Dismissal of California Probationary Teachers

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No single piece of legislation in recent years has raised greater problems of administration for local school officials than the 1961 amendments to those California Education Code provisions relating to dismissal of probationary teachers. The purpose of this paper is to discuss in some detail the legal relations of parties involved in such a dismissal situation, namely, the probationary teacher on the one hand and the groups and persons representing the school district which employs the teacher on the other.

A necessary preliminary to an understanding of this subject is an appreciation of the employment context in which a probationary teacher functions. A description of this context begins with, and will herein be confined to, the statutes authorizing the teacher employment relationship. In California, these statutes are found in the Education Code.

A teacher is employed by a local educational agency, a local governing board. This agency may be the governing board of a union or joint union district, an elementary school district, a high school district, a junior college district, or a unified district. The members are elected by the people of the district for which the board is responsible.

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1 CAL. EDUC. CODE §§ 13442-44. Detailed provisions of these and related code sections are set forth in notes and text as their terms are discussed.

2 CAL. EDUC. CODE § 13252. See, as to local governing boards generally, CAL. EDUC. CODE §§ 901-1153.

3 See CAL. EDUC. CODE §§ 1171-74 (general); §§ 1941-2056 (organization).

4 See CAL. EDUC. CODE §§ 1231-303 (general); §§ 2131-73 (organization).

5 See CAL. EDUC. CODE §§ 1321-92 (general); §§ 2201-512 (organization).

6 See CAL. EDUC. CODE §§ 1401-51 (general); §§ 2551-785 (organization).

7 See CAL. EDUC. CODE §§ 1481-93 (general); §§ 2611-931 (unification of districts).

8 CAL. EDUC. CODE §§ 937, 939, 952.
The board may be described as "quasi-autonomous"; that is, in the words of the statute,

The governing board of any school district shall:

(a) Prescribe and enforce rules not inconsistent with law or with the rules prescribed by the State Board of Education, for its own government, and for the government of the schools under its jurisdiction.\(^9\)

The italicized portion of this statute indicates a broad restriction upon the governing board's autonomy and suggests the fact that there exist other powers, emanating from non-local state agencies and from legislation, which may lawfully influence the local board's activities. These state educational agencies include the State Board of Education,\(^{10}\) the State Department of Education,\(^{11}\) and the State Council of Educational Planning and Co-ordination.\(^{12}\) The State Superintendent of Public Instruction may also exert influence upon the local board's governing of schools within a given district.\(^{13}\) And, in addition to state agencies, the County Board of Education\(^{14}\) and the County Superintendent of Schools,\(^{15}\) representing the county, \textit{qua} county, within which the school district is located, may be a source of influence upon the district schools' government. Finally, the local governing board is restricted in its exercise of power by the "law" itself, which here primarily means the provisions of the Education Code. For the most part, the interplay and co-ordination of these variously-originated powers are outside the scope of this paper.\(^{16a}\) However, the \textit{law} restricting exercise of power by the local governing board is relevant here to the extent that it is the source of restrictions upon the particular power of the local governing board to hire and fire teachers. Thus, it is correlative to the primary source of whatever rights a teacher enjoys, as a teacher, with respect to his employment.

\(^{16a}\) "There is no general publication on the California school system as a legal or administrative complex. . . . Generally, however, those involved in California schools learn by experience and study of the Education Code and Title 5 of the State Administrative Regulations." Letter from Mr. Garford G. Gordon, Research Executive, California Teachers Association, to the \textit{Hastings Law Journal}, March 26, 1964.

\(^{16}\) These rights exist, of course, concurrently with common law and statutory employment contract rights and remedies; the former are in addition to the latter. See \textit{Cal. Educ. Code} §§ 13439, 13516.5; Beseman v. Remy, 160 Cal. App. 2d 437, 325 P.2d 578 (1958).
As to the kind of work done, and qualifications therefor, the local governing board employs two classes of employees:17 "certified employees"18 and "classified employees."19 Certified employees are teachers, administrators, and supervisors; that is to say, persons who fill "educational positions."20 All other employees are classified employees.21 This distinction is the basis for one great restriction upon the local board's autonomy: to fill educational positions, the board may hire only such persons as meet the educational and administrative requirements prescribed by the Education Code.22

With respect to tenure,23 teachers and other certified employees24 are classed as either "permanent,"25 "probationary,"26 "temporary,"27 or "substitute."28 A teacher achieves permanent status by (1) being employed by the district for three complete, consecutive school years in a position requiring certification qualifications, and (2) being re-

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17 See CAL. EDUC. CODE §§ 12901-4775.
18 See CAL. EDUC. CODE §§ 13101-570.
19 See CAL. EDUC. CODE §§ 13580-756.
20 CAL. EDUC. CODE §§ 12902, 12907-08.
21 CAL. EDUC. CODE §§ 13580-81.
22 See CAL. EDUC. CODE § 12902 and further references contained therein.
23 The word "tenure" does not play a prominent role in the Education Code sections dealing with teachers' employment rights; however, those sections which create such rights are generally known as teacher tenure acts. See generally 44 CAL. JUN. 2d SCHOOLS §§ 477-531 (1958); Annots., 127 A.L.R. 1298 (1940), 113 A.L.R. 1495 (1938), 110 A.L.R. 791 (1937) (these annotations, which are complementary, deal on a national basis with courts' handling of teacher tenure acts resulting from their great upsurge in the thirties).
24 Administrators and supervisors in a given district, whether originally employed in or advanced to such positions, may also gain permanent status upon fulfilling the requirements of CAL. EDUC. CODE § 13304; however, they do not attain permanent status as administrator or as supervisor but rather as classroom teacher. CAL. EDUC. CODE § 13315. Thus, a principal who has achieved tenure as a permanent employee is not protected in his position by tenure provisions; he may be "demoted" to the position of classroom teacher. This is not to say, however, that he may not have an action for damages on his contract of employment as a principal. Board of Educ. v. Swan, 41 Cal. 2d 546, 261 P.2d 261 (1953). The body of case law built up between 1921 and 1935 to the effect that administrators were not entitled to tenure unless they also performed classroom teacher duties was invalidated by a 1935 amendment to the School Code predecessor of section 13315. Cases implicitly recognizing this change are Board of Educ. v. Swan, supra; Holbrook v. Board of Educ., 37 Cal. 2d 316, 231 P.2d 853 (1951). The court in Griffin v. Los Angeles City High School Dist., 53 Cal. App. 2d 350, 127 P.2d 939 (1942), failed to grasp the true import of the 1935 amendment and continued to rely on the cases which construed a substantially differently worded statute.
25 CAL. EDUC. CODE § 13304.
26 CAL. EDUC. CODE § 13304.
27 CAL. EDUC. CODE § 13337.
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elect for the next succeeding school year to a position requiring cer-
tification qualifications: after such re-election, the teacher is a perma-
nent employee of the district. This permanent status right is created
by operation of law; it matters not whether such status is formally
recognized by the governing board. Many of the tenure rights of the
permanent teacher will necessarily appear in the following discussion
of the tenure rights of the probationary teacher; the purpose of the fore-
going is to furnish background for a meaningful statement of the proba-
tionary teacher’s position within the educational system’s employment
structure. To summarize, a probationary teacher may be said to be a
certified employee, other than a substitute or temporary employee, of a
given school district, who has not achieved permanent employee status.

