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Teachers' Union and Employment Rights: A Survey of West Virginia Law

William B. Flanigan
West Virginia University College of Law

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Student Note

TEACHERS' UNION AND EMPLOYMENT RIGHTS: A SURVEY OF WEST VIRGINIA LAW

I. INTRODUCTION

West Virginia is a relative newcomer in the management of public labor disputes.[1] Unlike some of its more industrialized neighbors,[2] the state has been largely spared the torment and disruptive effects of job actions by government workers. The only major public employee strike this state has confronted in recent memory was dealt with swiftly and severely by Governor Moore[3] after a brief interruption of vital public services. But the relationship between government and its workforce in this state is changing. Public bodies can no longer rely on their employees to forego grievances for fear of the kind of retaliation meted out by Governor Moore. All categories of public workers are becoming restive with a system which permits them no active voice in setting wages or in improving working conditions; and nowhere is this more apparent than in education.

It has been slow in coming, but the 26,000 public school teachers in West Virginia have begun to flex their political muscle. Low salaries, overcrowded classrooms and demanding parents have forced educators to shed their images as demure scholars in favor of the scowling masks of militant reformers. Teachers have donned their "hardhats," so to speak; they have organized their membership into a hardhitting union, formed a very effective political lobby and, on occasion, used the force of their numbers to extract concessions from elected officials.

So far teachers have utilized conventional avenues to press their demands for better wages and classroom conditions. This tactic has produced some significant victories, particularly in the areas of job security and procedural pro-

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[1] Because Congress exempted state and local governments from the National Labor Relations Act, West Virginia, like other states, is left to its own devices in managing public sector labor relations. *See, e.g.*, NLRB v. National Gas Utility Dist., 402 U.S. 600 (1971). Unfortunately, the state has not yet seen the need for a formalized system of labor management.

[2] Several of West Virginia's neighbors have been especially hard-hit by teacher strikes. Pennsylvania, for example, recorded an astounding 267 separate teachers strikes for the period 1972 through 1980. For the same period, Ohio recorded 116 teachers strikes and Illinois reported 176. PUBLIC SERVICE RESEARCH COUNCIL, THE EFFECT OF COLLECTIVE BARGAINING ON TEACHER SALARIES 12 (1981).

[3] See Kirker v. Moore, 308 F. Supp. 615 (S.D. W. Va. 1970), *aff'd*, 436 F.2d 423 (4th Cir. 1971), *cert. denied*, 404 U.S. 824 (1971), for a description of Governor Moore's reaction to a winter strike by Department of Highways workers.

tections.[4] But it has also resulted in some notable setbacks. Teachers' salaries,[5] for example, still lag far behind other jurisdictions and there is no indication that the gap is closing. With the deepening recession and the decline in the coal industry, West Virginia's economy has been crippled to the point that teachers may face several successive years without a pay increase.

At some point, the combination of unresponsive administrators and poor wages will force teachers to abandon the tactic of persuasion in favor of confrontation. Rather than working within the political process, educators may find that more disruptive measures, such as strikes, are necesary to bring about desired changes. Before conditions reach this flashpoint, it is important to understand the range of concerns troubling those in the teaching trade. From such an understanding, constructive proposals may emerge which can avert the burgeoning confrontation between teachers and government. This Note will hopefully contribute to that process by focusing on the rights of teachers in both the classroom and the larger educational system.

II. Permissible Limits of Union Activities

A. *The Bargaining Rights of Teachers*

West Virginia has no formalized system of collective bargaining for public school teachers, or for any other category of public employees. Unlike many of its counterparts,[6] the state has resisted the movement toward managed labor relations in public education, in favor of a system which leaves decisionmaking largely in the hands of elected officials.[7] Because this system operates at both the state and local levels, it is a source of great frustration for teachers and county officials.

While permitting elected officials wide participation in educational decisions arguably serves the interest of democratic government, it also creates some very real difficulties for teachers who seek better working conditions. These difficulties can best be understood by illustrating the struggle teachers face in achieving something so basic as a pay increase: Under present law, the state legislature has reserved the power to set teacher salaries.[8] If county officials want to supplement salaries with local resources, they are free to make that choice, so long as local tax levy ceilings are not exceeded.[9] For teachers to impact on the salary decision, then, they have to join the battle on two levels;

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[4] Golden v. Board of Educ., 285 S.E.2d 665 (W. Va. 1981).

[5] West Virginia ranks 44th among the states in terms of average teacher salary. Even more alarming, during the decade 1970-1979, there were only three states in the country which increased teacher salaries at a slower rate than West Virginia. National Center for Education Statistics, Average Annual Salaries of Classroom Teachers in Public Elementary and Secondary Schools by State, U.S. Dep't of Educ. (1980).

[6] There are at least 31 states that have enacted legislation to formalize a system of collective bargaining. *See* Gee, *The Unionization of Mr. Chips: A Survey Analysis of Collective Bargaining in the Public Schools*, 15 Williamette L. Rev. 367 (1979) [hereinafter cited as *Mr. Chips*].

[7] W. Va. Code § 18A-4-1. (1977).

[8] W. Va. Code § 18A-4-2 (Supp. 1982).

[9] W. Va. Code § 18A-4-5 (Supp. 1982).

at the statehouse and at the local school board. At the state level, the parties which must be convinced are politicians with varied constituencies, including many who may be disserved by a teacher pay hike. Compounding the task further is the sheer number of people who must be persuaded. Teachers face a bicameral legislature with a combined membership of nearly one-hundred.[10] To be successful, teachers must secure the votes of a majority of each house, plus the acquiescence, if not the support, of the governor — and that is only the first level of the battle. From there, they must persuade fifty-five county school boards to make acceptable adjustments in their respective salary supplements.

As this illustration demonstrates, "bargaining," such as it exists at the state level is really a cousin of "interest group" lobbying.[11] Teachers formulate their set of demands, gather whatever resources they have available and make the journey to Charleston each winter, where they line up with the hundreds of other "interest groups" for a share of the state "pie." Depending on the political clout they enjoy at the time, or the friends they can make on critical committees, the teachers may succeed in securing a modest salary increase or other concessions; but only after running the gauntlet of compromise and "horse-trading" that is so ingrained in the political process. The inefficiencies of this system are legion, but the greater tragedy is that it does not work. The system simply fails to address the broad range of issues which are important to teachers and leaves too many unresolved disputes to fester.

"Bargaining" also takes place on the county level in West Virginia,[12] and it is here that teachers potentially can have a significant impact. Rather than dealing with a large, unmanageable collection of politicians, they are confronted by five individuals whose only governmental responsibility is to oper-

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[10] W. VA. CONST. art. VI, § 2.

[11] West Virginia's teachers number 26,105 and are supported by non-professional staff of 15,305. By sheer numbers, educators constitute a potent political force in this state. Highly educated and politically astute, they can turn the tide in both statewide and local elections.

[12] Despite the manageability of negotiations on the local level, teachers can expect only marginal benefits even from the most accomodating school boards. In West Virginia, virtually all the important decisions are governed by state statute and cannot be contravened by local officials. Teachers' salaries, for example, are set by the state legislature. W. VA. CODE § 18A-4-2 (Supp. 1982). Although local boards may supplement salaries from tax revenues, the tax assessment rates are statutorily set, often binding boards of education to prior year funding levels. Counties can gain extra revenue to finance salary supplements through a special tax levy, but this requires a special election and the acquiescence of 60% of the qualified voters. W. VA. CODE 18-5-15 (Supp. 1982). (The 60% requirement was recently lowered to 50% by constitutional referendum. The Legislature may still, however, choose to impose a higher approval rate than is constitutionally required.) Moreover, a special assessment expires in five years and must be renewed at another special election. At a time when voters are strapped with high interest rates and inflation, not to mention suspicions about the quality of education being provided in our schools, the special levy option gives local board members little flexibility to meet teacher demands.

