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ARE MINNESOTA TEACHER TERMINATION PROCEDURES PROGRESSIVE: HOW MUCH PROCESS IS DUE?

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I. INTRODUCTION

Minnesota’s public school teachers¹ who have earned either “tenure”² or “continuing-contract”³ rights to their teaching

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1. For purposes of this essay, “teacher” includes most individuals employed by a Minnesota public school district whose job requires a teaching license, who teach students enrolled in kindergarten through 12th grade (K–12), and who are not superintendents or otherwise excluded by the governing statutory definitions from the protections of the law. The term also includes school nurses, counselors, librarians, psychologists, and social workers, as well as school principals and assistant principals. MINN. STAT. § 122A.40, subdiv. 1 (2004) (definition of teacher for continuing-contract law) and § 122A.41, subdiv. 1(a) (2004) (definition of teacher for tenure act). The term does not include certain community education instructors or nonlicensed community experts. MINN. STAT. § 122A.26, subdiv. 2 (2004) (excluding e.g., early childhood and family education (ECFE) instructors from the protections of the continuing-contract law and tenure act) and MINN. STAT. § 122A.25 (2004) (allowing districts to hire nonlicensed community experts instead of licensed teachers).

2. MINN. STAT. § 122A.41, subdiv. 4 (2004) (describing “tenure” for purposes

positions are among teachers in only eleven states⁴ who, when faced with termination or discharge from their positions, have a statutory right to neutral and binding decision making to determine whether their job is saved or lost.⁵ Minnesota's current system has only been in place since 1991. This essay examines whether Minnesota's approach to public school teacher terminations is "progressive."

The essay begins with a brief outline of its underlying assumptions, particularly as to what "progressive" means within the context of teacher terminations.⁶ Next, the essay reviews the evolution of Minnesota's tenure and continuing-contract statutes, both by describing the three distinct historical periods of pre-1982, 1982-1991, and post-1991, and then by analyzing the results of termination cases during each such period to evaluate their relative progressive qualities.⁷ Finally, the essay compares Minnesota's current statutory structure to termination procedures and mechanisms available to tenured teachers in other states.⁸ Under both the historical and comparative approaches to the question, the essay concludes that Minnesota's system, although not without flaws and limitations, is among the best and most progressive in the

of Minnesota's tenure act).

3. MINN. STAT. § 122A.40, subdiv. 7 (2004) (describing "continuing-contract" for purposes of Minnesota's continuing-contract law).

4. CAL. EDUC. CODE §§ 44929.20-44988 (West 2006); 105 ILL. COMP. STAT. ANN. 5/10-22.4, 5/24-11 to -16 (West 2006); KAN. STAT. ANN. §§ 72-5436 to -5447 (2002 & Supp. 2005); KY. REV. STAT. ANN. §§ 161.720-810 (West 1999 & Supp. 2005); MASS. GEN. LAWS ANN. ch.71, §§ 41-42 (1996 & Supp. 2006); MINN. STAT. §§ 122A.40, 122A.41 (2004); N.J. STAT. ANN. §§ 18A:6-29 (West 1999); N.M. STAT. ANN. §§ 22-10A-21 to -30 (West 2003 & Supp. 2005); OHIO REV. CODE ANN. §§ 3319.07-08, 3319.11, 3319.111, 3319.16 (West 2005); OR. REV. STAT. ANN. §§ 342.805-934 (West 2003 & Supp. 2006); WASH. REV. CODE ANN. §§ 28A.405.200-250, 28A.405.300-380, 28A.405.470 (West 2006).

5. In four more states that have statutes allowing unions representing teachers to collectively bargain similar protections, the unions have extensively and pervasively exercised the statutory authority, such that the rights are guaranteed via collective bargaining agreements to most teachers in each of the four states. MONT. CODE ANN. §§ 20-4-203 to -207 (2005); 24 PA. CONS. STAT. ANN. §§ 11-1121 to -1133 (West 1992 & Supp. 2006); VT. STAT. ANN. tit. 16, § 1752 (2004); WIS. STAT. ANN. § 118.22 (West 2002).

6. See *infra* Part II.

7. See *infra* Part III. The authors are grateful for the research and writing done by Christine Ver Ploeg, Professor of Law, William Mitchell College of Law and Member, National Academy of Arbitrators, in her article, *Terminating Public School Teachers For Cause Under Minnesota Law*, 31 WM. MITCHELL L. REV. 303 (2004), which served as significant reference and research source for this essay.

8. See *infra* Part IV.

United States.⁹

II. THE MEANING OF “PROGRESSIVE” IN THE CONTEXT OF TEACHER TERMINATIONS

The dictionary defines “progressive” to mean moving forward, advancing, promoting, or favoring progress towards better conditions or new policies, ideas, or methods.¹⁰ In the historical review section of this essay, the reader will see that Minnesota’s teacher termination laws have most certainly “progressed” over the last several decades. However, the question of whether Minnesota’s teacher termination laws and procedures are currently “progressive” is best answered by determining whether the system is “fair.”