Tenure Rights of Probationary Teachers

The word “probation” is defined as “the action of subjecting an
individual to a period of testing and trial so as to be able to ascertain
the individual’s fitness or lack of fitness for something (as . . . retention
of a particular academic classification . . . ).” From this statement
the rationale underlying the probationary teacher’s employment status
may be inferred. It is obvious that not all persons who meet the state’s
minimum requirements for classification as certified employees are

29 Cal. Educ. Code § 13304. Prior to 1961, the mandatory application of this
section was limited to districts having 850 or more average daily attendance (“ADA”—
more fully defined at note 84 infra). By a 1961 amendment mandatory application is
extended to include districts of 250 or more ADA. Classification of certified employees
as permanent by governing boards of districts with less than 250 ADA is discretionary
with the board. Cal. Educ. Code § 13307. A declaration of legislative intent and pur-
pose in effecting these changes, with emphasis on their retroactive application, is found
250-850 ADA class should thoroughly familiarize themselves with the provisions of this
section. “The size of 250 ADA was chosen because it is close to the attendance level
which would require eight or more teachers. With this number of teachers a district
can employ a superintendent and thus have professional advice and direction in em-
ploying and evaluating teachers.” Letter from Mr. Gordon, supra note 15a. See also
Although such districts comprise roughly one-third of the state’s school districts, it is
estimated that less than eight per cent of the total number of public school teachers
(both permanent and probationary) are employed in such districts. Letter from Mr.
Gordon, supra.

In addition, certain special geographical considerations governed the applicability
of mandatory classification of teachers as permanent in joint union or union high school
districts (see note 3 supra) prior to 1963. These considerations were removed by the
repeal of the distinguishing codes sections in 1963.

The only qualification, therefore, to the general text statement is that its application
is not mandatory as to districts with less than 250 ADA.

destined to perform admirably or even adequately in educational positions. This is as true of teaching as of any other profession. More specifically, it is quite likely that not all such persons are destined to so perform in a particular school district. Thus, it is fitting that persons who aspire to the ranks of permanent teachers, with the tenure security which such status affords, submit to a probationary period. On the other hand, it is not inconceivable that a qualified—even a highly qualified—person may be the victim of dismissal (including in the meaning of this word, failure to be rehired) for reasons having no relationship to his fitness as a teacher. The imagination may supply such potential situations; a single illustration will suffice here: it is entirely possible that a genuine personality conflict might exist between a probationary teacher and his immediate supervisor, a conflict which could result in a grossly inaccurate evaluation of the teacher and eventually lead to dismissal, a situation which would result in a totally unnecessary scar on the teacher's professional record. And yet both teacher and supervisor might be qualified persons in all other respects. It is to guard against such personal injustices, as well as to minimize the possibility of permanent loss of qualified persons both to a particular district and to our educational system as a whole, that the legislature has seen fit to supply certain substantive and procedural restrictions on local governing boards' power to dismiss probationary teachers.

Dismissal of Probationary Teachers “During the School Year”

Prior to 1961, the Education Code clearly differentiated between two kinds of “dismissals” of probationary teachers.33 Section 13442 provided (and still provides, the wording not having been changed by recent amendments) that probationary employees dismissed during the school year should be dismissed “for cause only, as in the case of permanent employees.”34 The school year begins on the first day of July and ends on the last day of June,35 a full twelve-month period. Thus since teachers are first “elected” for “the next ensuing school year,” and subsequently “re-elected from year to year,”36 it would seem obvious that dismissal by any means other than failure to “re-

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34 Cal. Educ. Code § 13442: “Governing boards of school districts shall dismiss probationary employees during the school year for cause only, as in the case of permanent employees.”


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elect” was dismissal during the school year. In other words, if a school
district sought to terminate a probationary teacher’s contract while it
was still running, this was an attempt to dismiss him during the school
year within the meaning of section 13442.\footnote{In Kimberlin v. Los Angeles City High School Dist., 115 Cal. App. 2d 459, 252
P.2d 344 (1953), petitioner, a probationary teacher, was first notified of filing of charges
against him by a letter which stated that it was the intention of the governing board
to “dismiss you upon the 16th day of June, 1950 . . . .” Technically, this would have
been dismissal during the school year since the teacher had been “re-elected” for an
ensuing school year which did not end until June 30, 1950. But in its notice of dis-
missal, the board informed petitioner that he was dismissed “effective at the close of
business June 30, 1950, and that your services will not be required for the ensuing
year.” Presumably, therefore, petitioner enjoyed his rights under the contract until
June 30, so that in fact he was not dismissed during the school year. Even had the
board not corrected the date in its notice of dismissal, it has been held in a case where
the date specified in the notice coincided with the date on which the teacher’s duties
ended (June 5), that such notice was of intent not to rehire and not of intent to dismiss
would seem, however, that the board owes to itself and to the teacher the duty of
knowing the code definition of the school year. CAL. EDUC. CODE § 5101. Errors of
this nature breed litigation.}

Thus it may be seen that a probationary teacher had certain statu-
tory rights flowing from his position as a teacher, which rights were
in excess of those under a simple contract of employment for a term
certain. The statute did not make the precise nature of these rights as
clear, perhaps, as might be desired. First, did the requirement of
“cause” for dismissal mean that probationary employees were to be
dismissed only for those causes enumerated in section 13403 of the
Education Code,\footnote{CAL. EDUC. CODE § 13403:}

No permanent employee shall be dismissed except for one or more of the fol-
lowing causes: (a) Immoral or unprofessional conduct. (b) Commission, aid-
ing or advocating the commission of acts of criminal syndicalism, as prohibited
by Chapter 188, Statutes of 1919, or in any amendment thereof. (c) Dis-
honesty. (d) Incompetency. (e) Evident unfitness for service. (f) Physical
or mental condition unfitting him to instruct or associate with children. (g)
Persistent violation of or refusal to obey the school laws of the State or reason-
able regulations prescribed for the government of the public schools by the
State Board of Education or by the governing board of the school district em-
ploying him. (h) Conviction of a felony or of any crime involving moral tur-
pitude. (i) Violation of Section 8455 of this code or conduct specified in
Section 1028 of the Government Code, added by Chapter 1418 of the Statutes
of 1947. (j) Violation of any provision in Section 12952 to 12958, inclusive,
of this code. (k) Knowing membership by the employee in the Communist
Party.
tionary teachers during the school year also be that which had to be followed in the case of dismissal of a permanent employee?