State preemption of local prerogatives is also evident in other areas. The number of instructional days, for example, is set by statute, W. VA. CODE § 18-5-15 (Supp. 1982), as are the major parts of the school calendar, the maximum student-teacher ratios, the term of teachers' contracts, W. VA. CODE § 18-2-2 (1977), and the amount of sick pay and personal leave. W. VA. CODE § 18A-4-10 (Supp. 1982). State control is so prevalent that even minute details such as duty-free lunches and planning periods are controlled by statute. W. VA. CODE § 18A-4-10 (Supp. 1982).

ate the schools in accordance with the directives of the state legislature and their own consciences. Superficially, at least, conditions are ideal at the local level for fruitful negotiations between educators and school officials. Yet the processes of negotiation are as confused here as they are at the state level.

The primary cause of the confusion is that the system of negotiation is not formalized or structured. Where it exists at all, the process has evolved into something different in every county. Teachers may enjoy a good rapport with school board members in one school district,[13] while in others the relationship may be abysmal, with the parties unable to meet face-to-face, much less enter into meaningful discussions.

In addition to lack of structure, the local bargaining process is further undermined by the participants' uncertainty about the nature and extent of their roles. This uncertainty flows, in large part, from contradictory pronouncements from public agencies about the rights and duties of those engaged in bargaining. A prime example is the West Virginia Supreme Court of Appeals' decision in *City of Fairmont v. Retail, Wholesale & Department Store Union.*[14]

In *Fairmont,* the court faced a range of questions about public employee union activities, including the government's duty to bargain. In a very carefully crafted opinion, Justice Miller acknowledged that workers in the public domain enjoy the protections of the first amendment. They can form unions, petition their employers for improved working conditions and, in limited circumstances, strike, all within the protections of the Constitution. They may not, however, force the government employer to lend an attentive ear to their demands. Under Justice Miller's opinion, public agencies are relieved of any duty to meet and confer with employees over the terms and conditions of employment. The decision to turn a deaf ear to demands for better pay and benefits is a prerogative of sovereignty, according to Miller, and the judiciary will not interfere with the government's right to pursue such a policy.[15]

For teachers, the *Fairmont* decison is particularly distressing. Although the court recognized the organization rights of all public workers, including teachers, it quickly undermined the ability of these employees to affect their employment destiny by freeing local officials of the duty to bargain. Teachers, and all other categories of public employees, gain little by the right to speak on important employment matters, if there is no forum in which they can be heard. As the experience in the private sector has shown, the duty to fairly consider all proposals is essential to a bargaining process which hopes to avert disruptive confrontation.[16] The failure of the court to impute such a duty to local officials not only emboldens them to harden their positions against union demands, but it may push the workforce toward more reckless action to get the

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[13] For a very good discussion of collective bargaining options in West Virginia, see Kincaid, *Resolving Public Employment Disputes: A Guide for West Virginia,* 79 W. VA. L. REV. 23 (1976).

[14] 283 S.E.2d 589 (W. Va. 1981).

[15] 283 S.E.2d at 593.

[16] See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) and NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1969) for a discussion of the role the duty to bargain plays in private sector labor disputes.

attention of government officials.

To compound the damage done by the supreme court's decision, teachers must also reckon with school boards whose power to voluntarily bargain is severely circumscribed. In a 1974 opinion letter,[17] which is the latest and most authoritative declaration on voluntary bargaining, the Attorney General of West Virginia concluded that school officials could not legally engage in collective bargaining with teacher unions, even if they did so by choice. Definitionally, the Attorney General explained, collective bargaining would ascribe a number of options to teachers which are forbidden by state law, not the least of which is the right to strike if negotiations fail. Since only the legislature can cleanse such options of the "taint of illegality," school boards are powerless to engage in a process which may encourage teachers to step outside the law to press their demands for better working conditions.[18]

On the positive side, the Attorney General did recognize school officials' power to engage in meaningful "negotiations" with teachers. These powers include the ability to meet and confer with teacher representatives, the option to recognize a union as the exclusive bargaining agent of the teachers, the authority to allow neutral fact-finding and third party mediation to resolve outstanding disputes, and the capacity to enter into contracts with teacher unions with respect to the terms and conditions of employment.[19] Furthermore, the Attorney General acknowledged that teachers have an important role to play in educational decisions, a role, he emphasized, that can only improve the school system's ability to achieve its assigned mission. The Attorney General let teachers down, however, by not identifying how this role can be gained. The favorable language about the benefits of negotiation means little when, in the next breath, he makes it clear that the decision to include teachers must come from school officials.[20] They are still the powerbrokers and, unless they can be con-

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[17] 55 Op. Att'y Gen. 300 (W. Va. 1974).

[18] The Attorney General was also wary of collective bargaining because of his fear that a school board might impermissibly delegate authority to non-elected officials. As he stated in his opinion, "the final determination of wages, hours, working conditions and the like, rest with the particular government unit and cannot be delegated away." *Id.* at 308 (citing 51 Op. Att'y Gen. 683, 689 (W. Va. 1966)).

The Attorney General's fear is not without foundation. In West Virginia, the state legislature is constitutionally charged with the duty to provide a system of public education and, in discharging that duty, the legislature has chosen county boards of education to administer the schools. These boards are creatures of the state. Their functions and powers are governed by statute and may only be exercised in the manner prescribed. They have no implied power, except that which is reasonably necessary to accomplish their assigned mission. *See* Evans v. Hutchinson, 214 S.E.2d 453 (W. Va. 1975). So long as these boards "negotiate" with teachers, the ultimate authority for decisionmaking remains with school officials. But, when "negotiation" matures into a formal contract, the danger exists that the board may have relinguished its power to non-governmental individuals. Any contract which included such a delegation would be unenforceable. *See* Stone v. Camden County Bd. of Chosen Freeholders, 280 N.J. Super. 430, 435 A.2d 143 (1981); Board of Directors of Maine School Administrative Dist. No. 36 v. Maine School Administrative Dist. No. 36 Teachers Ass'n, 428 A.2d 419 (Me. 1981); Richards v. Board of Educ., 58 Wis. 2d 444, 206 N.W.2d 597 (1973).

[19] 55 Op. Att'y Gen. 300 (W. Va. 1974).

[20] The Attorney General's Opinion is not dispositive of the collective bargaining issue. In West

vinced of the benefits of negotiation, teachers are without any rights in the process.

Taken together, the Attorney General's opinion and the later supreme court decision in *Fairmont* cannot be hailed as significant victories for teachers. Nor, for that matter, do they contribute to the rationalization of the public bargaining process. In practical terms, the Attorney General and the supreme court have left the field of collective bargaining as they found it — in disarray. Still, the opinions are far from expressions of anti-employee sentiment. Both the court and the Attorney General agree, for example, that teachers and other public employees have a constitutional right to associate in unions and to use lawful processes to further their collective demands. A careful reading of the decisions also reveals a shared recognition that public sector bargaining can yield important benefits for employees and government. On these points, at least, the court and the Attorney General line up squarely with the interests of the public workforce.

B. The Teachers' Strike Option

The court's ruling that government agencies are under no legal duty to recognize and bargain with unions leaves public employees in a dilemma.[21] However legitimate their grievances about pay, working conditions, or benefits, they have no guaranteed forum in which to petition for changes. If the public employer ignores their concerns, the employees are without a vehicle to force the agency to act in good faith or to come to the bargaining table with new proposals.

Increasingly, public workers in this state are choosing to confront the government employer rather than foresake legitimate demands. So far this confrontation, with one notable exception,[22] has been confined to isolated work-stoppages and sickouts. But it is only a matter of time before public employees choose more disruptive tactics to press their demands for better working conditions. Since teachers are the best organized of all the categories of public workers, the problem is likely to surface first in education. It is important, then, to explore whether educators even have the strike option in West Virginia. Necessarily, this discussion must proceed as if the teachers' strike rights are identical to those of the public workforce at large. The topic must be treated in this broad context because the only caselaw available deals with the subject on this same plane. Hence, if the discussion seems universalized at times, rest assured that it is intentional.

Virginia, such opinions are not controlling precedent. They may serve as guideposts for the judiciary, but they do not have the force and effect of law. *See* State v. Wassick, 156 W. Va. 128, 191 S.E.2d 283 (1972); Walter v. Ritchie, 156 W. Va. 98, 191 S.E.2d 275 (1972).

