, some still harbored the view that there was a serious problem with a local board making decisions on

termination because of board loyalty to the superintendent.

At the Association level, a slight majority felt that the law had resulted in greater constitutional protection for teachers, more consistent due process procedures, and a known process for resolution of conflicts. However, the great majority also felt that the law had fallen short of the original intentions of those sponsoring and supporting the act. Specifically, concern was expressed over (1) the lack of coverage for provisional employees; (2) the lack of binding arbitration; (3) the lack of detailed procedures relating to the use, selection, and training of hearing examiners; and (4) the lack of a single quality procedure that is uniform state-wide.

Greater over-all general support for the law was found at the district level. The law, from the district perspective, provided guidelines that would assure appropriate and adequate due process. As will be noted in the section that follows, most districts have not found the provision calling for hearing examiners to be necessary or desirable.

Category II: Utilization of Hearing Examiners

A fundamental question to this study was to determine why so few districts had utilized the hearing examiner option. In a follow-up survey (to that conducted in early 1993 by the Utah Education Policy Center) districts that hadn't provided for the use of hearing examiners in their termination policies were asked the following questions:

1. What are the primary reasons why your district has chosen not to incorporate the use of outside hearing examiners in your district's termination procedures?
2. Has your district ever utilized an outside hearing examiner in an educator termination procedures? In other contexts?
3. How, in your opinion, would the Board of Education in your district handle a case where an "impermissible bias" existed (something making it inappropriate for the board to hear the case)?

Relative to question number one, the most common response was the lack of sufficient termination cases to justify the hiring of an outside hearing examiner. The second most common response

was that the Board preferred to hear appeals directly. Also mentioned quite frequently was the cost associated with hiring outside hearing examiners. In one case, a district superintendent said that the board's legal counsel had advised the board not to utilize hearing officers.

In response to question number two, only one district that doesn't currently utilize hearing examiners indicated that it had ever employed a hearing examiner in a termination action. Interestingly enough, the superintendent of that district indicated that the results had been "excellent." Only two of the districts reported having used a hearing examiner in some other context.

Pertaining to the question of how they would handle an impermissible bias situation, district responses were quite mixed. Some said that they hadn't ever thought about it. Others indicated they would consult with their legal counsel. A few said they would seek an impartial hearing officer or panel.

In addition, all of the participants in the survey were asked to share any personal comments, suggestions, or thoughts relative to the use of outside hearing examiners. The following is a representative sample of the comments received:

> Control of a school district is vested in the Board of Education as a group. This is wise, predictable, and constant (stable). A hearing examiner would have a chilling effect upon this process. Termination procedures are best handled by a group rather than an individual in my opinion.
>
> My personal preference would be to keep termination in house except in extreme cases.
>
> We are a small district of limited means. We have not had a termination in six years and are fortunate to have been able to resolve problems without hearing examiners, lawyers or even board hearings.

When districts that utilize hearing officers were asked the question of why they choose to include hearing examiners in their termination policies, the most common responses were: (1) to provide due process; (2) to achieve an unbiased decision; (3) to

obtain greater impartiality and fairness; and (4) to comply with the conditions of the negotiated agreement.

Categories III & IV: Qualities and Qualifications of Hearing Examiners

Since state law leaves to the individual districts the task of selecting hearing examiners, there are no specific state requirements regarding who is utilized. Of interest to the researchers was the question of what qualities and/or qualifications are considered most important in hiring a hearing examiner. Table 3 notes the responses of legislators, school district leaders that utilize examiners, and association officials as well as hearing examiners themselves regarding personal qualities. Impartiality, fairness, being unbiased, and objectivity were clearly the qualities most often mentioned. Although important to all four groups, they were almost the only items mentioned by the legislative and district officials. It is interesting to note that association officials seemed to also be interested in skill areas such as the ability to listen, write, and verbally articulate a point. The hearing examiners had the largest list of suggested qualities and included several personal traits which were not mentioned by the others groups. These included: (1) patience; (2) sense of commitment; (3) courage; and (4) helpfulness.

The qualifications mentioned as being important are noted on Table 4. Among all the groups, knowing the issues and knowledge of school law was viewed as most important. However, in each of the four groups, a separate and different qualification was noted as being most important. For the legislative officials, knowledge of employee relations was most critical. Among association officials, it was skill in negotiations and mediation. School district officials felt that previous experience as a hearing examiners was the most critical qualification; and hearing examiners, themselves, most often mentioned the ability to control and conduct the hearing.

Category V: Impact of Hearing Examiners

Several questions were posed to district officials whose districts utilized hearing examiners in order to determine their perception of the impact and value the hearing examiners brought to the process.

Table 3
Hearing Examiner Qualities

Qualities	Legislators	Association	District	Hearing Examiner
Unbiased	43%			38%
Objectivity	29%			13%
Fairness	14%	11%		50%
Compassionate	14%			
Sense of Right/Wrong	14%			
People Oriented		11%		
Able to Listen		33%		
Impartiality		22%	43%	25%
Integrity		11%		
Open-Minded		11%		
Articulate		33%		13%
Ability to Write Well		11%		15%
Personality			14%	
Patience				13%
Sense of Commitment				13%
Courageous				13%
Helpful				13%
Organizational Skills				13%

Table 4
Qualifications of Hearing Examiners

Qualities	Legislators	Association	District	Hearing Examiners
Employee Relations	43%			13%
Know District Agreement	14%			13%
Know Issue(s)	14%	33%	43%	
Know School Law	23%	11%	43%	
Know Educational Process	14%			
Personnel Management	14%			
Negotiations/Mediation	14%	67%	14%	
Conflict Management	14%	22%	29%	
Experience as H.E.		44%	71%	
Contro/Conduct Hearing		22%	57%	
Human Relations			14%	
College Degree			14%	
Conduct Research			14%	
Educational Issues			43%	

One question which was asked was, "What are the strengths of using hearing examiners?" Most felt that it brought expertise to the hearing, improved the extent of due process extended to employees, and provided greater impartiality. Some further noted that bringing in an outside third party relieved the board of the burden of making decisions; provided an unbiased decision which was objective; provided a better paper trail, and made the process more expedient. One official felt that a strength was that "control" was taken away from the board. Eighty-six percent of those interviewed felt that the use of hearing examiners improved the termination process.