As for the first of these questions, a 1927 case construing the Political Code predecessors of Education Code sections 13403 and 13442 indicated that the grounds for dismissing a probationary teacher during the school year could be only those enumerated for the dismissal of a permanent employee.\(^{39}\) On the other hand, a more recent case\(^ {40}\) construing the term dismissal for cause in a related Education Code provision, the predecessor of pre-1961 section 13444, suggests that dismissal of a probationary teacher for cause requires "much less cause" than the section specifying grounds for dismissal of permanent teachers. "For example," noted the court, "the failure to conform with a reasonable standard of excellence during the probationary period may constitute a sufficient cause for terminating the employment."\(^ {41}\) The latter statement, however, was made with respect to dismissal by failure to rehire upon the expiration of a probationary teacher's current contract year, a second type of "dismissal," distinguished and discussed in greater detail below. Quite possibly, both courts were correct. The historically separate treatment that the legislature has accorded dismissal of a probationary teacher during the school year, as opposed to mere failure to rehire, may well indicate an intent to require more weighty grounds for this more drastic action.\(^ {42}\) Furthermore, such grounds as "failure to conform with a reasonable standard of excellence" may well be perfectly adequate cause for failure to rehire since presumably the administration's authority to enforce such value judgments is the underlying reason for the teacher's probationary status.

\(^{39}\) Alexander v. Manton Union School Dist., 82 Cal. App. 330, 255 Pac. 516 (1927) (dictum, for petitioner was a principal, and principals, whether permanent or probationary employees, were expressly extended the rights of permanent employees by the statute in force at that time), cited in Comstock v. Board of Trustees, 20 Cal. App. 2d 731, 67 P.2d 694 (1937). Moreover the cases subsequent to Alexander also cited by the court in Comstock as authority for this "rule" were not in point.


\(^{41}\) Id. at 714, 214 P.2d at 385.

\(^{42}\) An attempt to dismiss any certified employee during the school year is an effort at unilateral termination of a contract and would presumably be undertaken only for very serious reasons, particularly during the months when pupils were actually in attendance. The district would be faced with two unpleasant alternatives: (1) finding a replacement after virtually all of the state's non-substitutes were already under contract, or (2) doubling up children in already overcrowded classrooms. Moreover, from the teacher's point of view this action would be much more serious, as it would attach a greater degree of reprehensibility to the teacher's conduct than would mere failure to rehire, and it would virtually eliminate any possibility of finding employment as a teacher, certainly for the balance of that school year.
However, it must be conceded that this question appears not to have been authoritatively decided.

The second question posed above, whether the final words of section 13442, "as in the case of permanent employees," meant that the legislature intended the procedure for dismissing probationary teachers during the school year to be that prescribed for dismissal of a permanent teacher, can be somewhat more authoritatively answered. A 1937 case construing the old School Code predecessor of Education Code section 13442 ordered reinstatement of, and back salary paid to, a probationary junior college teacher whom the local governing board had sought to dismiss during the school year by merely notifying him of its resolution to that effect, the court holding that the procedure prescribed for dismissing permanent teachers had to be followed. Unfortunately, however, the court here relied on the 1927 case noted above in connection with grounds for dismissal of probationary teachers during the school year; in that earlier case the court's statement on the issue of procedure for such dismissal was, again, obiter.44

To summarize the school year dismissal situation prior to 1961: (1) "cause" for dismissal was necessary, and some authority exists to the effect that cause meant only those grounds for which a permanent teacher could be dismissed under what is now Education Code section 13403; (2) the necessity for cause for dismissal presupposes a procedure to establish this cause, and there is authority to the effect that such procedure is that to be followed in the case of dismissal of a permanent teacher, although, once more, this authority is somewhat questionable in view of the cases therein relied upon.43 It is this

44 See note 39 supra. Nor were other cases cited by the court in Comstock as supporting Alexander in point as to this issue.
48 Comstock v. Board of Trustees, 20 Cal. App. 2d 731, 732, 67 P.2d 694 (1937). A possible third alternative is an argument that section 13442 should be read as meaning that governing boards may dismiss probationary teachers during the school year for some cause, just as permanent teachers may be dismissed only for cause, but not as intending that either grounds or procedure must be that prescribed for permanent teachers. But such a construction would render the final clause of section 14442 tautological, and it must be assumed that the legislature intended the words to convey some additional meaning.
writer's considered opinion that, as to both these issues, such authority as exists has been headed in the right direction. The seriousness of a school year dismissal, particularly during that period when pupils are in attendance, has already been alluded to. It follows from this fact that such a dismissal should not be predicated upon light and transient grounds, nor should it be processed by means of a makeshift procedure. While it is doubtless true, as one court has pointed out, that cause for dismissal by failure to rehire may well be “failure to conform with a reasonable standard of excellence during the probationary period,” it would seem clear that the policy underlying the existence of the probationary period would require that school officials seek to point out, and assist the probationary teacher in attaining, this standard of excellence during the school year, at least, for it is obvious that a probationary teacher is himself something of a student during the probationary years.

A further reason for this writer's opinion that section 13442 demands both permanent teacher grounds and permanent teacher procedure for school year dismissal of probationary teachers is the effect of the recent amendments upon section 13442. This particular effect will be detailed below in the discussion of the general effect of these amendments upon the entire dismissal situation. Basic to the writer's position is his opinion that no change in the state of the law regarding section 13442 was intended by the legislature and that none was wrought by the amendments. It is for this reason that the pre-1961 law regarding dismissal of probationary teachers during the school year has been given detailed treatment above.

Assuming then that it has been and continues to be the intent of the legislature to extend to probationary teachers dismissed during the school year those substantive and procedural rights which accrue to permanent teachers upon dismissal at any time, it would seem appropriate to review such rights here. This review must be brief for the

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49 See note 42 supra.
51 This analysis is, as to procedure for dismissal during the school year, in accord with an Attorney General's Opinion, wherein the answer to the question, "what procedure should be followed if a probationary teacher is dismissed prior to the termination of the school year," was that "a probationary teacher dismissed during the school year is entitled to demand the same superior court hearing to which tenured [permanent] teachers are entitled." 39 Ops. CAL. AT'Y GEN. 186 (1962). It will be noticed that this opinion was delivered subsequent to the 1961 amendments but prior to the 1963 session which added § 13445.1 to the Education Code, of which more infra. See also Homer v. Board of Trustees, 61 A.C. ——, 37 Cal. Rptr. 185, —— P.2d —— (March, 1964)
reason that a full and adequate discussion of the rights of permanent teachers in a dismissal situation is not possible within the scope of this paper.52

Grounds for Dismissal of Permanent Teachers

Education Code section 13403 specifies in its subsections the grounds for dismissal of permanent employees.53 It is important to note that this list is exclusive; cause for dismissal must be fitted into one or more of the grounds enumerated, a fact which is made clear by the introductory words of the statute: "No permanent employee shall be dismissed except for one or more of the following causes . . . ." No cases are to be found wherein the contrary has been contended. As a practical matter, however, it may readily be seen that some of the specified grounds (for example, "immoral or unprofessional conduct," "dishonesty," "incompetency") are framed in quite general language and are thus subject to all the virtues and vices peculiar thereto.54 This fact is the source of much of the appellate litigation arising from section 13403. It would serve no useful purpose to attempt a review of examples of successful and unsuccessful charges under the more general of the specified grounds. Such issues ultimately are questions of fact and here, as elsewhere, appellate courts are reluctant to disturb the findings of the court of first instance.55 However, the statement that cause for dismissal must lie within one or more of the grounds enumerated in section 13403 bears repeating.