[21] City of Fairmont v. Retail, Wholesale & Dept. Store Union, 283 S.E.2d 589 (W. Va. 1981).

[22] Kirker v. Moore, 308 F. Supp. 615 (S.D. W. Va. 1970), *aff'd*, 436 F.2d 423 (4th Cir.), *cert. denied*, 404 U.S. 824 (1971).

1. Common Law Rule

Public employee strikes are unlawful under common law,[23] for reasons relating to outdated notions of sovereign authority and disproved theories about the disruptive effects of such strikes. Beginning with the United States Supreme Court decision in *United States v. United Mineworkers of America*,[24] public employee workstoppages have been viewed as insidious attempts to influence government by crippling essential services. Striking employees have been harrassed, disciplined and even discharged for daring to challenge government's authority to run the "business" of the people the way it chooses.[25] Common law states uniformly condemn employee actions which challenge government authority, disrupt essential services or seek to coerce public officials, regardless of the validity of the grievances being advanced.[26]

Recognizing the failings of the common law rule, most states have enacted statutes which define the permissible boundaries of employee job actions.[27] The majority still prohibit vexatious strikes,[28] but they have replaced the strike option with a comprehensive system of collective bargaining which usually includes arbitration. A smaller number of states have completely repudiated the common law rule, permitting public employees the right to strike when public health and safety are not jeopardized.[29] As the Air Traffic Controllers' strike illustrates, the federal government is not among those jurisdictions which has altered its views on the evil of public employee work stoppages.[30]

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[23] *See* Gardner v. Broderick, 392 U.S. 273 (1968); Abney v. City of Winchester, 558 S.W.2d 662 (Ky. 1977); Board of Educ. v. Asbury Park Educ. Ass'n, 145 N.J. Super. 495, 368 A.2d 396 (N.J. Super. Ct. Ch. Div. 1976), *modified*, 155 N.J. Super. 76, 382 A.2d 392 (N.J. Super. Ct. App. Div. 1977); Goldberg v. City of Cincinnati, 26 Ohio St. 2d 228, 271 N.E.2d 284 (1971).

[24] 330 U.S. 258 (1947).

[25] *See* Kirker v. Moore, *supra* note 22; Farrelly v. Timberland Regional School Dist., 114 N.H. 560, 324 A.2d 723 (1974) (tenured teachers are stripped of employment when they engage in an illegal strike); Board of Educ. v. Sussex County Vocational Technical Teachers Educ. Ass'n, 170 N.J. Super 426, 406 A.2d 989 (1979) (teachers who violate injunction to return to work may be discharged).

[26] *See* City of Manchester v. Manchester Teacher's Guild, 100 N.H. 507, 131 A.2d 59 (1957); Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965).

[27] *See* Gee, *Mr. Chips*, *supra* note 6.

[28] *See, e.g.*, FLA. CONST. art. I § 6; CONN. GEN. STAT. ANN. §§ 7-475, 10-153(e) (Supp. 1982); VA. CODE. §§ 40.1-54.2 (1981); OHIO REV. CODE ANN. § 4117.02 (Baldwin 1977); WIS. STAT. ANN. § 111.89 (West Supp. 1981).

[29] ALASKA STAT. § 23.40.200 (1977); HAWAII REV. STAT. § 89-12 (Supp. 1976); PA. STAT. ANN., tit. 43, § 1101.1003 (Purdon Supp. 1982); VT. STAT. ANN., tit. 21, § 1730 (Supp. 1978).

[30] Congress has long recognized the potential dangers that can arise from public employee strikes. During the heyday of union activities, it expressly prohibited any job actions against a federal agency. *See* United States v. UMWA, 330 U.S. 258 (1947). Under present law, the Congress not only prohibits strikes, but it also forbids a federal employee from associating with an organization of employees that he knows asserts the right to strike against the government of the United States. 5 U.S.C. § 7311(4) (1980). Although Congress' power to prohibit public employee strikes has been upheld, the broader proscription against even associating with a group which espouses the right to strike would seem to run afoul of the first amendment's free association provision. *See* United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, *aff'd*, 404 U.S. 802 (1971).

2. West Virginia's Position on Right to Strike

For some time, West Virginia was thought to follow the common law rule on the right to strike.[31] In a 1970 federal case,[32] for example, Judge Field upheld the firing of over 3,000 highway department employees because they engaged in an illegal work stoppage. Although the judge cited no specific authority, he concluded that West Virginia was a common law state and would follow the accepted rule that public employee strikes are unlawful. As recently as 1974, West Virginia's Attorney General agreed with the federal court's description of West Virginia law on the strike question. In the previously discussed opinion letter on teachers' bargaining rights,[33] the Attorney General stated baldly that strikes by public employees are illegal in West Virginia. To support his position, the Attorney General cited a provision of the West Virginia Constitution which preserves the common law in this state,[34] unless expressly changed by the legislature. Since that body has never acted either to prohibit or legitimize the strike option, the Attorney General reasoned, the common law rule proscribing strikes controls in this jurisdiction.

Eight years after the Attorney General's opinion, the legislature still has not spoken on the strike option, except in relation to teachers' sick pay and leave benefits.[35] In an obscure recent amendment, the legislature does expressly prohibit a teacher from using these benefits "in connection with a concerted work stoppage or strike."[36] But it does not pass on the strike's underlying lawfulness.

The most definitive statement that has yet been made on the legality of public employee strikes came from the supreme court in the earlier discussed *Fairmont* decision.[37] In that case, it will be recalled, the court ruled that hospital workers were not engaged in illegal activity when they staged a one day work stoppage against their municipal employer. To the court, the job action was peacefully executed and was not designed to turn away clients or bar nonstriking personnel from engaging in work. Absent a breach of contractual duty, then, the employees had done nothing which would entitle the hospital to recover damages against the responsible union. In short, the workers' job action

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[31] Kirker v. Moore, *supra*, note 22.

[32] *Id.*

[33] *See supra*, note 17.

[34] W. VA. CONST. art. VIII § 13 provides:

Except as otherwise provided in this article, such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature.

The original construction of this section of the Constitution strictly adhered to the view that only the legislature could change the common law. State v. Abrogast, 133 W. Va. 672, 57 S.E.2d 715 (1950). The supreme court has since moved away from a literal interpretation of the section, holding that the courts have historic power to alter the common law in light of present societal conditions. *See* Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979); Markey v. Watchel, 264 S.E.2d 437 (W. Va. 1979).

[35] W. VA. CODE § 18A-4-10 (Supp. 1982).

[36] *Id.*

[37] 283 S.E.2d 589 (W. Va. 1980). *See supra* text accompanying footnotes 14-16.

was not "illegal" by the court's definition of that term.

Fairmont undeniably moved the court away from the common law prohibition against strikes. Just how far down the road it has traveled, however, is still unclear. Justices McGraw and Harshbarger left little doubt about their views on the breadth of the strike option, saying, in their concurrence, that "a peaceful strike by public employees is legal in West Virginia."[38] But their characterization of *Fairmont*'s holding is too generous. The plurality opinion never directly states that public workers may engage in strikes. In fact, the language of the opinion deliberately avoids a sweeping statement indicating court support for a "right-to-strike."[39] To restrict the breadth of its opinion, the plurality even recasts the fundamental controversy in the case to focus on the employer's common law recovery rights against a striking public union, rather than the legality of the underlying job action.

Still, the implication of the court's decision cannot be masked by vague language or clever machinations. Had the court not embraced the principle that some public employee strikes are lawful, the result in *Fairmont* would have been impossible to reach. Before celebration turns to rash action, however, teachers and other categories of public workers must recognize the narrow dimensions of the strike option. A union, for example, which struck in violation of an employment contract would fall outside the protective umbrella of *Fairmont*. This is of particular importance to teachers, since they can only be employed by contract. Similarly, a union which pursued its job action through illegal means, such as trespass or physical coercion, would likewise find *Fairmont* unaccommodating. Finally, a workstoppage which interfered with the operations of a government agency or with the employment rights of co-workers could not invoke *Fairmont* to shield its participants from the sting of the state's reprisals.