Before deprivation of a property right such as a public employee’s right to continued employment, the United States Constitution guarantees only the due process rights of notice and an opportunity to be heard.¹¹ Constitutional due process rights supply a threshold of protection, but a threshold of fairness is not enough. Instead, it is the authors’ thesis that a truly fair job termination system must also include (1) either mutual selection or third party selection of the decision maker; and (2) a decision that is final and binding on both parties, without either party having the ability to override or otherwise reject any aspect of the decision. Additional protections, such as the scope and procedural aspects of the hearing, the right both to present and to confront all relevant testimony and other evidence, and the opportunity for continued compensation or benefits pending the outcome of the hearing, can make a system even “more fair.”¹² The premise of this essay, however, is that the hallmarks of fairness are that the decision

9. See *infra* Part V.

10. The American Heritage Dictionary of the English Language (4th ed. 2000).

11. *Loudermill v. Cleveland Bd. of Educ.*, 470 U.S. 532 (1985). See also *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that a fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner).

12. Minnesota’s continuing-contract law does include each of these additional protections, and its tenure act includes all of them except the right to continued compensation pending the outcome of the hearing. MINN. STAT. §§ 122A.40, 122A.41 (2004). Nevertheless, these and other protections are outside the scope of this essay and will not be examined or considered in either the historical or comparative context.

maker is mutually or neutrally selected and also has real and final authority to decide whether or not the teacher retains his or her position.

III. HISTORY OF MINNESOTA'S TERMINATION SYSTEM

A. Pre-1982

Minnesota was one of the first states to enact some protections against arbitrary or unfettered terminations of its public school teachers.¹³ In 1927, the Minnesota legislature adopted a tenure¹⁴ law for teachers in "cities of the first class."¹⁵ The first tenure law included certain due process protections against termination, such as notice and an opportunity to be heard.¹⁶ Although school districts retained control over what constituted cause for

13. Massachusetts led the way in 1886 with a law "relating to the tenure of office of teachers" (cited to in *McSherry v. City of St. Paul*, 202 Minn. 102, 106, 277 N.W. 541, 543 (1938)), followed by New Jersey in 1909. Bertram H. Lebeis, Comment, *Constitutional Law—Schools and School Districts—Teachers' Tenure Legislation*, 37 MICH. L. REV. 430, 432 (1939).

14. The concept of "tenure" generally means that a teacher who has completed a probationary period (usually two to three years, but sometimes as long as five years) has the right to retain his or her position unless discharged for cause, and then only after notice of the charges and an opportunity to be heard, followed by a finding that the charges are true. Some right to judicial review is also generally included in the concept.

15. MINN. STAT. § 410.01 (2004) (defining "cities of the first class" as those having more than 100,000 inhabitants). Only the cities of Minneapolis, St. Paul, and Duluth meet the definition.

16. 1 MINN. STAT. § 2935-1 to -14 (Mason 1927). Specifically, the law provided that the charges shall be in writing, signed by the person making the charges, filed with the secretary or clerk of the school board, and that the teacher must be afforded a full hearing with ten days' notice of time and place of such hearing. The hearing itself included "all evidence that may be adduced in support of the charge or charges and for the teacher's defense thereto," with the right to a written record of the hearing at the expense of the board, the right to have witnesses subpoenaed and examined under oath, the right to counsel, the right to examination and cross-examination of witness, and the right to present arguments. *Id.* §§ 7-8. The hearing may be private or public at the decision of the teacher, the decision must be rendered within twenty-five days after giving of the notice, and where the hearing is before the school board, the teacher may be discharged upon the affirmative vote of a majority of the members of the school board. *Id.* at §§ 9-10. Much of the original language in this part of the tenure law remains intact today, supplemented by a few additional protections. MINN. STAT. § 122A.41 subdvs. 7-10 (2004). However, the amendments of 1991, discussed in part III.B., provided a significantly different alternative method to challenge a proposed termination or discharge.

termination, this early enactment was progressive for its time, as well as somewhat reflective of the burgeoning labor movement in the United States.¹⁷ Another recognized impetus for this and other tenure statutes during this era was to rid the public schools of cronyism, nepotism and use of spoils systems.¹⁸

Ten years later, the Minnesota legislature enacted a different—and weaker—set of protections for teachers in all other school districts in the state.¹⁹ This law is known as the “continuing-contract law.”²⁰ The primary protection was that districts could only terminate contracts at the end of a school year by giving notice on or before a specified annual deadline.²¹ By 1937, nineteen states and the District of Columbia had some statutory protections.²² In 1967, the due process protections already contained in Minnesota’s tenure act were added to the continuing-contract law.²³ After that point, the courts typically stated that the termination proceedings in the tenure act and the continuing-contract law were relatively equivalent.²⁴

In 1971, the enactment of Minnesota’s public sector collective bargaining law afforded comprehensive bargaining rights to most public sector employees in Minnesota, including teachers.²⁵ The Public Employment Labor Relations Act (PELRA) required that all

17. The American Federation of Labor was formed in 1886, followed by the Industrial Workers of the World in 1905. The Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938), and the Wagner-Connery Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935) are two of the more prominent pieces of labor legislation promulgated during this time.