Forty-three percent of those interviewed did not think the utilization of hearing examiners added to the termination time-frame. Twenty-nine percent felt that it was more time consuming because hearing examiners were not always familiar with the issues or the district policies. Interestingly enough, 57 percent felt there were financial savings to the district in the use of hearing examiners especially if one considered the court litigation costs they perceived were being saved by the process.

Then, asked if there were any weaknesses in utilizing hearing examiners, 29 percent said the cost of hiring a hearing examiner was a weakness. Other statements of perceived weaknesses included: (1) It showed that the District and the Association had been unable to solve the issue at their level; (2) The Association utilized hearing examiners to prove to their clients that they are working for them; (3) It takes away the decision from the board; (4) Hearing officers are unfamiliar with the issues, and it is time consuming; (5) Districts run the risk of being ruled against; (6) Hearing officers recommend resignations rather than termination; and (7) It reflects a loss of district control.

Other impacts which district officials noted were that hearing examiner rulings and advice contributed to the district's understanding of the law, assisted in the development of policies, and provided valuable material for training sessions. Their reports also, as one individual remarked, "Assisted the district in cleaning up our act by pointing out problem areas."

Hearing examiners were also asked their perceptions regarding the impact they have had on educator termination actions. As a group, they felt that the use of hearing examiners provided: (1) Better employee relations; (2) Increased due process protections;

(3) Increased and improved fact finding; (4) Added insight to district procedures; (5) A reduction in time and expenditure due to a smaller amount of cases going to court; (6) A perception of impartiality; (7) A reduction in the potential for bias; (8) A less traumatic hearing setting; (9) A buffer zone for employees; (10) A cost saving process; and (11) A reduction of board time.

When asked about ways to improve the process, both association and district officials dwelt on the selection issue. District officials felt a need for a more formalized or standardized procedure for selection. Many association officials suggested a central clearinghouse where more information could be obtained about hearing officers. The hearing officers had many suggestions. These included: (1) Training programs for hearing examiners; (2) Licensure of hearing examiners; (3) Written guidelines; (4) Apprenticeship programs; (5) A state pool of hearing examiners; (6) Increased pay; (7) Ethical guidelines; and (8) Standardized procedures.

General Conclusions and Observations

1. The Utah Orderly Termination Act was enacted one year after the United States Supreme Court cases of Roth and Sindermann were decided. These cases seemed to have been the catalyst for prompting the legislature to enact something that would assure appropriate due process procedures in educator termination actions within the state's forty public school districts. Many provisions envisioned by original sponsors and supporters of the bill such as a uniform set of procedures to be utilized statewide, mandatory use of hearing examiners, inclusion of provisional teachers, and boards being bound by hearing examine decisions did not emerge in the final product produced by the legislature. Stiff resistance from local districts opposing a statewide uniform set of procedures and detailed requirements resulted in a law that essentially required each district to establish its own orderly termination procedures. Additionally, it provided some guidelines that would hopefully assure the development of 40 policies (one for each school district) which would meet and guarantee the minimally required due process procedures which the U.S. Supreme Court was mandating. This local autonomy-based policy is unique among all the states.

Even in states where the traditional pattern of local boards of education conduct termination hearings, legislative enactments assure a uniform procedure statewide. In Utah every district's policy and procedures vary one from another.

2. As pertaining to the Utah provision that allows for, but does not mandate, the use of hearing examiners in educator termination procedures, less than half of the local districts provide for them in their policies; and only half of those have made use of them within the past five years. With only one exception, those districts making use of hearing examiners are to be found in the most densely populated areas of the state; and for the most part, these are also the largest districts in terms of student numbers. As a general rule, it appears that the larger the district, the more termination cases; the more sophisticated the policy; and the more likely is the use of outside hearing examiners. By contrast, the smaller rural districts report less use of termination procedures, fewer cases, and less support for outside hearing examiners.

3. Those districts that utilize hearing examiners support and value them more than those that do not. Conflicts of perception relative to their need, importance, utility, cost, etc., emerge as a result. And like many other political issues within the state of Utah the split tends, in general, to be rural vs. urban. This becomes significant in the context of any kind of reform. As districts make use of hearing officers, problems pertaining to a lack of statewide uniformity and guidelines relative to the selection of hearing officers, their operation, reporting procedures, training, etc., become more obvious and grow in severity. Yet, reform becomes more problematic because districts have been allowed to go off in their own directions resulting in deeper commitment to traditional practices and perceptions.

4. Although there is a high approval rating by those districts and associations that have worked with hearing examiners within the state of Utah, it is clear that some uniformity of procedures, better training, improved and standardized selection processes, etc., could greatly improve the over-all process.

5. A powerful underlying issue relative to any kind of reform relates to the questions of control and autonomy of local boards of education. Only as problems of bias, work-load, cost, and/or sophisticated and highly technical legal issues emerge do local

boards seem inclined or convinced of the necessity to make greater use of outside independent hearing examiners in educator termination actions.

References

1. Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482, 495-496 (1976).

2. Hortonville at 493.

3. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972).

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