3. The Discharge Threat

Teachers should be wary of the "strike option" because of the federal court decision in *Kirker v. Moore*.[40] A district judge there upheld the power of West Virginia's governor to discharge striking State Department of Highways workers who had walked off the job during a late winter storm. As previously mentioned, the judge categorized West Virginia as a common law state with respect to public employee strikes. When the employees defied their government employer, the judge explained, the Governor had "the right, if not indeed

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[38] 283 S.E.2d at 597.

[39] The court's express holding in *Fairmont* was that:

> Where public employees who have no employment contracts with their employer, engage in a work stoppage which is peaceful and directed only against the employer with no attempt to interfere with his customers or bar ingress to other employees there is no common law right to damages.

Id. at 590.

[40] 308 F. Supp. 615 (S.D. W. Va. 1970), 436 F.2d 423 (4th Cir.), *cert. denied*, 404 U.S. 824 (1971).

the responsibility"[41] under common law to terminate their relationship with the state.

The decision in *Kirker v. Moore* is important because it is the only judicial statement in West Virginia on the power of government bodies to discharge striking workers. It stands alone as a harsh reminder of the price public employees may pay if they rashly test the authority of the state. But, and this must be emphasized, it is not conclusive on the discharge question. *Kirker v. Moore* was rendered by a federal court interpreting an unclear area of West Virginia law. Its conclusions and findings are therefore not binding on the courts of this state.[42] While the decision may serve as a guidepost, the West Virginia Supreme Court of Appeals is free to reject the *Kirker v. Moore* rationale and set a different course for dealing with striking public employees.[43] Indeed, the court's decision in *Fairmont*[44] already indicates movement away from *Kirker*'s blanket condemnation of public employee strikes. In *Fairmont*, it will be recalled, the supreme court recognized a qualified right to strike for public employees. Where the action is peaceful, violates no contract obligations and is not designed to disrupt vital public services, a strike by public employees is not necessarily illegal in West Virginia.[45]

The *Fairmont* decision obviously casts doubt on *Kirker v. Moore*'s bold statement that all public employee strikes are illegal.[46] But this does not mean that the importance of *Kirker* may be entirely discounted. The state supreme court has yet to rule on whether the government's power to discipline striking employees is as expansive as Judge Field's opinion in *Kirker* indicated. Until this issue is squarely addressed, the public workforce, and teachers particularly, should exercise restraint in organizing job actions, because the threat of retaliation still looms large in West Virginia.

C. *Picketing Rights of Teachers In Non-Strike Setting*

No less than any other citizen, a school teacher is entitled to the full range of protections afforded by the first amendment.[47] She may associate with her colleagues in a union,[48] comment critically upon public issues without fear of

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[41] *Id.* at 623.

[42] *See* Nature Conservancy v. Machipongo Club, Inc., 579 F.2d 873 (4th Cir.), *cert. denied*, 439 U.S. 1047 (1978).

[43] *Id.*

[44] 283 S.E.2d 589 (W. Va. 1980).

[45] 283 S.E.2d at 590.

[46] *Id.*

[47] *See* Madison Joint School Dist. v. Wisconsin Employment Rel. Comm., 429 U.S. 167 (1976) (teachers have a right to discuss educational matters at board of education meeting if open to other members of the public); Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (teacher cannot be discharged for making public internal school memorandum when disclosure violates no school policy); Pickering v. Board of Educ., 391 U.S. 563 (1968) (teacher has right to comment publicly on important issues, even though utterances are adverse to board of education's official position).

[48] In Smith v. Arkansas State Highway Employees, 441 U.S. 463 (1979), the United States Supreme Court recognized public employees' first amendment rights to organize into labor unions. The Court went on to hold, however, that "the first amendment does not impose any affirmative

reprisal,[49] and address the school board in a public forum about issues related to salary levels, classroom conditions, or general education policy.[50] In limited circumstances, she may even bring her protest into the school building, provided the educational process is not disrupted.[51] As the United States Supreme Court has restated many times, a teacher may not be "compelled to relinquish the First Amendment rights [she] would otherwise enjoy as a citizen"[52] merely because of her employment in the public domain. Nor, the Court has further admonished, can the state or its subdivisions operate schools without obeying "the transcendent imperatives of the First Amendment."[53]

Among the freedoms protected by the first amendment is the right to engage in peaceful picketing. Since *Thornhill v. Alabama*,[54] the United States Supreme Court has consistently recognized that picketing is a form of self-expression which is shielded from unwarranted government invasion. Like all forms of self-expression, the state is not always powerless to regulate the activity. Indeed, the Court has expressly upheld the power of the government to prohibit picketing which disrupts vital public services[55] or which is undertaken to accomplish an unlawful purpose.[56] But such regulation, even when appropriate, must be necessary to achieve a weighty public interest and be very narrowly drawn.[57]

Peaceful picketing, off school property, by public school teachers is neither a threat to public safety, nor to the educational process. Hence, the state and its subdivisions would have difficulty justifying broad restraints on the rights of teachers to express themselves through this means. The courts have protected teachers' first amendment rights to refuse to recite the Pledge of Alle-

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obligation on the government . . . to recognize the association and bargain with it." 441 U.S. at 465.

[49] Pickering v. Board of Educ., 391 U.S. 563 (1968).

[50] Madison Joint School Dist. v. Wisconsin Employment Rel. Comm., 429 U.S. 167 (1976).

[51] In Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), the United States Supreme Court struck down a school policy which prohibited students from wearing black armbands to express their opposition to the Vietnam War. Such a policy, the Court explained, placed an unnecessary restraint on the students' right of expression, without a demonstration that the conduct "materially and substantially interfere[d] with the requirements of appropriate discipline in the school." *Id.* at 509. The language important to teachers was the Court's general conclusion that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. The Court went on to acknowledge that the special needs of the educational process would always be a factor in the reach of teachers' and students' first amendment rights, but it left little doubt that certain forms of nondisruptive expression, such as armbands, badges, etc. are certainly protected. *See* Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981), for some adverse commentary on the *Tinker* decision.

[52] Madison Joint School District, 429 U.S. at 175.

[53] Board of Educ. v. Pico, 102 S. Ct. 2799 (1982).

[54] 310 U.S. 88 (1940); *see also* Carey v. Brown, 447 U.S. 455 (1980); Gregory v. Chicago, 394 U.S. 111 (1969).

[55] Cox v. Louisiana, 379 U.S. 536 (1965) (prohibition against picketing or demonstrating near courthouse upheld).

[56] Teamsters v. Vogt, Inc., 354 U.S. 284 (1957) (where a "union shop" is prohibited by state law, picketing designed to accomplish that unlawful purpose may be restricted).

[57] Carey v. Brown, 447 U.S. at 470.

giance,[58] to keep personal affiliations with political groups secret,[59] to criticize a public school administrator about school policy in a face-to-face confrontation,[60] and to speak openly with school officials in a public forum.[61] With such an unshakable commitment to protecting the self-expression rights of educators, the courts are unlikely to countenance any blanket restrictions on teachers' rights to engage in peaceful picketing.

The tougher problem, from a constitutional vantage point, is the extent to which teachers can take their picketing to the school grounds. Like any other government entity, a board of education does have the power to place reasonable restrictions on the public's access to property under its control.[62] The fact that the property is publicly owned does not mean that every person or group in the community is entitled to unregulated usage. Nor does it mean that reasonable restrictions must necessarily give way when they collide with constitutional rights.[63] Where the issue has arisen in the "free expression" context, the United States Supreme Court has upheld the agency's authority to mute public speech when the restrictions are applied uniformly, designed to achieve a significant public interest and are not directed at the "content" of the message being advanced.[64]

Assuming a school board adhered to these standards, it could constitutionally prohibit teachers from picketing or demonstrating in classrooms or hallways during normal school hours. Presumably, a teacher discharged for violating such a policy would not be able to claim that the school restrained free speech as a ground for gaining reinstatement.