18. See Lebeis, *supra* note 13 at 430.

19. Act of April 5, 1937, ch.161, 1937 Minn. Laws 229 (The Lager Bill) (later codified at 3 MINN. STAT. § 2903 (Mason Supp. 1940)).

20. Under the “continuing-contract” concept, a teacher’s contract “continues” without interruption unless the employing district terminates the contract by a certain yearly deadline set by the statute (the date in Minnesota is April 1). MINN. STAT. § 122A.40 subdiv. 7 (2004).

21. See *supra* notes 15 and 16.

22. Lebeis, *supra* note 13, at 432.

23. Act of May 25, 1967, ch. 890, 1967 Minn. Laws 1885, § 1 (amending MINN. STAT. § 125.12 subdivs. 1–4 and adding subdivs. 6–11 which are now codified at MINN. STAT. § 122A.40, subdivs. 1–7, 9, 12–14, 16, 17 (2004)).

24. Graham v. Special Sch. Dist. No. 1, 472 N.W.2d 114, 116 n.1 (Minn. 1991) (under either statute, a termination proceeding is conducted in essentially the same manner).

25. Labor Relations Act, ch. 33, 1971 Minn. Laws Extra Sess. 2709. In 1984, the public sector aspects of the Labor Relations Act were recodified and classified as the Public Employment Labor Relations Act (PELRA). Act of April 24, 1984, ch. 462, 1984 Minn. Laws 235. PELRA is now codified at MINN. STAT. ch. 179A (2004).

collectively bargained agreements include the right to binding arbitration for employee discipline and terminations.²⁶ However, PELRA did not override the more specific termination provisions in the teacher tenure act and continuing-contract law. This meant that organized workers other than teachers arguably gained significantly better and stronger protections against terminations than the concomitant rights guaranteed to teachers by either the tenure act or the continuing-contract law.²⁷ In short, all public employees represented by a union and covered by a collective bargaining agreement could grieve and arbitrate disciplinary actions such as written reprimands or suspensions. Additionally, all such employees except K–12 teachers could grieve and arbitrate terminations, the “capital punishment” of disciplinary actions. In this era, the progressive movement left K–12 teachers behind.

Interestingly, regardless of PELRA’s substantively stronger protections, many Minnesota teachers—as well as school district administrators, their attorneys, and the public at large—believed that because teachers had “tenure” they had better protection than PELRA’s right to arbitration. Through the mid-1980s, the Minnesota Education Association (MEA), one of the two unions that represented virtually all of the public school teachers in the state, also maintained confidence in the continuing-contract and tenure statutes, primarily because the laws included the right of judicial review of school board termination decisions.²⁸ On the other hand, the other teacher union, the Minnesota Federation of Teachers (MFT), began at an earlier date to call for teachers to have the “PELRA” right to binding arbitration.²⁹

In a case decided just a few years after PELRA’s enactment, the Minnesota Supreme Court acknowledged the unfairness of the

26. MINN. STAT. § 179A.20, subdiv. 4 (2004).

27. Of course, in those school districts in which teachers remained unrepresented after PELRA took effect (representation rates for teachers increased from 72.2 percent in 1969 to 86.6 percent in 1979), each teacher who had completed his or her probationary period still had the individual right to challenge a termination under the governing statute—depending on the district, either the tenure act or the continuing-contract law. Memorandum from David Lutes to Minnesota Senator Roger Moe, TRENDS IN MINNESOTA SCHOOL LABOR RELATIONS (1981) (on file with authors) (providing teacher representation rate information).

28. The MEA called for the use of a neutral hearing examiner as early as 1981. H.R. 550, 72d Leg., Reg. Sess. (Minn. 1981) (an MEA supported bill).

