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DISMISSAL OF PERMANENT TEACHER FOR PUBLIC CRITICISM OF THE SCHOOL SYSTEM

Whether a permanent teacher can be dismissed by a local school board for publicly criticizing the school system was the question in a recent California case,¹ which engendered statewide debate of a highly emotional character.² The purpose of this note is to investigate the permanent teacher's right to engage in such criticism without losing his position by dismissal, by examining two important cases. Since teachers no longer serve at the will of the school board,³ a brief examination of the teachers' tenure system is advisable.

Teachers' tenure statutes, by which teachers are granted certain protections from dismissal without cause, have been enacted in most states.⁴ These acts generally provide for the orderly dismissal of those teachers who are professionally incompetent or whose conduct is detrimental to the best interests of the schools and pupils served.⁵ One obvious purpose of such acts is to protect from dismissal for unjust and arbitrary reasons those teachers who have completed their probationary period.⁶ In 1881 California became one of the first states to provide statutory protection by amending section 1793 of the Political Code to forbid removal of a teacher elected to her position by the school board except for specified causes.⁷

Teachers' tenure in California, as provided for in the Education Code, can be traced to the Teachers' Tenure Act⁸ of 1921. Under this act as it appears today, a permanent teacher can be dismissed only for one of the causes specified in section 13403 of the Education Code.⁹ In California it

¹ Board of Trustees v. Owens, 206 Cal. App. 2d 147, 23 Cal. Rptr. 710 (1962).

² San Francisco Chronicle, July 27, 1962, p. 17, col. 1.

³ 47 AM. JUR. SCHOOLS § 125 (1943).

⁴ See Annots., 127 A.L.R. 1298 (1940), 113 A.L.R. 1495 (1938), 110 A.L.R. 791 (1937), for construction and validity of teachers' tenure statutes generally. See also Annot., 147 A.L.R. 293 (1943), for discussion of the effect of repeal or modification of teachers' tenure statutes.

⁵ Cf. CAL. EDUC. CODE § 13403, note 9 *infra*.

⁶ Fresno City High School Dist. v. DeCaristo, 33 Cal. App. 2d 666, 674, 92 P.2d 668, 672 (1939). Under CAL. EDUC. CODE § 13320, the probationary period in California is three complete consecutive school years.

⁷ Cal. Stat. 1881, ch. XLV § 1793, p. 46-47. See Kennedy v. Board of Educ., 82 Cal. 483, 22 Pac. 1042 (1890) (leading case interpreting this statute).

⁸ Cal. Stat. 1921, ch. 878, p. 1663. See Comment, 24 CALIF. L. REV. 441 (1936), for discussion of teachers' tenure in California.

⁹ CAL. EDUC. CODE § 13403: "No permanent employee shall be dismissed except for one or more of the following causes: (a) Immoral or unprofessional conduct. (b) Commission, aiding, or advocating the commission of acts of criminal syndicalism (c) Dishonesty. (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 reasonable regulations prescribed for the government of the public schools by State Board of Education or by the governing board of the school board of the school district employing him. (h) Conviction of a felony or of any crime involving moral turpitude. (i) Violation of section 8455 [advocating or teaching of communism] of this code or conduct specified in section 1028 [advocating overthrow of the government] of the Government Code (j)

has been held that public criticism of the school system as well as other objectionable conduct is not cause for dismissal unless it falls within one of the grounds enumerated in section 13403.¹⁰

A recent case applying this section was *Board of Trustees v. Owens*,¹¹ which for the first time dealt squarely with dismissal of a teacher for public criticism of the school system. The district court of appeal reversed a superior court finding that Owens' public criticism of school administrators was unprofessional conduct, a ground for dismissal under section 13403. Owens, a tenure teacher, had written a number of letters to the local newspaper in which he proposed public debates on the local educational system. In five of these letters,¹² Owens was highly critical of school administrators and of the manner in which they were running the schools.