The result would be different, however, if the school property was used as an outlet for public commentary. In evaluating any restraints on picketing in this setting, a tribunal would have to apply the United States Supreme Court's more rigorous "public forum" test.[65] The fact that the restrictions were "content neutral" and "reasonable" would not save them under "public forum" analysis. School officials would also carry the burden of demonstrating that the restrictions advanced a very substantial government interest,[66] that they were the least restrictive means of advancing that interest,[67] and that the proponents of the message had alternative avenues of reaching the desired audi-

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[58] Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

[59] Shelton v. Tucker, 364 U.S. 479 (1960).

[60] Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979).

[61] Madison Joint School Dist. v. Wisconsin Employment Rel. Comm., 429 U.S. 167 (1976).

[62] *Id.*

[63] *See* Greer v. Spock, 424 U.S. 828 (1976) (military base may prohibit groups from conducting peaceful demonstrations on government property); Jones v. North Carolina Prisoners Labor Union, Inc., 433 U.S. 119 (1977) (prison warden may restrict inmates' rights of association and solicitation, even if purpose would otherwise be lawful); United States Postal Serv. v. Greenburgh Civic Ass'n., 453 U.S. 114 (1981) (Congress may restrict access to mail boxes, even though "use" is related to freedom of expression).

[64] United States Postal Serv. v. Greenburgh Civic Ass'n., 453 U.S. 114 (1981).

[65] *Id.*

[66] *Id.*

[67] Police Dept. of Chicago v. Mosely, 408 U.S. 92 (1972).

ence.[68] The difficulty in justifying restraints on free speech rights under these standards would obviously afford teachers greater protection from possible school board retaliation.[69]

III. Procedural and Substantive Rights

While teachers have suffered some setbacks on the union front, they have nevertheless enjoyed considerable success in extending the reach of their procedural and substantive employment rights. These triumphs have been primarily achieved in the court system, where recent decisions have strengthened due process protections,[70] expanded avenues of appeal from local board decisions,[71] and narrowed the grounds for discharge.[72] To a lesser extent, teachers have also won important protections from the state legislature. Just recently, for example, the state gave probationary teachers the right to a "statement of reasons" when a board decides not to renew their contracts.[73] The "statement of reasons" protection is especially important, because it gives the nontenured teacher the ability to discover whether the adverse decision was based on a stigmatizing factor, such as imcompetency or immorality. She can then use this information to challenge the correctness of the board's judgment through the administrative framework and, ultimately, through the courts. If the decision was wrong, she can remove this blemish from her employment record before it permanently jeopardizes her professional standing.

With few exceptions, teacher successes have come at the expense of school boards. Most of the important recent decisions have chipped away at local prerogatives by requiring more uniformity in personnel practices and by providing greater judicial oversight of board operations.[74] While some may lament the loss of local control these decisions have wrought, the court's interventions, in many cases, have been justified, if not long overdue. Its ruling on teacher im-

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[68] Consolidated Edison Co. v. P.S.C., 447 U.S. 530 (1980).

[69] Madison School Dist., 429 U.S. 167 (1980).

[70] *See* Wayne County Bd. of Educ. v. Tooley, 276 S.E.2d 826 (W. Va. 1981).

[71] *See* Leef v. Via, 293 S.E.2d 442 (W. Va. 1982).

[72] *See* Golden v. Board of Educ., 285 S.E.2d 665 (W. Va. 1981).

[73] W. Va. Code § 18A-2-8(a) (Supp. 1982) provides in part:

> Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

[74] In two recent decisions, Mason County Bd. of Educ. v. State Superintendent of Schools, 274 S.E.2d 435 (W. Va. 1981) and Trimboli v. Board of Educ., 254 S.E.2d 561 (W. Va. 1979), the court has ruled that, in cases involving incompetency, the teacher is entitled to an objective evaluation of her performance and an opportunity to correct any deficiencies. These steps are mandatory on all local school boards and noncompliance will result in a reversal of any decision adverse to the teacher's interest.

morality,[75] for example, finally provides local officials with some direction on the weight to be given out-of-school behavior in the employment decision. Granted, the trade-off for this direction has been a loss of discretionary authority; but it is a bargain, nevertheless, that those concerned about teachers' employment rights welcome.

Collectively, the court's recent rulings have dramatically changed the employment relationship between school boards and teachers. Whether these changes have made the school system a better place to work will become clearer as this discussion unfolds.

A. *Source of Employment Rights*

A public school teacher can only be employed by the local board of education upon the recommendation and nomination of the superintendent.[76] The terms and conditions of her employment must be reduced to contract and retained on file with the local school board.[77] Initially, the duration of the contract may be for no "less than a year nor more than three years."[78] But if, after three years of successful employment, the board renews the employment relationship, the teacher retains her position under a continuing contract.[79] Commonly called "tenure," this species of contract cannot be terminated except by written resignation of the teacher or by majority vote of the full school board.[80] Statutorily, the school board is restrained from taking such a vote without good cause and without providing the teacher the fundamental protections of due process.[81] Minimally, these protections must include a statement of reasons for the decision, an opportunity to be heard on the charges, and the decision of an impartial tribunal.[82]

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[75] The court confronted the morality issue in Golden v. Board of Educ., 285 S.E.2d 665 (W. Va. 1981).

[76] W. VA. CODE § 18A-2-1 (1977).

[77] State *ex rel.* Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908 (W. Va. 1980).

[78] W. VA. CODE § 18A-2-2 (1977).

[79] *Id.*

[80] *Id.*

[81] W. VA. CODE § 18A-2-2 (1977) provides in part:

> The continuing contract of any teacher shall remain in full force and effect except as modified by mutual consent of the school board and the teacher, unless and until terminated (1) by a majority vote of the full membership of the board before April first of the then current school year, after written notice, served upon the teacher, return receipt requested, stating cause or causes, and an opportunity to be heard at a meeting of the board prior to the board's action thereon . . . .

[82] The court has said that the procedural protections which must be afforded to public employees depend upon (1) the personal interests that will be affected by the state's decision; (2) the risk of erroneous deprivation of the employee's property interest through the procedures used and (3) the government's interest in the proceeding and the administrative and financial burdens imposed by additional due process requirements. Waite v. Civil Serv. Comm'n, 241 S.E.2d 164, 165 (W. Va. 1977).

Where the court has applied the *Waite* standards, it has favored the employee's employment interest over the state's interest in controlling administrative costs. In *Evans v. Board of Regents*, 271 S.E.2d 778, 781 (W. Va. 1980), for example, the court noted that a medical student could not be denied readmission after a temporary leave of absence without: (1) written notice of the rea-

During the term of their employment contracts, tenured and probationary teachers enjoy roughly the same rights. They are both acknowledged to have important property interests tied up in the contract and they are both protected against the arbitrary deprivation of these interests.[83] But this blurring of identities ends with the expiration of the contract. A tenured teacher at this point has a legitimate expectation of reemployment. State law guarantees her a continuing contract, terminable at her choice, save for egregious misconduct or lack of need.[84] Her expectational interest rises to the level of an entitlement, recognized by West Virginia law, and deserving of due process protection.[85] Any effort to end the teacher's employment relationship must be founded on just cause and must go forward in strict compliance with the procedural safeguards contained in the West Virginia Code.[86] In contrast, a probationary teacher does not enjoy the same expectation of renewal. She can point to no provisions of the educational statute which define her right to reemployment, and, under established precedent, she therefore has no protectable property interest.[87]

Still, the probationary teacher is not totally at the mercy of the school board when her contract is up for renewal. She may have important liberty interests intertwined with the decision not to rehire and, hence, be entitled to

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sons; (2) a fair hearing before an impartial tribunal; (3) an opportunity to have counsel present; and, (4) the right to present evidence and to cross examine witnesses. The court determined that the burdens these procedural requirements placed upon the state paled in comparison to the property interest the medical student had at stake.

[83] *See* Mason County Bd. of Educ. v. State Superintendent of Schools, 234 S.E.2d 321 (W. Va. 1977); Burks v. McNeel, 264 S.E.2d 651 (W. Va. 1980); Beverlin v. Board of Educ., 216 S.E.2d 554 (W. Va. 1975).