29. *See, e.g.*, H.R. 452, 72d Leg., Reg. Sess. (Minn. 1981) (an MFT-supported bill that called for final and binding arbitration).

teacher termination system.³⁰ The Court first noted that although the terminated teacher had raised a number of procedural and evidentiary questions, school boards are not held to the same strict rules required of trial courts.³¹ The Court then noted:

Although the fairness of a hearing before a tribunal which may have already decided the outcome is at first blush questionable, the object of such proceedings under Minn.St. 125.12 is not so much to reach a wholly impartial decision as it is to ventilate the grounds for terminating the contract and create a record for judicial review. With this premise in mind, we hold that Holton's discharge was not arbitrary and was accomplished by substantial compliance with statutory directives.³²

A few years later, the belief that the teacher termination process was fair was bolstered by a set of three cases in 1980 and 1981, in which the Minnesota Supreme Court injected a ray of hope into the teacher termination process. In response to teacher-union challenges to the fairness of the process, the court began requiring school districts to hire hearing officers to preside over teacher termination hearings. The earliest decision in this series warned districts to hire hearing officers in these cases.³³ This was followed by a decision holding that hearing officers should be hired absent unusual or extenuating circumstances,³⁴ and a third case holding that hearing officers should make detailed findings and conclusions consistent with proceedings conducted under the Administrative Procedure Act.³⁵

The incongruous effect of this judicially imposed change to the teacher termination statutes was that these three teacher termination cases were not only the first, but also the only, cases in which the appellate courts reversed a K-12 teacher termination case under this new requirement.³⁶ At the same time, however,

30. State *ex rel.* Holton v. Indep. Sch. Dist. No. 84, 301 Minn. 275, 222 N.W.2d 277 (1974).

31. *Id.* at 282, 222 N.W.2d at 281-82.

32. *Id.*

33. Liffrig v. Indep. Sch. Dist. No. 442, 292 N.W.2d 726, 730 (Minn. 1980).

34. Kroll v. Indep. Sch. Dist. No. 593, 304 N.W.2d 338, 345 (Minn. 1981).

35. Ganyo v. Indep. Sch. Dist. No. 832, 311 N.W.2d 497, 500 (Minn. 1981).

36. See *supra* notes 33-35. Between 1981 and 1991, the Minnesota Court of Appeals did reverse the terminations of two individuals whose termination rights were governed by the continuing-contract law, but who were not K-12 teachers. Beranek v. Joint Indep. Sch. Dist. No. 287, 395 N.W.2d 123, 127 (Minn. Ct. App. 1986) (teacher in adult vocational education program); *In re Brose*, No. CX-91-

until the mid-1980s, school districts continued to exercise reasonable restraint when deciding whether to propose teachers for termination or discharge.³⁷ It is difficult to measure the extent to which this restraint resulted from school districts believing that terminated teachers would be successful on appeal. School districts may also have been influenced by a later series of cases applying the “hearing examiner” requirement to cases involving school district decisions to terminate teachers under the continuing-contract statute by placing the teacher on unrequested leave of absence (ULA).³⁸

Nevertheless, by the late 1980’s, school districts had realized the extent of their discretion and authority under the teacher termination statutes and began showing that they could—and would—fire tenured and continuing-contract teachers. Finally, the MEA agreed with the MFT and was thoroughly convinced that the “myth of tenure” was exactly that.³⁹ By the end of the decade, the myth had eroded to extinction.

B. 1982–1991

In the mid-1980s, the myth of tenure received one more judicial boost. In 1982, Minnesota created the intermediate appellate court, the Minnesota Court of Appeals.⁴⁰ Governor Rudy Perpich appointed Peter S. Popovich as the new court’s first chief judge.⁴¹ Prior to his appointment, Chief Judge Popovich’s practice

793, 1991 WL 263497 (Minn. Ct. App. Dec. 17, 1991) (school principal). In both cases, the school board had rejected the hearing examiner’s recommendation that the teacher be reinstated, holding that the district had not supported its decision under the “remediability” factors outlined in *Kroll*. See *Kroll*, 304 N.W.2d at 345–46.

37. From 1979–1984, the MEA represented an average of four teachers per year who were being proposed for discharge or termination for cause. The authors of this essay only have statistics for MEA members during this period of time; however, attorneys representing MFT members during this same period of time confirm a proportionate number of cases. Interviews with William F. Garber, Attorney, Education Minnesota (June–July 2006).

38. See *infra* Part III.B.

39. The MEA’s change of view also coincided with its decision to begin using staff attorneys instead of outside counsel to represent teachers subject to discharge.

40. MINN. CONST. art. VI, § 2 (amended 1982); MINN. STAT. ch. 480A (Act of March 22, 1982, ch. 501, 1982 Minn. Laws 569).

41. In May 1983, and effective November 2, 1983, Governor Perpich designated Peter S. Popovich as Chief Judge of the new intermediate appellate court. Chief Judge Popovich served on the Court of Appeals until November

was as a school district attorney.⁴² In his new capacity, Chief Judge Popovich authored a series of decisions involving school district decisions to terminate teachers under the continuing-contract statute by placing the teacher on ULA. In each of these ULA cases, the court required neutral hearing officers.⁴³ The court also required school boards choosing not to follow the hearing officer's recommendations to provide adequate reasons and rationale from the hearing record to support their choice, or their decision would be reversed.⁴⁴ What could better define progress than the courts righteously adding fairness protections to supplement the legislature's efforts? The myth of tenure was recharged.