Procedural Rights of Permanent Teachers

In the area of a permanent teacher's procedural rights in a dismissal situation it is both possible and desirable to be more definitive. The legislature having extended to teachers certain substantive rights with respect to his employment, it is only natural that it should protect these

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52 See generally, 44 Cal. Jur. 2d Schools §§ 507-18 (1958). Research has failed to disclose any discussion of this subject in California more recent than a Comment, 24 Calif. L. Rev. 441 (1936), the usefulness of which is now rather limited; and because teacher tenure laws differ widely in scope and wording recourse to non-California materials appears to be of little value. The statutes, however, are not complex, and research into the applicable Education Code sections in the annotated codes would seem to be the best means of attaining a detailed understanding of this subject. These sections are cited as they are discussed in the text infra.

53 Cal. Educ. Code § 13403. This section is set out in its entirety in note 38 supra.


rights through procedural safeguards. The safeguards are to be found in Education Code sections 13404 through 13441.

The procedure begins with the filing with the governing board of a formal written statement of charges against the teacher. This statement is usually executed by the district superintendent, but the governing board itself may formulate the charges. After the statement is filed the board may, by majority vote, resolve to notify the teacher “of its intention to dismiss him at the expiration of thirty days from the date of service of the notice, unless the employee demands a hearing ....”56 If the board does resolve to notify the teacher of its intention to dismiss, such notice must be in writing and served upon the teacher personally or by mailing it to his last known address, attaching thereto a copy of the charges and copies of certain Education Code sections dealing with his tenure rights.57 Although section 13404, providing for the filing of a statement of charges, does not specify the detail with which such charges must be set forth, the charges should be formulated at this point with the degree of particularity necessary to inform the teacher of their nature so that he may properly prepare a defense. The courts rightfully assume the necessity of this in cases where the charges come on for judicial hearing.58 In such cases, the charges will form the foundation for the complaint and for this further reason should be drafted with an eye to that possibility and the realization that such a complaint is demurrable.59 If the teacher does not demand a hearing within thirty days, as is his right under section 13404, he is considered to have waived this right and may be dismissed upon the expiration of the thirty-day period.60 If the teacher demands a hearing, however, the board has two options, either (a) to rescind its intention to dismiss, or

(b) to file a complaint in the superior court of the county in which the school district ... is located, setting forth the charges against the employee and asking that the court inquire into the charges and determine whether or not the charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of the employee, under the provisions of this code, and for judgment pursuant to its findings.61

56 CAL. EDUC. CODE § 13404. See also a form for the statement of charges following § 13404 in Deering's Annotated Education Code.
57 CAL. EDUC. CODE §13405. See also a form for the notice of intention to dismiss following § 13405 in Deering’s Annotated Education Code.
59 CAL. EDUC. CODE § 13414.
60 CAL. EDUC. CODE § 13406.
61 CAL. EDUC. CODE §13412. See also a form for the complaint for dismissal following § 13412 in Deering's Annotated Education Code.
This provision is an excellent indication of the seriousness with which the legislature regards dismissal of a permanent teacher (and presumably of a probationary teacher during the school year): the first hearing on the merits of the dismissal is not administrative but judicial.62

Upon service of summons accompanied by a copy of the complaint, the teacher must demur or answer within ten days. Failure to demur or to plead results in entry of default, and thereupon "judgment shall be entered by the court declaring the right of the governing board to dismiss the employee."63 Demurrer may be upon any of the grounds specified in the Code of Civil Procedure and procedure on the demurrer is that followed in a civil action.64 If an answer is filed, the governing board may demur thereto, with the same effect as in a civil action.65

A proceeding of this nature must be set for trial at the earliest possible date and must be given precedence over all other cases, except older matters of the same nature and other actions to which special precedence is given by law.66 A novel provision respecting these proceedings is that, upon motion of either party, in the court's discretion, or upon its own motion, the court "may appoint three disinterested persons over 21 years of age as referees, to ascertain the facts and report their findings to the court."67 Whether the case is heard at trial or hearing by referees, both parties may be represented by counsel.68 Some special rules of evidence are applicable to these proceedings: in the case of a hearing before referees, the code provides that technical rules of evidence shall not apply;69 in either case, the code provides that "no testimony shall be given or evidence introduced relating to matters which occurred more than three years prior to the date of the filing of the complaint."70 Records relating to the teacher which are regularly kept by the governing board may be introduced into evidence,
“but no dismissal of the employee, or judgment that the governing board may dismiss him may be made on the records alone.”

Code sections intervening among those discussed herein deal generally with pre-hearing actions which the board may take in the event of the filing of certain charges; for example, immediate suspension of the teacher upon a charge of immoral conduct, conviction of felony, or of any crime involving moral turpitude, or incompetency due to mental disability, etc. Finally, both parties are given the right to appeal from the judgment of the superior court.

The grounds and procedure for dismissal must be those outlined above; a teacher whom the governing board is attempting to dismiss in derogation of the rights extended to him by the statutes may obtain an injunction to restrain the board from proceeding with its illegal action, and in the event such action has been consummated, it is well established that the teacher may petition for a writ of mandate to compel reinstatement and the payment of back salary.

“Dismissal” of Probationary Teachers by Failure to Rehire

As has been noted, the statutes as they existed on the eve of the 1961 amendments distinguished between two types of “dismissal” of probationary teachers. Education Code section 13442, discussed at length above, was applicable in terms to probationary teachers dismissed “during the school year.” On the other hand, section 13443 clearly contemplated a different kind of “dismissal.” Although this

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71 Cal. Educ. Code § 13434. Such records have been held admissible without this special provision under the Uniform Business Records as Evidence Act (Cal. Code Civ. Proc. §§ 1953e-h) as a statutory exception to the hearsay rule, so long as they were not prepared after the charges were made. Fox v. San Francisco Unified School Dist., 111 Cal. App. 2d 885, 245 P.2d 603 (1952). Thus the proviso in Cal. Educ. Code § 13434 that no dismissal or judgment that the board may dismiss shall be made on these records alone would seem to be a stricter evidentiary requirement than that existing for civil actions generally. Cf. Fox, 111 Cal. App. 2d at 891, 245 P.2d at 608.

72 Cal. Educ. Code § 13408. See also §§ 13407 (“general” incompetency), § 13409 (teacher charged with a sex offense).


75 Kennedy v. Board of Educ., 82 Cal. 483, 22 Pac. 1042 (1890); Titus v. Luardale School Dist., 157 Cal. App. 2d 822, 323 P.2d 56 (1958); Daughterty v. Board of Trustees, 111 Cal. App. 2d 519, 244 P.2d 950 (1952).