[84] W. VA. CODE § 18A-2-2 (1977).

[85] In Board of Regents v. Roth, 408 U.S. 564 (1972), the United States Supreme Court ruled that the source of the property interest protected by the fourteenth amendment was state law. To enjoy the protections of due process, the individual must have a "legitimate claim of entitlement" to the property interest. *Id.* at 577. "An abstract need or desire" is not enough. *Id.*

Teachers who qualify for continuing contracts obviously have an identifiable property interest in their employment and, hence, meet the "legitimate claim of entitlement" standard. *See* Mason County Bd. of Educ. v. State Superintendent of Schools, 234 S.E.2d 321 (W. Va. 1977).

[86] Mason County Bd. of Educ. v. State Superintendent of Schools, 234 S.E.2d 321 (W. Va. 1977).

[87] The blanket statement that probationary teachers have no protected property interest in their employment must be qualified. The West Virginia Supreme Court of Appeals has ruled that "tenure-like" rights can accrue to probationary teachers when they meet the objective requirements of tenure. *See* State *ex rel.* McLendon v. Morton, 249 S.E.2d 919 (W. Va. 1978); *See also* Major v. DeFrench, 286 S.E.2d 688 (W. Va. 1982) for an explanation of *McLendon.* Hence, a public school teacher who has completed her third year of employment with satisfactory performance has met the objective requirements for tenure. If school officials refuse to rehire her for the fourth year, then, under the court's *McLendon* rationale, they must show that they have cause for the decision and, presumably, must provide the affected teacher with the same procedural rights afforded a fully tenured employee.

Although *McLendon* involved teachers in the college system, its reasoning spills over into all levels of public education. Practically speaking, the high court has expanded tenure to include those who perform their teaching duties satisfactorily and who are accepted for a third year of employment. This effectively shortens the statutorily prescribed tenure period by one year and significantly enhances the rights of many probationary teachers.

due process protections.[88] To illustrate: If the board decision not to re-employ is based on a judgment about the teacher's competency or moral character, she not only loses her present position, but the opportunity to compete for future appointments as well. The board action becomes a "scarlet letter" upon the employment history of the probationary teacher which will plague her entire professional life. She may find a job in another school district, but she will never be on the same competitive footing as her unmarked peers.

Wisely, the courts have recognized the important personal and professional interests threatened by public decisions which stigmatize.[89] They have determined that these interests merit constitutional protection and have afforded those who face public censure procedural safeguards.[90] To the courts, the guiding purpose of these safeguards must be correctness of judgment. A public body can certainly dismiss those who are incompetent or guilty of illegal acts. But it may not place the stamp of disgrace on one of its employees without insuring its judgment is accurate.[91]

B. The Narrowing Grounds for Discharge

The grounds for which a teacher may be discharged are set by state law. It would not be accurate to say "limited by state law," for the range of impermissible conduct is very broad. According to the language of the education statute, a teacher can be released from her contract for everything from intemperance, to willful neglect of duty, to immorality.[92] Still, her position is much more secure than a private sector worker, who, in most cases, serves at the will of her employer. Excluding those who have unionized to protect their jobs, a non-public worker can be terminated for good cause, no cause, or even bad cause, provided the decision is not based on factors such as race, sex or national origin.[93] In contrast, a teacher can only be removed for good cause — and even

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[88] In Roth v. Board of Regents, 408 U.S. 564 (1972), the United States Supreme Court recognized that a teacher's reputational interest is protected by the due process clause. If the decision not to renew a probationary teacher's contract is made in a way that stigmatizes, then the affected employee is entitled to notice and hearing.

Unfortunately, the courts have not been willing to give a broad definition to the liberty interest recognized in *Roth*. In many cases, the courts have not allowed employees to defend themselves against even the most stigmatizing charges, because either the charges were not communicated to the public or the employees were not released from employment. *See, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976), and Paul v. Davis, 424 U.S. 693 (1976). The definition given to the liberty interest has been so narrow that some federal courts have ruled that a discharge decision made on the grounds of incompetency is not stigmatizing to a degree that warrants due process protection. *See* Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361 (9th Cir. 1976); Paige v. Harris, 584 F.2d 178 (7th Cir. 1978).

[89] *See generally*, Clemons v. Daugherty County, Slip Op. No. 81-7536 (11th Cir. Sept. 7, 1982); Vanelli v. Reynolds School Dist., 667 F.2d 773 (9th Cir. 1982). *But c.f.*, Harrison v. Ayers, 673 F.2d 724 (4th Cir. 1982); Robertson v. Rogers, 679 F.2d 1090 (4th Cir. 1982).

[90] *Id.*

[91] *Id.*

[92] Under W. VA. CODE § 18A-2-8 (1977), a teacher may be discharged for immorality, incompetency, cruelty, insubordination, intemperance or wilful neglect of duty. The fact that the teacher is tenured does not affect the school board's power to fire a teacher guilty of these offenses.

[93] There are many federal and state laws which protect the private sector worker from adverse

then, she must be afforded the full range of due process safeguards.

The teacher's employment position has been further strengthened by the construction given to the term "cause" by the judiciary. Recent decisions of the West Virginia Supreme Court of Appeals have narrowed the definition of the term and, hence, limited the school board's discharge power. Nowhere has the court's impact been greater than in cases involving allegations of teacher incompetency or immorality.

1. Immorality As Cause for Discharge

The supreme court squarely faced the issue of teacher immorality in *Golden v. Board of Education.*[94] In *Golden,* a high school guidance counselor was fired after pleading *nolo contendere* to a shoplifting charge. On appeal, the court set aside the board's decision, rejecting the premise that an illegal act, albeit immoral, is sufficient ground to deny a teacher her livelihood. Although it is true, the court explained, that a teacher has a special role in shaping the minds and behavior of students, this role alone does not justify holding her to a higher code of conduct than the public at large. The proper inquiry in dismissal cases, the court went on, is whether the act, once proved to be immoral, bears a "rational nexus" to the duties the teacher must perform in the classroom. Immorality is not enough; the school board must demonstrate the connection between the teacher's offense and her job responsibilities.

Golden's "nexus" test is likely to incur the wrath of board members and parents. As Justice Neely argued in his dissent, the decision ostensibly removes a community's ability to enforce a moral environment in which the education process can go forward. Parents are accustomed to viewing public schools as ministeries, where children pursue their educational endeavors under the watchful eyes of the "pure of spirit." They are not likely to be enamoured with

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employment decisions made on the basis of certain immutable physical characteristics. The broadest is, of course, Title VII of the Civil Rights Act of 1964, which makes it an unlawful practice:

> to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. § 2000e-2(a)(1) (1964).

Workers 40 years old or more enjoy essentially the same protections, as provided under Title VII, for discrimination based on age. 29 U.S.C. § 623(a)(1) (1976 & Supp. II 1978). A private employer can no longer arbitrarily replace its older workforce with a younger version without running afoul of the Age Discrimination Employment Act of 1967. Similar protection is also provided to handicapped workers under the Rehabilitation Act of 1973. Under §§ 793 and 794 of that Act, federal contractors and federal financial recipients are prohibited from discriminating against the physically disabled in employment decisions. 29 U.S.C. § 793 (1976 & Supp. II 1978); 29 U.S.C. § 794 (1976 & Supp. II 1978). Although the Rehabilitation Act covers fewer employees than those afforded protection under Title VII and the ADEA, it is still a powerful means of enforcing the handicapped worker's employment rights.

West Virginia law makes many of the same practices illegal under the Human Rights Act, W. VA. CODE § 5-11-1 to -19 (Supp. 1982). That statute provides a system of administrative enforcement designed to vindicate an employee's rights when she feels an employer has acted discriminatorily.

[94] 285 S.E.2d 665 (W. Va. 1981).

a decision which could open the classroom and their children's minds to the persuasions of misdemeanants.