However, this final burst of hope soon diminished when the appellate courts rejected teacher union challenges to the inherent unfairness arising from the fact that teachers had no input into the selection of the so-called "independent" hearing officer.⁴⁵ When coupled with the deferential standard of appellate review that applies to administrative decisions,⁴⁶ few cases had even the hope of

1987, when Governor Perpich appointed him to the Minnesota Supreme Court. He served as an associate justice there until his further appointment by Governor Perpich as Chief Justice in February 1989. He retired from the Court in late November 1990. Minnesota State Law Library Docket Series, Biographies of Justices and Judges of the Minnesota Appellate Courts, Popovich, Peter S., <http://www.lawlibrary.state.mn.us/coajudgebio.html#popovich> (last visited September 30, 2006).

42. Peter S. Popovich was in private practice from 1947 to 1983. *Id.* He also served as a state legislator from 1953 to 1963. *Id.*

43. Schmidt v. Indep. Sch. Dist. No. 1, 349 N.W.2d 563 (Minn. Ct. App. 1984) (remanding for a new hearing using a hearing officer, and setting forth recommended qualifications for same); Pearson v. Indep. Sch. Dist. No. 381, 356 N.W.2d 438 (Minn. Ct. App. 1984) (holding that failure to hire an independent hearing officer violates right to due process); Pinkney v. Indep. Sch. Dist. No. 691, 366 N.W.2d 362 (Minn. Ct. App. 1985) (holding that school district attorneys acting as hearing officers impaired neutrality and reversing the termination decision).

44. Beste v. Indep. Sch. Dist. No. 697, 398 N.W.2d 58, 63 (Minn. Ct. App. 1986).

45. Russell v. Special Sch. Dist. No. 6, 366 N.W.2d 700 (Minn. Ct. App. 1985) (selection of a hearing officer by the school board without teacher input did not show bias); Bates v. Indep. Sch. Dist. No. 482, 379 N.W.2d 239 (Minn. Ct. App. 1986) (failure to use hearing officer with the recommended qualifications does not require reversal absent actual bias or prejudicial conduct by hearing officer). Between 1988 and 1989, the same hearing officer was selected by school districts in nineteen consecutive cases. Further, in those cases and in all other teacher discharge cases in which he was selected, that particular hearing officer's recommendation always supported the school district's proposal to discharge or terminate.

46. The test for appellate review in teacher termination cases was first

reversal.

Finally, although the appellate courts had consistently stated that school districts are held to a “strict compliance” standard⁴⁷ for procedural requirements under the tenure act and the continuing-contract law, the courts did not always “strictly” apply the standard.⁴⁸ For cases involving probationary teachers, the courts have not only expressly reduced the standard to one of “substantial compliance,”⁴⁹ but have also cited to a school district’s “complete discretion” over probationary teachers.⁵⁰ For cases involving tenured or continuing-contract teachers, the courts have affirmed school district actions taken after statutory deadlines “when a school board has in good faith attempted to comply with the requirements” of the statute,⁵¹ and have held that the statutory requirements should be construed using a “flexible approach,” such that teacher terminations will not be set aside if the teacher was not prejudiced by “technical defects.”⁵²

Then, beginning in 1984, the number of teacher discharges began increasing at an alarming rate. From 1979–1984, the MEA

established in *State ex rel. Ging v. Board of Education*, 213 Minn. 550, 7 N.W.2d 544 (1942), *overruled on other grounds by Foesch v. Independent School District No. 646*, 300 Minn. 478, 223 N.W.2d 371 (1974), and has been reinforced and reiterated consistently since that time. *See, e.g., Liffrig v. Indep. Sch. Dist. No. 442*, 292 N.W.2d 726, 729 (Minn. 1980) (noting that “a school board’s decision to terminate a [continuing-contract] teacher . . . should only be set aside if the decision is fraudulent, arbitrary, unreasonable, not supported by substantial evidence on the record, not within the school board’s jurisdiction, or is based on an erroneous theory of law.”). Substantial evidence includes “1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than ‘some evidence’; 4) more than ‘any evidence’; and 5) evidence considered in its entirety.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977). The reviewing court is “not at liberty to hear the case de novo and substitute its findings for those of the school board.” *Kroll v. Indep. Sch. Dist. No. 593*, 304 N.W.2d 338, 342 (Minn. 1981) (citations omitted). For a more recent restatement of the standard, see *In re Shelton*, 408 N.W.2d 594, 596–97 (Minn. Ct. App. 1987).

47. *See, e.g., Perry v. Indep. Sch. Dist. No. 696*, 297 Minn. 197, 202, 210 N.W.2d 283, 287 (1973).

48. *See State ex rel. Holton v. Indep. Sch. Dist. No. 84*, 301 Minn. 275, 222 N.W.2d 277 (1974) cited *supra* at notes 30–32 and accompanying text.