77 Cal. Educ. Code § 13443. The current wording of this section is here set forth; that portion of the statute as it existed prior to 1961 is set in roman type, the material added by Cal. Stat. 1961 ch. 2063 § 1, p. 4290, is italicized:

(a) On or before the 15th day of May in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year.

The notice shall be deemed sufficient and complete when delivered in
section was, and remains, in the annotated codes entitled “Notice required for dismissal of probationary employee,” use of the word “dismissal” is unfortunate. This title indicates at first glance that the section is applicable to dismissal generally, but the first sentence clearly shows that the section contemplates a decision by a governing board not to rehire a probationary employee for an ensuing school year. In fact, prior to 1961, the word “dismissal” did not even appear in the body of this section. Moreover, in view of the fact that section 13442 had already prescribed the requirements for dismissal of a probationary teacher during the school year, the only possible application of section 13443 would be to a decision not to offer the teacher a contract for the next year; that is, a failure to rehire; there is no other alternative means of terminating the teacher’s employment relationship.

Turning to the substance of section 13443, it may readily be seen that prior to 1961, a probationary teacher had no tenure, as this word is commonly understood, in his position. He had the “right”—if it can be called such—to be notified in writing prior to May 15 of his contract year that his services would not be required for the ensuing year. However, this bare minimum of “right” did carry with it certain advantages to the teacher. First, his rights and duties under his current contract continued until the end of the current school year—that is, until June 30—for, as we have seen, an attempt to terminate his contract prematurely was dismissal during the school year, for which action “cause” was necessary as well as the procedural safeguards surrounding the dismissal of a permanent teacher. Moreover, the governing board was

person to the employee by the clerk or secretary of the governing board of the school district or deposited in the United States registered mail with postage prepaid, addressed to the employee at his last known address.

(b) Upon the request of such employee, the governing board shall give such employee a written statement of the reasons for the dismissal. The determination of the board as to the sufficiency of the reasons for dismissal shall be conclusive but the cause shall relate solely to the welfare of the schools and the pupils thereof. No right of judicial review shall exist for such employee on the question of the sufficiency of the reasons for dismissal.

78 “Historically the courts and legislature have referred to termination of employment of a probationary employee, whether during the school year as well as at the end of the school year, as a dismissal.” 39 Ops. Cal. Att’y Gen. 186, 190 (1962). But notwithstanding this custom, the courts have not treated the two types of “dismissals” in the same way. The somewhat misleading dictum suggesting the contrary in Griggs v. Board of Trustees, 218 A.C.A. 24, 33, 32 Cal. Rptr. 355, 361 (1963) was corrected on appeal in Griggs v. Board of Trustees, 61 A.C. ——, 37 Cal. Rptr. 194, —— P.2d —— (March 1964).

required to notify him of its decision in writing, and this notification had to take place on or before May 15 of the current contract year. Where such notice was not given, or not given by the date specified, a probationary teacher was deemed rehired and could if necessary by petition for mandamus obtain reinstatement.

The "rights" under section 13443 of the Education Code and its School Code predecessor were available generally; no exception was made by the terms of this section for large or small districts or for districts having certain geographical peculiarities. However, in 1935 the School Code predecessor of section 13444 was amended to extend additional rights to probationary teachers "dismissed" in school districts having a certain minimum average daily attendance (ADA).

Although this section (then and now) speaks of "dismissal" generally, it was again the intent of the legislature that the dismissal contem-

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80 "Any language which may be reasonably understood to mean that his tenure as a probationary teacher has been terminated is sufficient." Volandri v. Taylor, 124 Cal. App. 358, 359, 12 P.2d 462, 463 (1932). Annot., 92 A.L.R.2d 751 (1963) collects cases on the sufficiency of notice of intention not to rehire.

81 This was true notwithstanding the fact that another teacher had meanwhile been hired by the board to fill the "vacant" position. Thibaut v. Key, 126 Cal. App. 32, 14 P.2d 138 (1932).

82 See note 29 supra.

83 On the eve of the 1961 amendments, CAL. EDUC. CODE § 13444 read as follows:

Anything in Section 13443 to the contrary notwithstanding, governing boards of school districts having an average daily attendance of 85,000 or more pupils shall dismiss probationary employees for cause only. The determination of the board as to the sufficiency of the cause for dismissal shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof.

In case a hearing is requested by the employee the proceeding shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency in said Chapter 5, except that the respondent shall file his notice of defense, if any, within five days after service upon him of accusation and he shall be notified of such five-day period for filing in the accusation. All expenses of the hearing, including the cost of the hearing officer, shall be paid by the governing board from the district funds.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section, as may be necessary to effectuate this section.

Cal. Stat. 1959, ch. 2 § 1, pp. 595, 948.

The second and third paragraphs were originally added in 1953. Cal. Stat. 1953, ch. 88 § 2, p. 810.

The present wording of § 13444 is given at note 102 infra.

84 A school district's "ADA" means, generally, the number of pupils in attendance in all the district's schools on the average day during a given period. For example, if on the average day ninety per cent of a district's pupils were in attendance, a school district with a total enrollment in all schools of 95,000 would have an ADA of 85,500. Actual determination of ADA is much more painstaking than simply taking a percentage of total enrollment; in practice, ADA is determined quite accurately from the daily attendance reports of every classroom teacher in the district. ADA will always be some
plated be failure to rehire for the ensuing school year. Three reasons warrant this conclusion: (1) as was pointed out at some length above, section 13442, by the better view, has pre-empted the area of dismissal during the school year; (2) section 13444 in its opening sentence referred to section 13443 in such a manner as to indicate an intent that section 13444 be a particular quantitative qualification of the general type of “dismissal” to which section 13443 is applicable; to wit, dismissal by failure to rehire; (3) research fails to disclose any appellate cases wherein districts have attempted to dismiss a probationary teacher during the school year by means of the procedure prescribed in pre-1961 section 13444, a situation which is at least negatively indicative of the interpretation placed upon the legislative intent by interested persons in the field.

The additional rights granted by the 1935 amendments to section 13444 to probationary teachers in districts of 85,000 or more ADA were primarily these: (1) failure to rehire a probationary teacher had to be for cause; and (2) the necessity for cause implied a hearing so that the existence or non-existence of cause could be ascertained. Moreover, the requirement of cause for dismissal was further qualified by the proviso that cause should relate solely to the welfare of the schools and the pupils. On the other hand, the statute expressly stated that the determination of the board as to the sufficiency of the cause should be conclusive. Prior to 1953, there was no specific hearing procedure prescribed by this section; thus, it was necessary for the superior court, hearing a petition for mandate, to consider the procedure surrounding the hearing, if such procedure were attacked, in order to determine whether the procedure complied with reasonable due process standards. The additions to section 13444 by the 1953 amendments ob-

figure less than total enrollment, depending upon the incidence of absences. See generally CAL. EDUC. CODE §§ 11251-653.