Below the surface, however, the *Golden* decision is not quite so outlandish. The court still acknowledges a community's legitimate interest in the moral character of its teachers and permits school boards the authority to vindicate this interest in a limited number of circumstances. *Golden* simply attempts to protect teachers againt Salem-style "witch-hunts" in which the guilty and innocent alike are sacrificed in the flames of moral indignation. The decision does not require a school board to retain a convicted sex-offender as the coach of the girls basketball team, or an alcoholic as the head of the chemistry lab. But it does prevent the school board from passing judgment on the lifestyles of its faculty. Implicitly, at least, the decision recognizes that teachers who live together outside of marriage, use mild drugs in the privacy of their own homes, or view patently obscene adult films are not, by virtue of these acts alone, unfit to enter the classroom. To the majority, at least, educators are not engaged in a ministry, nor have they taken vows of poverty and chastity. So long as their personal conduct does not find its way into the classroom, teachers are free to make the same mistakes in life as the rest of the community.

2. Incompetency as Cause for Discharge

A school board's power to make an independent judgment about a teacher's competency has been the subject of a series of recent decisions by the state supreme court. Beginning with *Trimboli v. Board of Education*,[95] the court has consistently expressed disfavor with the way the competency issue has been approached at the administrative level. Of particular concern has been the school board's expansive interpretation of its discharge authority and its persistent disregard of state personnel regulations. To lessen the confusion on the competency issue, the court has evolved a series of standards to guide local officials. Underlying these standards is a judgment, by the court, that correctable incompetency is not grounds for dismissal under West Virginia law. If a teacher's skills can be rehabilitated through further education or greater supervision, then the court's recent pronouncements would forbid her discharge without first providing the opportunity to demonstrate improvement.[96]

Using State Department of Education Regulations[97] as a guide, the court has evolved a set of standards which must be followed by school officials before

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[95] 254 S.E.2d 561 (W. Va. 1979). *See also* Wayne County Bd. of Educ. v. Tooley, 276 S.E.2d 826 (W. Va. 1981); Wilt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982).

[96] *Id.*

[97] The primary source of the court's recent rulings on teacher competency is West Virginia Board of Education Policy No. 5300(6)(a). That policy provides:

> (a) Every employee is entitled to know how well he is performing his job, and should be offered the opportunity of open and honest evaluation of his performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his job performance prior to the terminating or transferring of his services, and can only do so with assistance of regular evaluation.

an educator can be fired for incompetence.[98] First, the teacher's job performance must be fully and fairly evaluated by capable staff.[99] Under the supreme court's recent rulings, this evaluation can only be conducted by supervisory personnel, familiar with the demands of the classroom and the skills of the teacher.[100] Board of education members are not permitted to make the initial determination of competency. They must stay their judgment until the matter is brought to their attention by the superintendent.[101]

Second, the teacher must be notified of the results of the evaluation and provided an opportunity to improve performance.[102] The court has not set the length of this improvement period, but it should probably vary in accordance with the nature of the deficiency and the experience of the school teacher. Someone in her first year in the classroom, for example, should not be expected to conquer disciplinary problems in a week. A teacher with twenty years in the schools, on the other hand, can be expected to correct lesson plan deficiencies relatively quickly.

Finally, after the improvement period has ended, the teacher must be re-evaluated by equally qualified supervisory staff.[103] Presumably, if she has shown improvement in the trouble areas, she cannot be discharged for incompetency even though her performance is still not optimal. If the re-evaluation shows no improvement or insignificant improvement, then the superintendent may recommend that the school board terminate the teacher's employment.[104] At this point, the school board is free to make its first independent assessment of the educator's qualifications.

The court has extended the "fair evaluation" and "improvement period" requirements to all board employees, including probationary teachers, substitutes and non-professional personnel.[105] In recent opinions, the court has also ruled that no decision on competency is valid unless these standards have been met.[106] Substantial compliance is not enough.[107] The board must strictly follow the recently announced standards to exercise its statutory power to discharge.[108] Moreover, where compliance is a close question, the case must be resolved in favor of the teacher.[109] A school board must therefore carefully doc-

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[98] Trimboli v. Wayne County Bd. of Educ., 254 S.E.2d 561 (W. Va. 1979).

[99] *Id.*

[100] Mason County Bd. of Educ. v. State Superintendent of Schools, 274 S.E.2d 435 (W. Va. 1981).

[101] *Id.* at 439.

[102] *Id.*

[103] Wilt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982).

[104] W. VA. CODE § 18A-2-8a (Supp. 1982).

[105] *See* Leef v. Via, 293 S.E.2d 442 (W. Va. 1982); Mason County Bd. of Educ. v. State Superintendent of Schools, 274 S.E.2d 435, 439 (W. Va. 1981); Trimboli v. Wayne County Bd. of Educ., 254 S.E.2d at 566.

[106] Wilt v. Flanigan, 294 S.E.2d at 189.

[107] Leef v. Via, 293 S.E.2d 442 (W. Va. 1982).

[108] *Id.*

[109] School personnel regulations and state laws are to be strictly construed in favor of the employee. State *ex rel.* Wilson v. Truby, 281 S.E.2d 231 (W. Va. 1981); Wayne County Bd. of Educ. v. Tooley, 276 S.E.2d 826 (W. Va. 1981); Morgan v. Pizzino, 256 S.E.2d 592 (W. Va. 1979).

ument each step taken in the evaluation process or risk reversal of its decision on appeal.

Although one may question the wisdom of setting education policy in the courtroom, the beneficial effects of the *Trimboli* line of cases must be acknowledged. The court's decisions not only force school officials to make more constructive use of evaluations, but they also insure that the professional educator is not the victim of an erroneous decision about the level of her capabilities. A teacher, it must be remembered, makes a substantial investment of time and resources into becoming a member of her profession. The skills she learns and nurtures are unique to her craft in the same way that a doctor's or lawyer's skills are unique. Once denied the license to practice her profession, the teacher cannot move freely into the private sector to a job of equal pay and prestige, because her skills are non-transferable.

For these reasons, a teacher facing expulsion from her profession because of incompetence deserves, minimally, a fair evaluation and a system of procedures designed to produce a correct judgment. The standards announced in *Trimboli* and subsequent cases do little more than insure that school boards tread slowly and cautiously when deciding the professional fate of a teacher. Admittedly, local prerogatives must be compromised to accomodate the extra procedural safeguards. But, given the substantial personal interests at stake, this diminution is justified.[110]

C. *Procedural Protections Summarized*

The West Virginia Supreme Court of Appeals has been particularly sensitive to the procedural rights of teachers facing any form of disciplinary action. The court has imposed a set of safeguards which exceed the threshold requirements of due process in an apparent effort to protect teachers against damaging judgments about their competency or moral character.[111] Where school officials have deviated even slightly from these safeguards, the court has reversed

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Where the facts give rise to several interpretations, the issues must be resolved in favor of the employee. *Id.*

[110] This reasoning explains why the court insists upon strict adherence to Education Policy No. 5300(6)(a) when teacher employment interests are threatened, but it does not adequately explain the same protections for non-professionals. After all, this latter group possesses skills which are easily transferable to the private sector and which have been acquired at a fraction of the costs of a teaching certificate.

Perhaps the answer lies in the approach the court has taken when reviewing dismissals in the private sector. In a series of recent cases, Harless v. First National Bank of Fairmont, 246 S.E.2d 270 (W. Va. 1978); Shanholtz v. Monongahela Power Co., 270 S.E.2d 178 (W. Va. 1980); and Stanley v. Sewell Coal Co., 285 S.E.2d 679 (W. Va. 1981), the court has revealed its displeasure with the common law principle that employees not under contract serve at the will of their employer. The court is moving in the direction of repudiating the "at will" doctrine in favor of a standard that recognizes employment, even in the private sector, as an important right which should only be deprived for cause. The "teacher cases" are merely the cutting edge of a movement toward a recognition of a right to work.