49. *Shell v. Indep. Sch. Dist. No. 811*, 301 Minn. 442, 223 N.W.2d 774 (Minn. 1974); *Savre v. Indep. Sch. Dist. No. 283*, 642 N.W.2d 467 (Minn. Ct. App. 2002); *Allen v. Indep. Sch. Dist. No. 582*, 435 N.W.2d 124 (Minn. Ct. App. 1989).

50. *Pearson v. Indep. Sch. Dist. No. 716*, 290 Minn. 400, 188 N.W.2d 776 (1971); *Tornow v. Indep. Sch. Dist. No. 118*, 435 N.W.2d 142 (Minn. Ct. App. 1989).

51. *Herfindahl v. Indep. Sch. Dist. No. 126*, 325 N.W.2d 36, 39 (Minn. 1982).

52. *In re Peterson*, 472 N.W.2d 687, 691 (Minn. Ct. App. 1991).

represented at hearing an average of four teachers per year who were being proposed for discharge or termination for cause.⁵³ Between 1984 and 1988, this number increased to an average of fifteen teachers per year. In the 1988–89 school year, the figure jumped to fifty-two, and the following year it almost doubled to ninety-three. School districts had fully comprehended that “tenure” was a myth, and had begun to act accordingly.⁵⁴

During the ten years between 1981 and 1991, the MEA represented a total of 552 teachers who were subject to discharge.⁵⁵ Although exact data is not available, the MFT represented between 100 and 200 teachers during the same period of time, while individual attorneys represented a few more.⁵⁶ In only one of these cases did a school board reverse its proposed discharge of a teacher.⁵⁷

Further, between 1988 and 1991, hearing officers recommended “no discharge” in a majority of the cases that went to hearing.⁵⁸ However, not a single school board followed such a recommendation. Instead, in each such case, the district rejected the recommendation and terminated the teacher anyway.⁵⁹ Perhaps most telling is the earlier-referenced fact that Minnesota’s appellate courts had not reversed a single K–12 teacher discharge since 1981. This stark pattern ensued even though the creation of the Minnesota Court of Appeals in 1983 resulted in an “eruption” of school law appeals.⁶⁰ Progress had ground to a halt.

53. See *supra* note 37 (comparable MFT statistics).

54. Increased awareness and enforcement of the Reporting of Maltreatment of Minors Law, MINN. STAT. § 626.556 (2004) was also a contributing factor. Amendments in the mid-1980s also broadened the reporting requirements and clarified responsibilities of school officials under the statute. See, e.g., Act of May 31, 1985, ch. 266, 1985 Minn. Laws 1185; Act of April 26, 1984, ch. 577, 1984 Minn. Laws 1160; Act of June 14, 1983, ch. 345, 1983 Minn. Laws 2381 (making public policy applicable to school and community settings).

55. “Subject to discharge” means either a formal school board proposal to terminate or discharge, or a district commitment to take such an action unless the teacher resigns.

56. See interviews with William F. Garber, *supra* note 37.

57. INDEP. SCH. DIST. NO. 316, THE PROPOSED IMMEDIATE DISCHARGE OF A CONTINUING CONTRACT TEACHER (1987) (hearing officer VerPloeg recommended reinstatement, and school board adopted recommendation).

58. Records maintained by MEA attorneys Roger L. Barrett and Harley M. Ogata.

59. *Id.*

60. Hon. Peter S. Popovich, Donald W. Niles & Michael Thomas Miller, *Recent Developments in Minnesota Education Law*, 13 WM. MITCHELL L. REV. 1, 2 (1987).

C. Post-1991

While teachers were being fired at this alarming rate and utterly failing to retain employment under the hearing and appeal process available to them under the tenure act and the continuing-contract statute, other fired public employees were arbitrating their discharges under PELRA. Between 1983 and late 1990, records compiled by the Minnesota Bureau of Mediation Services (BMS) on 435 non-teacher public employee arbitration decisions revealed a reinstatement rate of 53 percent.⁶¹ Standing alone, this might not appear to be a terrific rate of success, but when gauged against the K-12 teacher rate of 0 percent, it is overwhelming.

In 1991, the MEA and the MFT successfully combined efforts at the legislature to extend the right to binding arbitration to teacher termination cases.⁶² Not only did the legislature amend both the tenure act and the continuing-contract law to add this option, but it also amended PELRA so that it now provides for a list of arbitrators used exclusively in teacher termination and discharge cases, with Education Minnesota⁶³ and the Minnesota School Boards Association each appointing fourteen arbitrators to the list.⁶⁴ In enacting these amendments, the legislature responded to overwhelming evidence of systemic unfairness, demonstrated by the ten years of case statistics from 1981-1991. The significance of the addition of binding arbitration as a method to challenge proposed terminations is proven by the fact that although teachers still have the option of a school board hearing and the right to appeal if they choose that option, no teacher represented by Education Minnesota or its predecessors has ever opted for the school board hearing.