Much emphasis is placed at all levels on accurate and punctual reporting of ADA because, among other uses, a district’s ADA determines the amount of state educational aid to be allocated to the district.

See 39 CAL. OP.S. ATTY GEN. 186, 190 (1962).

Riggins v. Board of Educ., 144 Cal. App. 2d 232, 300 P.2d 848 (1956), is an example of proceedings under this section held properly conducted, wherein “dismissal” was by failure to rehire.


Ibid. In Keenan, the court held that the procedure followed did not constitute a hearing. In Tucker, involving the same governing board, the court held that the procedural rules and regulations promulgated by the board as a result of the Keenan decision did prescribe an adequate procedure.

viated the necessity of a court's passing upon the adequacy of a local board's do-it-yourself procedure; these amendments required that the hearings be held pursuant to the provisions of the Administrative Adjudication section of the Administrative Procedure Act.  

From these additional rights granted three decades ago to probationary teachers in the larger districts arose some very important judicial implications; furthermore, as will be seen from the later discussion of the effects of the 1961 and 1963 amendments, the importance of these implications is no longer confined to the larger districts.

Under the provisions of section 1085 of the Code of Civil Procedure, it is accepted that the writ of mandate is the proper remedy for testing the claim that a teacher has been wrongfully ousted from his position. With what questions might the court, under section 13444, be concerned? In two district court of appeal cases, the first prior to the 1961 amendments and the second after these amendments, two different district courts held that the role of the court is to determine whether, under section 1094.5(c) of the Code of Civil Procedure, there is substantial evidence in the record to support the findings and the conclusion of the board "that the cause conclusively found to exist relates solely to the welfare of the school and the pupils thereof." In other words, the court in both cases stated that it would look at the record only to determine (1) whether substantial evidence existed therein to support the board's findings, and (2) to ascertain that the board did not abuse its discretion in concluding that its findings supported a cause for dismissal which related solely to the welfare of the schools and pupils. The first of these is an accepted power of a court in reviewing the action of an administrative tribunal; the second is a requirement upon the court imposed by this particular statute to insure that the court does not substitute its judgment as to what constitutes sufficient cause (grounds) for dismissal for that of the board. The only standard against which the board's discretion as to cause is to be tested is whether or not the findings supported the board's conclusion that the grounds for dismissal related solely to the welfare of the schools and pupils. This construction would seem to be a recognition of the Supreme Court's dictum in Keenan v. San Francisco Unified School

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91 See note 75 supra.
94 Id. at 37, 32 Cal. Rptr. at 364 (relying almost verbatim upon Riggins, supra note 92).
that “cause” in section 13444 meant “much less cause than that justifying charges against a permanent teacher.” The courts in the two cases noted above, however, successfully attempt to state just how much less this cause need be, under section 13444.

To summarize the position of the probationary teacher, prior to 1961, with respect to dismissal by failure to rehire: (1) a teacher in a district with less than 85,000 ADA had the “right” to written notification of intent not to rehire, delivered prior to May 15; (2) a teacher in a district with an ADA of 85,000 or more had, in addition to the above rights, the right (a) to be refused re-employment only for a cause related solely to the welfare of the schools and the pupils; and (b) to a hearing to determine this cause; and (c) after 1953, to a hearing conducted under the provisions of the Administrative Procedure Act. In both cases, a teacher could test the legality of his dismissal through petition for a writ of mandate.

Effect of the 1961 Amendments on “Dismissal” by Failure to Rehire

We come now to a consideration of legislation which amounts to a revolution in the area of substantive and procedural rights of the vast majority of the state’s probationary teachers. In 1961, the legislature amended sections 13443 and 13444 of the Education Code. Section 13443 was amended by the addition of a new paragraph. It will be remembered that originally this section permitted the local governing board to dismiss a probationary employee by failure to rehire simply by written notification prior to May 15 that his services would not be required for the ensuing year. After 1961, the right to written notification prior to May 15 remains, but the teacher is given additional rights by the added paragraph: (1) he may request a written statement of reasons for the dismissal; (2) the reasons (grounds) must constitute a cause; (3) this cause must relate solely to the welfare of the schools and the pupils thereof; and (4) by implication, upon the authority of *Keenan*, some sort of hearing on the cause would be necessary. (But see the discussion of amended section 13444, below.) Again we find the qualification that the sufficiency of the reasons shall be the conclusive determination of the board; in fact, the section now specifically

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65 34 Cal. 2d 708, 214 P.2d 382 (1950) (dictum, in that denial of writ of mandate by the trial court was reversed on grounds that the hearing contemplated by the statute was not accorded petitioner). The dictum is cited with approval in 39 Cal. Ops. Att’y Gen. 186, 189 (1962). The decision in *Keenan* is well-considered; it assigned a reasonable application to what might otherwise have been a meaningless statute.

66 See the italicized paragraph of section 13443 as quoted at note 77 supra.

77 See Annot., 89 A.L.R.2d 1018 (1963), as to the sufficiency of the language used by a teacher to indicate a request for a hearing.

98 34 Cal. 2d 708, 214 P.2d 382 (1950).
states that no right of judicial review shall exist on the question of the sufficiency of the reasons for dismissal. It will be noted that the wording of this added paragraph bears a close resemblance to the wording of the first paragraph of pre-1961 section 13444, which then applied only to probationary teachers in the 85,000 or more ADA districts. However, there are some differences. The most important of these differences, at least superficially, is that while pre-1961 section 13444 stated that "the determination of the board as to the sufficiency of the cause for dismissal shall be conclusive," amended section 13443 says that "the determination of the board as to the sufficiency of the reasons for dismissal shall be conclusive." (Emphases added.) Does this literal difference necessitate any substantial distinction between the courts' construction of pre-1961 section 13444 and the current section 13443? It is submitted that it does not. It will be remembered that the district court of appeal in Riggins v. Board of Education, construing section 13444 in 1956, decided that the court's job was to determine (1) whether there existed substantial evidence to support the board's findings, and (2) to determine whether there was any abuse of discretion in the board's determination that the cause for dismissal related solely to the welfare of the schools and pupils thereof. Although section 13443 as amended specifically disallows judicial review on the question of the sufficiency of the reasons for dismissal, it does not say that there shall be no review as to the question of whether the reasons given by the board do in fact relate solely to the welfare of the schools and the pupils. Indeed, it would be a very strange statute which provided that cause for dismissal should relate solely to the welfare of the schools and pupils (as this one does), but which then was construed to mean that the conclusion of the board as to whether the cause did relate to such welfare was conclusive upon a reviewing court (note that the statute does not say the latter). Thus, the only reasonable conclusion is that with respect to cause (or "grounds," or "reasons") for dismissal by failure to rehire, the court's job in hearing a petition for mandate is that which was enunciated in Riggins. Such was the conclusion of the district court in 1963 in Griggs v. Board of Trustees and is clearly the proper one.