[111] *See* Wilt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982); Trimboli v. Board of Educ., 254 S.E.2d 561 (W. Va. 1979).

any decision adverse to the teacher and restored her full employment rights.[112] Even in cases where the officials' action was otherwise justified and executed in substantial compliance with due process, the court has nevertheless insisted that the letter of the law be followed and taken the side of the educator.[113] In practical terms, the supreme court has effectively transformed these procedural safeguards into substantive rights. A teacher, then, can challenge not only the correctness of any disciplinary decision, but also the manner in which it was made. This increases the grounds the teacher can assert in any later court action to overturn the board's decision and also insures an expanded judicial role in educational matters.

1. Tenured Teachers

Tenured teachers have a substantial property interest in their employment.[114] This interest may not be denied, under West Virginia law and the United States Consitution, without providing minimal due process protections, including notice of the pending decision, a statement of the charges and an opportunity to be heard before final action is taken.[115] The notice requirement can only be met by providing the teacher with sufficient information to prepare a meaningful defense.[116] If specific allegations of misconduct form the basis of the board's action, the teacher is entitled to a listing of the allegedly odious conduct.[117] If the charges outline a continuing course of misconduct which would prove burdensome, if not impossible, to document, then the notice can be more general.[118] At the hearing stage, the teacher is entitled to present evidence on her behalf, to confront witnesses who have given adverse testimony and to have retained counsel present. She is also assured that a record of the proceeding will be developed in the event the decision is appealed.[119]

If the decision of the school board is adverse, the teacher has several avenues of appeal. She may seek immediate review by the circuit court of the county in which she was employed and, from there, apply for *certiorari* to the state supreme court.[120] Alternatively, she may seek an administrative appeal to the state superintendent of schools if the adverse decision by the local board was by less than unanimous vote.[121] Once the state superintendent has rendered his decision upholding or setting aside the action taken on the local

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[112] *Id.*

[113] Wilt v. Flanigan, 294 S.E.2d at 193.

[114] Mason County Bd. of Educ. v. State Superintendent of Schools, 234 S.E.2d 321 (W. Va. 1977).

[115] *See generally*, Roth v. Board of Regents, 408 U.S. 564 (1972); *see also* W. VA. CODE § 18A-2-2 (1977); North v. Board of Regents, 233 S.E.2d 411 (W. Va. 1977).

[116] Clarke v. Board of Regents, 279 S.E.2d 169 (W. Va. 1981).

[117] In Snyder v. Civil Service Comm'n, 238 S.E.2d 842 (W. Va. 1977), the court made it clear that every public employee is entitled to notice of the specific behavior which gave rise to the discharge decision. This obviously applies to teachers with a protectable property interest in their employment.

[118] Clarke v. Board of Regents, 279 S.E.2d 169 (W. Va. 1981).

[119] North v. Board of Regents, 233 S.E.2d 411 (W. Va. 1977).

[120] Beverlin v. Board of Educ. of Lewis County, 216 S.E.2d 554 (W. Va. 1975).

[121] Leef v. Via, 293 S.E.2d 442 (W. Va. 1982).

level, the teacher may petition for circuit court review in the appropriate county.[122] The supreme court has made it clear that the appeal to the state superintendent is not mandatory.[123]

2. Non-Tenured Teachers

The procedural protections afforded a probationary teacher differ from those available to her tenured colleague in several respects. First, a probationary teacher is not entitled to prior notice of a board decision allowing her contract to lapse.[124] She does receive formal notice of the board's action after the fact, but she must then request a statement of reasons and an opportunity for a hearing to gain reconsideration of the decision.[125] Second, a probationary teacher is not entitled to have retained counsel present at the hearing stage.[126] Of course, the parties may agree to permit counsel at the hearing, but the court has indicated, in an analagous case, that such an agreement is not obligatory.[127] Finally, a probationary teacher whose contract is not renewed must appeal that decision to the state superintendent of schools before seeking judicial relief.[128] If she is dissatisfied with the administrative relief ordered by the superintendent, she may then apply for a *writ of certiorari* with the appropriate circuit court.[129] But, she cannot bypass the superintendent and go directly to the courts, as can her tenured associates.[130]

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[122] State *ex rel.* Bd. of Educ. v. Martin, 112 W. Va. 174, 163 S.E. 850 (1932).

[123] The court's position on the by-pass of the superintendent seems at odds with the common law duty to exhaust administrative remedies. It is well-settled in West Virginia that administrative relief must be exhausted before invoking the jurisdiction of the courts. McGrady v. Callaghan, 244 S.E.2d 793 (W. Va. 1978). The exhaustion requirement is not discretionary. Failure to vigorously pursue administrative relief, where made available by statute or regulations having the force of law, is a jurisdictional bar to a court's consideration of the case. Daurelle v. Traders Fed. Sav. & Loan Ass'n., 143 W. Va. 674, 104 S.E.2d 320 (1958). The Supreme Court of Appeals has recognized exceptions to the exhaustion requirement, but only in limited and well-defined circumstances. These circumstances include: (1) cases where the constitutionality of the statute is challenged; (2) controversies that are outside the jurisdiction of the administrative agency; and (3) suits where delay will result in irreparable harm to the plaintiff. State *ex rel.* Arnold v. Egnor, 275 S.E.2d 15 (W. Va. 1981). The case of discharged teachers would not seem to fit nicely into any of these categories of exceptions, yet the court continues to allow complete circumvention of the established administrative network.

[124] W. VA. CODE § 18A-2-8(a) (Supp. 1982). The post-decision hearing process provided by the legislature seems to run afoul of the supreme court's ruling in North v. Board of Regents, 233 S.E.2d 411 (W. Va. 1977), where the court held that due process protections must be afforded *before* the deprivation occurs, unless a compelling state interest justifies the precipitous decision.

[125] W. VA. CODE § 18A-2-8(a) (Supp. 1982).

[126] In State *ex rel.* McLendon v. Morton, 249 S.E.2d 919 (W. Va. 1978), the court held that the presence of legal counsel was not required when a college professor challenges an adverse tenure decision at a hearing before school officials. Presumably, this curious rule would also control in the public school setting.

[127] *Id.*

[128] Leef v. Via, 293 S.E.2d 442 (1982).

[129] *Id.*

[130] The court was silent in *Leef v. Via* on whether an appeal to the State Superintendent from a decision not to renew her contract was mandatory. If the court applies the common law rule on "administrative exhaustion," a probationary teacher will have to go to the superintendent to perfect her right to challenge any adverse decision in court.

Apart from these three minor differences, the distinction between tenured and probationary teachers has been blurred by the supreme court's recent decisions. Where important employment rights are in jeopardy, the court has looked past the labels in deciding what procedural rights the teacher enjoys. Its decisions have undoubtedly created additional administrative burdens on school boards, as well as further eroded local discretion in dealing with personnel matters. But the court has apparently determined that this trade-off is necessary to adequately protect the job interests of educators.

IV. Conclusion

The underlying inconsistencies in West Virginia's position on collective bargaining has blackened the relationship between school boards and teachers. Understandably, these groups are confused about the reach of their legal rights and the confines of their legal duties. Confusion, in turn, has bred inaction on the part of school boards and impatience on the part of teachers, leaving important problems affecting the quality of education unresolved. As conditions between these two groups worsen, the danger exists that educators will have little choice but to harden their demands and to become more militant in their actions. Militancy, in this context, is merely a euphemism for what officials fear most—strikes by public school teachers; strikes which would not only erode public confidence in educational institutions, but disrupt the learning process for the system's intended beneficiaries.

The bright spots for educators in this building confrontation have been provided by the state supreme court. Its decisions on teacher competency and morality are particularly noteworthy, because they provide both sides clear directions on the responsibilities they are expected to assume in the educational process. But much more remains to be done if order and structure are to rule the relations between school boards and teachers; and, unfortunately, the court is institutionally limited in the role it can play. As Justice Miller said in *City of Fairmont v. Retail, Wholesale and Department Store Union,* "the complex issues in this field [labor relations] are ill-suited to any comprehensive judicial solution."[131] Where, then, does one look for the required leadership? The answer must be, to the state legislature. It is that body which is charged with the constitutional duty of providing a system of public education; and, ultimately, it is only that body which can marshal the necessary resources to accomplish the task of formalizing the employment relationship between educators and school officials.

William Flanigan

[131] 285 S.E.2d at 595.