Perhaps the most telling statistic is that since the amendment took effect, arbitrators conducting these hearings have upheld thirty proposed terminations while returning twenty-three teachers to their jobs.⁶⁵ Although one might argue that a reinstatement rate

61. MINNESOTA BUREAU OF MEDIATION SERVICES, LABOR ARBITRATION AWARDS SUMMARIES 1-5 (1983-1990).

62. Act of May 27, 1991, ch. 196, 1991 Minn. Laws 455, §§ 2-6.

63. In 1998, the MEA and the MFT merged into a single organization called Education Minnesota.

64. MINN. STAT. § 179A.04, subdiv. 3(b) (2004).

65. Case files maintained by the BMS and Education Minnesota. The authors thank Education Minnesota law clerk Michael Turpin for researching these case files.

of less than 50 percent is not definitively progressive, any improvement from a return rate of zero is definitely progress. In fact, the change is dramatic. Moreover, school districts still “choose” which teachers to propose for termination, and although arbitrators are “neutrals”, they may nevertheless bring to the hearing the expectation that school districts generally act in good faith, a predisposition that will inevitably be a factor in the final outcome of many cases. Considering these additional factors, school districts *should* “win” more teacher terminations than they “lose.” Now, however, under the statutes as amended, Minnesota’s public school teachers threatened with termination or discharge at least have some chance of continued employment.

In addition, this reinstatement rate is occurring in a narrower set of cases than the set of teachers who were “subject to discharge” between 1981 and 1991 that formed the statistical base compiled by the authors. The 1981–1991 “subject to discharge” statistics included the many cases that are settled by resignation of the teacher in lieu of hearing, while these post-1991 arbitration results are solely for cases that proceeded to hearing and a decision.⁶⁶ If the settled-by-resignation cases had been decided by an arbitrator instead, the reinstatement rate would have to be even higher.

The historical progress of tenure and continuing-contract rights for Minnesota’s teachers has involved a series of steps, some forward and others backward. Minnesota’s teachers were included in the first wave of state legislative enactments that provided some tenure or continuing-contract protections. Tenured teachers have had significant due process rights since 1927; continuing-contract teachers waited until 1967 for these same due process rights. In 1971, PELRA gave most other public sector employees the crucial right to challenge their terminations using a neutral decisionmaker and final and binding arbitration. Teachers were the only occupation or profession excluded from PELRA’s protections. Beginning in 1984, despite additional protections developed in the early 1980s by appellate court interpretation of the tenure and continuing-contract cases, the rate of teacher terminations

66. As practitioners know, cases that “go the distance” are disproportionately cases in which one or more of the following is true: (1) the evidence is fairly evenly balanced; (2) one or more variables that are likely to affect the outcome are not thoroughly known, disclosed, or predictable; (3) one party or the other is proceeding “on principle”; and (4) the district has no choice because of potential liability exposure, such as in cases involving allegations of sexual abuse.

increased at a rapid rate. When the rate nearly doubled in 1989 and 1990 from fifty-two to ninety-three, and when the K–12 teacher termination appellate reversal rate had remained at zero since 1981, the legislature responded in 1991 with PELRA-like rights to a neutral decision maker and final and binding arbitration. This most recent step forward brought progress and equity to teachers, and fairness to Minnesota’s teacher termination system.

IV. COMPARISON TO OTHER STATES

Minnesota’s teacher termination procedures appear to have progressed to a system that is not only acceptable but genuinely fair. But is it a system to envy? A final test of Minnesota’s progress in the area of teacher termination laws is to compare them to what exists in the other forty-nine states. If a majority of states also have a system that includes the two basic tenets—a neutral decision maker and a final and binding decision—then perhaps Minnesota is not as progressive as the historical review showed, and Minnesota’s advocates should be pressing for further reforms. On the other hand, if the reverse is true, and Minnesota is among a minority of states that afford these rights to their teachers, then the answer to whether Minnesota’s teacher termination system is progressive is a confident yes.

The Introduction to the essay already revealed the salient fact: Minnesota is among only eleven states with teacher termination procedures that include a statutory right to a neutral decision maker and a final binding determination of teacher termination cases.⁶⁷ An additional four states have statutes under which teacher unions are allowed to collectively bargain for similar protections.⁶⁸ Such bargaining has resulted in most teachers in each of those four states having contract rights similar to the statutory protections that Minnesota teachers have.⁶⁹

Overwhelmingly, teachers in the remaining thirty-five states have what Minnesota teachers had before the 1991 legislative amendments: a school board hearing, a school board decision, and the right to judicial review of the school board decision under a similar deferential standard of review.⁷⁰ In these thirty-five states,

67. *See supra* note 4 and accompanying text.

68. *See supra* note 5.