Turning now to the amendment of section 13444, we find that some of the questions raised by section 13443 are answered and also

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99 See note 83 supra.
100 144 Cal. App. 2d 232, 300 F.2d 848 (1956).
102 CAL. EDUC. CODE § 13444:
The governing board of any school district shall dismiss probationary em-
that the conclusions arrived at above in the discussion of section 13443 are reinforced. First, the provisions of section 13444 now apply, with one important exception, to probationary employees generally; that is, this section is no longer limited in its application to those probationary employees in schools districts of 85,000 or more ADA. Lest there be any doubt as to the substantive rights given by section 13443, the first sentence of section 13444 states that “the governing board of any school district shall dismiss probationary employees for cause only.” (Emphasis added.) The section then discusses cause in these words:

The determination of the board as to the sufficiency of the cause for dismissal shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof. The determination of the board as to the sufficiency of the cause for dismissal shall not be subject to judicial review. The causes for dismissal shall not be restricted to those specified in Section 13403.

It should be noted that this language is a return to that of the pre-1961 section and appears to add force to the conclusion reached above that, with respect to cause ("grounds" or "reasons"), a reviewing court may determine only whether a board abused its discretion in concluding that the cause related solely to the welfare of the schools and pupils, the test established by Riggins and followed in Griggs. Moreover, in proscribing any restriction of causes for dismissal to those enumerated...
in section 13403 (applicable to permanent teachers), the legislature gives an insight into its meaning of the term "sufficiency of the cause": the reviewing court is not to use the grounds enumerated in section 13403 as a standard for determining whether the board abused its discretion in concluding that the reasons for dismissal related solely to the welfare of the schools and pupils thereof; rather, this latter requirement is to be measured entirely independently of any pre-existing standard.

In March, 1964, only a few weeks prior to this writing, the supreme court, upon hearing petitioner's appeal from the appellate court's decision in Griggs, used the following significant language in affirming:

Nothing in the language of section 13444 prevents the reviewing court from determining whether the board has proceeded in excess of jurisdiction, whether there has been a fair trial, and whether the board's findings of fact are supported by substantial evidence. However, where there is evidence to support the board's findings of fact and where the cause for dismissal found by the board can reasonably be said to relate to the "welfare of the schools and the pupils thereof," the reviewing court may not consider whether the facts found are sufficiently serious to justify dismissal.

[Certain findings of the board as to petitioner's conduct are] clearly a matter which relates to the welfare of the school and its pupils, and, as we have seen, where the cause for dismissal can reasonably be said to relate to the welfare of the school and its pupils, it is solely for the board to determine whether dismissal is warranted. Accordingly, the trial court could not properly substitute its own judgment for that of the board on the question of the sufficiency of the cause for Mrs. Griggs' dismissal.

This decision would clearly seem to support the analysis set forth above.

In addition to extending to the probationary teacher the substantive right to cause for dismissal by failure to rehire, post-1961 section 13444 also prescribes procedural safeguards for the ascertainment of cause. Doubtless having in mind the procedural problems raised by section 13444 in Keenan, when the section applied only to probationary teachers in the larger school districts, and before the 1953 amendments providing for hearing pursuant to the terms of the Administrative Procedure Act, the legislature provided in terms that

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104 Thus the legislature recognizes in terms the dictum in Keenan, 34 Cal. 2d 708, 714, 214 P.2d 382, 385 (1950).
106 34 Cal. 2d 708, 214 P.2d 382 (1950).
107 See notes 83 and 102 supra.
no teacher should be denied the right to a hearing to determine cause for his dismissal, and further, if he requested a hearing, that it should be conducted in accordance with the Administrative Procedure Act, with the local board having the power given by the Act to an agency. There is no requirement that the hearing itself be conducted prior to May 15; it must, however, be held within a reasonable time after demand therefor.\textsuperscript{108}

At this point section 13444 continues to maintain one distinction between the very large school districts and all others: in districts having an ADA of less than 85,000 the governing board may conduct the hearing without its being presided over by a hearing officer as is otherwise provided by the Act. Note the use of the permissive word “may”; the governing board of a district of less than 85,000 ADA is not required to conduct the hearing with a hearing officer, but it may do so.\textsuperscript{108a}

Before leaving the discussion of the specific provisions of the recent amendments, two additions to the Education Code should be noted. Besides the 1961 amendments to sections 13443 and 13444, section 13443.5 was added, also in 1961.\textsuperscript{109} Briefly, this section provides for the forwarding by a local governing board which has dismissed a teacher by failure to rehire of a copy of the statement of cause or reasons for dismissal to the State Department of Education for descriptive and statistical analysis purposes; this analysis then forms the basis for an annual report to the legislature as to causes or reasons for dismissal. The new section is of particular interest here because it clearly distinguishes between dismissal pursuant to section 13442\textsuperscript{110} (dismissal during the school year) on the one hand, and failure to rehire pursuant to section 13443 on the other, thus indicating a legislative conviction that these are two distinctive types of dismissals. Moreover, apparently for the purpose of emphasizing that dismissal of probationary teachers during the school year should be for the causes, and by means

\textsuperscript{108} Horner v. Board of Trustees, 61 A.C. ——, 37 Cal. Rptr. 185, —— P.2d —— (March 1964); Sitzman v. City Board of Educ., 61 A.C. ——, 37 Cal. Rptr. 191, —— P.2d —— (March 1964). The notice itself, pursuant to § 13443, is the dismissal; when such notice is given prior to May 15, the teacher is dismissed “subject to the condition subsequent” of the dismissal being reversed at the hearing and the teacher being reinstated. Thus, the fact that the hearing is not held prior to May 15 does not mean that the teacher has been re-elected for another year, if the court affirms the dismissal. Horner, supra.

\textsuperscript{108a} In 1961-62 there were three districts in the state with an ADA in excess of 85,000: Los Angeles, San Diego, and San Francisco. Letter from Mr. Garford C. Gordon, supra note 15a. Mr. Gordon adds that it is his understanding that Long Beach is now also in this category.


\textsuperscript{110} See CAL. EDUC. CODE § 13442 (quoted in note 34 supra).
of the procedure, prescribed by the Education Code section relating to dismissal of permanent teachers, and not pursuant to sections 13443 and 13444, the legislature added in 1963 section 13444.5,111 which recites that "The provisions of Sections 13443 and 13444 shall not be construed as in any way modifying or affecting the provisions of Section 13442."

A further fact that should be noted is that the amendments are applicable to teachers who were employed in the system at their effective date and not merely to those teachers hired thereafter.112

Summary of the Current Probationary Teacher Dismissal Situation

The net result of the recent amendments has been to extend to the probationary teacher the right of notice, cause, and a hearing, if requested, when a local governing board decides not to rehire him for the next school year. The only distinction that now exists between dismissal by failure to rehire in districts of 85,000 or more ADA and all other districts is that the larger districts must employ a hearing officer from the Office of Administrative Procedure of the Department of General Services to conduct the hearing; other districts are not required to but may employ a hearing officer. Meanwhile, school year dismissal of a probationary teacher must continue to be that prescribed for permanent teachers, as to both cause and procedure.

Caveats and Suggestions for Teachers and Local Governing Boards

Many school districts throughout the state found themselves in a dilemma in 1962 at the time they determined not to rehire certain probationary teachers. Pursuant to advice of counsel, they notified the teachers of their intention not to rehire. Many of the teachers demanded to know why, as is now their right under section 13443. Some requested a hearing under section 13444. At this point, superintendents consulted counsel, who from sketchy and sometimes completely inadequate information prepared accusations, as is required under the Administrative Procedure Act.113 Since it was not necessary before the amendments, school administrators had never documented the reasons for their belief that the probationary teacher should not be rehired. It should be noted, also, that school administrators used teacher evaluation forms (which are very general) primarily for improving the particular teacher and not for recording and documenting his faults and failures. As a result, the accusations were almost universally deficient

as proper pleadings under Government Code section 11503. Most were conclusionary. Some typical allegations were these: (1) teacher has failed to provide pupils with courses of study required by law; (2) teacher lacks the necessary potential to be a classroom teacher; (3) teacher shows lack of proper organization of work; (4) teacher was insubordinate. Without more, such allegations are clearly insufficient in law. "The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense." Clearly the quoted examples are too uncertain and indefinite for the teacher to be able to identify any particular transaction as cause for the administration's failure to rehire him, and consequently they are not charges to which the teacher could prepare an adequate defense.

Surprisingly, attorneys representing teachers have failed to make pre-hearing objections to the form of the accusation under sections 11506(2) and (3) of the Government Code\textsuperscript{115} with the result that hearing officers have found it difficult to rule on objections during the hearing and to keep irrelevant and immaterial evidence out of the record. This has unduly obscured the material issues and prolonged some hearings. Attorneys representing teachers would be well advised to raise the appropriate objections to such pleadings, not only to better prepare themselves for the hearing, but also to eliminate nebulous parts of the allegations.

Under the Administrative Procedure Act\textsuperscript{116} the governing board may hear the case with a hearing officer presiding, ruling on the admission of evidence and advising the board on matters of law. Alternatively, the board may assign the matter to the hearing officer sitting alone. When the hearing officer sits with the board, he will attend the executive session with the board following the hearing, at the time it makes its decision. The hearing officer will not advise the board as to how it should decide the case, but he will inform it of the applicable law. His responsibility is to prevent the board from committing re-

\textsuperscript{114} Ibid.

\textsuperscript{115} CAL. Gov. Code § 11506:

(a) Within 15 days after service upon him of the accusation the respondent may file with the agency a notice of defense in which he may:

(1) Request a hearing;
(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed;
(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he cannot identify the transaction or prepare his defense ....

\textsuperscript{116} CAL. Gov. Code § 11512 is the specific section governing the conduct of hearing.
versible error. He will prepare the written decision in accordance with the board's findings of fact and determination of the issues. When the hearing officer sits alone, he prepares a written proposed decision. The board may adopt or refuse to adopt the proposed decision of the hearing officer. In the latter event it can decide the case itself upon the record, including the transcript, after affording the teacher an opportunity to present oral or written argument.\textsuperscript{117}

Although districts of less than 85,000 ADA are not required to use a hearing officer, they are strongly urged to do so. The technical knowledge and experience to conduct such hearings, requiring special training and experience, are generally not found in members of local governing boards. Failure to employ a hearing officer exposes the board to the risk of unduly lengthy hearings, probable reversible error, and possible injustice.

Governing board members or their counsel should first consult with the Office of Administrative Procedure when faced with any procedural problems under these sections. Upon sufficient notice hearing officers can be furnished to a district upon request. Requests for consultation and for hearing officers should be directed to the nearest regional office of the Office of Administrative Procedure; there are regional offices in Sacramento, San Francisco, and Los Angeles. Hearing officers are well-trained and experienced lawyers who conduct hearings for more than fifty-five state licensing agencies, including the State Board of Education and the State Personnel Board.

Hearings conducted by hearing officers are formal in nature. They are not of the “let’s-sit-down-around-the-table-and-talk-this-over” variety. There are several reasons for this. Presumably the parties have exhausted all possibilities of resolving the controversy through informal methods. A teacher whose future in education may be at stake is entitled to a formal, serious, legal proceeding. Moreover informality leads inevitably to a bad record which may well be the cause for reversal of the board’s decision by the superior court on a writ of mandate. The teacher should have counsel and both the teacher’s and the board’s counsel should prepare themselves for exactly the same type of trial they would expect in the courts. Also they should carefully read and be thoroughly versed on the Administrative Procedure Act,\textsuperscript{118} especially section 11513(c), dealing with evidence.\textsuperscript{119}

\textsuperscript{117} \textit{CAL.} \textit{Gov. Code} § 11517.
\textsuperscript{119} See \textit{Note, Hearsay Under the Administrative Procedure Act, 15 Hastings L.J.} —— (1964) (this issue).
What are the issues to be tried at the hearing? It has been suggested that the only issue to be tried is the question of whether the reasons stated for the dismissal relate solely to the welfare of the school and the pupils thereof. But if this were correct, it would seem that no evidence in support of factual allegations in the accusation need be introduced at the hearing. However, as we have seen, the words of Education Code section 13444 stating that “the determination of the Board as to the sufficiency of the cause for dismissal shall be conclusive,” and that “the determination of the board as to the sufficiency of the cause for dismissal shall not be subject to judicial review,” simply mean that the court will not substitute its judgment for the board’s discretion in determining sufficiency of the cause, so long as it relates solely to the welfare of the schools and the pupils thereof. Moreover, as was also pointed out above, it is within the traditional power of a court hearing a petition for writ of mandate to reverse a decision of an administrative agency if there is not substantial evidence to support the agency’s findings. It is submitted that there is nothing in the dismissal statutes to suggest a legislative intent to curtail this traditional power. Clearly then, substantial evidence must be introduced as to the factual issues raised by the accusation.

Whether such a hearing benefits a teacher is questionable. He may, in fact, seriously damage his opportunity to obtain employment in another district. By the time the board has made a determination not to rehire a teacher, it has presumably discussed the matter at some length with the teacher’s immediate supervisor and the superintendent; and, presumably, the board would not proceed with the dismissal action unless the administration and the board members believed that good cause existed and could be proved. Thus the chances of a hearing resulting in a finding in favor of the teacher are infinitesimal. Having made up their minds in executive session in the absence of the teacher, the board members could hardly be expected to reverse themselves in the formal proceeding under the Administrative Procedure Act. No case has been brought to the writer’s attention where a board has reversed itself and retained the teacher. The result of the hearing is a formal written decision spelling out the teacher’s deficiencies. This is a public record which will follow the teacher wherever he may apply for a new position. Yet, in fact, the teacher might well be able to do an effective teaching job in another school district.

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121 See note 102 supra, and accompanying text.