69. *Id.*

70. The authors reviewed and summarized each state’s statutes, then asked the general counsel or contact for each state affiliate of the National Education

the success rates at both the school board level and the appellate level were not as uniformly low as they were in Minnesota during the decade before the 1991 amendments.⁷¹ Yet the two basic protections—a neutral decision maker and a final and binding decision—do not exist in any of these thirty-five states.

A few of these states do allow for broad, expansive judicial review under a *de novo* standard.⁷² An argument can be made that those states provide an equally or similarly fair process because such judicial review provides the bona fide possibility of a favorable decision for a terminated teacher. However, extensive judicial review defeats one of the fundamental goals of labor relations, especially in the public sector, which is to employ dispute resolution mechanisms that are speedy, informal, and cost-effective.⁷³

Timely resolution of a teacher's proposed termination is progressive because it allows the affected community to begin its recovery from the devastating impact of a school teacher's termination. In Minnesota communities, schools continue to be central identifying entities, not only in rural areas, but all across the state. Unresolved teacher termination cases divide and damage the entire community, and not only in "notorious" cases. Moreover, once such a case is finally resolved by the court of last resort, so much community damage has occurred that the eventual outcome of the case is eclipsed by the longer-term effect of the community's prolonged suffering.⁷⁴ Arbitration or some similar hearing process

Association (NEA) and the American Federation of Teachers (AFT) to review and verify/correct the summary.

71. Correspondence with general counsel and contacts of NEA and AFT state affiliates (May–July 2006) (on file with authors).

72. *See, e.g.*, IDAHO CODE ANN. §§ 33-513, 33-515 (2001 & Supp. 2006).

73. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960) (Steelworkers Trilogy). *See Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371–72 (1984) (the presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, "further the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining.") (citation omitted). *See also* MINN. STAT. § 179A.01 (2004) ("Unresolved disputes between the public employer and its employees are injurious to the public as well as to the parties. Adequate means must be established for minimizing them and providing for their resolution.").

74. For a variety of reasons, ranging from "over-lawyering" to increased scheduling difficulties to heightened "day in court" expectations by both school districts and teachers, today's arbitration proceedings are frequently more

that is final and binding on both parties is almost always preferable to a system that allows for judicial review, even *de novo* review.⁷⁵ Under these criteria, Minnesota's system, which denies both parties the right for further review except in the most limited of situations,⁷⁶ is more progressive.

V. CONCLUSION

Under both the historical and comparative approaches to the question, Minnesota's tenure and continuing-contract laws prove to be as progressive and fair as the laws or system of any other state. This is not to say that Minnesota's system is flawless or even the best model for resolving teacher termination cases. In any given case, issues and battles between either the parties themselves or their advocates have the potential of prolonging and complicating the case while simultaneously delaying the decision. Data practices issues⁷⁷ take the advocates to court or to the Department of Administration for an advisory opinion.⁷⁸ Mandatory reports to the

prolonged and costly than in the past. But proceedings that include judicial review are uniformly still longer and more costly than in all but a few cases that are handled using final and binding arbitration.

75. The exception might be where a case raises a question of law that the courts—and not an arbitrator—are better equipped to resolve. Nevertheless, in the years since arbitration has become an available alternative, attorneys from Education Minnesota and its predecessor organizations have uniformly selected arbitration to challenge a teacher's proposed termination or discharge.

76. Under MINN. STAT. § 572.19, subdiv. 1 (2004) an arbitrator's award can only be vacated by the courts if:

- (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 572.12, as to prejudice substantially the rights of a party; or (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section 572.09 and the party did not participate in the arbitration hearing without raising the objection. But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

77. Much personnel data and most educational data is deemed private and therefore not always easily accessible for use by the teacher in the hearing.

78. MINN. STAT. §§ 13.03, subdiv. 6 (discoverability of not-public data), 13.072 (opinions by the commissioner), 13.32 (educational data), 13.43 (personnel data)

Minnesota Board of Teaching⁷⁹ and sometimes to law enforcement agencies or the Department of Education's Maltreatment of Minors Division⁸⁰ mean that teachers facing discharge proceedings also face investigations into their licenses, administrative findings of maltreatment of minors, and criminal charges.⁸¹ These complicating factors can and do prevent cases from being resolved in an informal, timely, and cost-effective way. Changes and reforms in these and other areas could make the system more progressive.

In the meantime, however, Minnesota's teachers should be pleased to know that should they find themselves in the unfortunate situation of learning that their school district has proposed their immediate discharge or termination from their position as a tenured or continuing-contract teacher, they will have a fair and equitable opportunity to respond to any charges lodged against them, and to have their case decided with finality by a neutral and mutually selected decision maker. Are Minnesota's teacher termination procedures progressive? Yes!

(2004).

79. MINN. STAT. § 122A.20, subdiv. 2 (2004).

80. MINN. STAT. § 626.556, subdiv. 3 (2004).

81. *See* MINN. STAT. § 122A.20, subdiv. 2 (2004); MINN. STAT. § 626.556, subdiv. 10 (2004).