Charges of unprofessional conduct, evident unfitness for service, and dishonesty under section 13403 were brought by the board of trustees of the local school district on the basis of the five letters.¹³ The superior court considered only the unprofessional conduct charge in arriving at the conclusion that Owens' criticism was "unwarranted," "unfounded," and "unsupported by the evidence";¹⁴ this was held to be sufficient grounds to dismiss for unprofessional conduct. The district court of appeal reversed, holding that the superior court had misdirected its inquiry. Instead of attempting to establish that Owens' statements were "unwarranted," "unfounded," and "unsupported by the evidence," the board of trustees should have directed its inquiry to whether there "had been any disruption or impairment of discipline or the teaching process as a result of defendant's letters."¹⁵ The district court concluded that the facts in the record would not support a finding of these elements, which were held to be necessary for dismissal under unprofessional conduct. The court implied that a contrary result might have been reached if the school board had attempted to convince the trier of fact that Owens' conduct resulted in a disruption or impairment, rather than pressing its mistaken effort to vindicate itself by arguing that the schools had been functioning properly.¹⁶

In developing this disruption or impairment test,¹⁷ the court in *Owens*

Violation of any provision in section 12952 to 12958, inclusive, of this code. [Subversive activity.] (k) Knowing membership by the employee in the Communist Party."

¹⁰ *Board of Trustees v. Owens*, 206 Cal. App. 2d 147, 23 Cal. Rptr. 710 (1962); see generally 44 CAL. JUR. 2d *Schools* §§ 507-08 (1958).

¹¹ 206 Cal. App. 2d 147, 23 Cal. Rptr. 710 (1962).

¹² *Id.* at 152-57, 23 Cal. Rptr. at 713-16. The five letters which formed the basis of the charges are printed in the footnotes to the opinion.

¹³ When a hearing is demanded by the teacher, CAL. EDUC. CODE § 13412 requires the school board to either file a complaint in the superior court to inquire into the charges or to rescind its action. See George, *Dismissal of Permanent Teachers*, 3 SANTA CLARA LAW. 164 (1963), for a brief discussion of the dismissal procedure.

¹⁴ 206 Cal. App. 2d at 149, 23 Cal. Rptr. at 711.

¹⁵ *Id.* at 157, 23 Cal. Rptr. at 717 (emphasis added).

¹⁶ *Id.* at 157-58, 23 Cal. Rptr. at 717-18.

¹⁷ See *Goldsmith v. Board of Educ.*, 66 Cal. App. 157, 225 Pac. 783 (1924), where the district court of appeal held that a school board could dismiss for unprofessional conduct a teacher who advocated to her class a particular candidate for a school district

relied on *Board of Educ. v. Swan*¹⁸ where the California Supreme Court affirmed a lower court judgment sustaining a teacher's dismissal for persistent violation of school rules, evident unfitness for service, and unprofessional conduct. Although Swan had been extremely critical of the school administration in public, there were sufficient grounds for dismissal aside from public criticism. The value of *Swan* to the present discussion is found in two contentions made by Swan as part of her defense.

Swan's first contention was that her dismissal was motivated by personal bitterness engendered by her public attack on the school board. The court replied that motive was irrelevant if the school board had a legal right to dismiss under one or the grounds in section 13403.¹⁹ By violating numerous school rules, Swan had subjected herself to dismissal under that section regardless of improper motive of the school board. Thus even where public criticism is not sufficient for dismissal, it may act as a motivation to punish for misconduct that might otherwise be ignored or treated leniently.

Swan's second contention was that her dismissal infringed upon her constitutional guarantee of freedom of speech,²⁰ including the right to criticize her superiors without pain of losing her position. In answering this contention, the court stated that one in public service is "subject to reasonable supervision and restriction . . . to the end that proper discipline *may be maintained*, and that activities among the employees *may not be allowed* to disrupt or impair the public service."²¹ By this language the court seems to sanction dismissal by a school board of an unruly teacher prior to occurrence of anticipated disruption or impairment. Indeed, any other interpretation would be patently unreasonable; a school board cannot carry out its duty to maintain the proper functioning of the school system if it cannot act to prevent threatened harm before it occurs.

The application in *Owens* of the disruption or impairment test of *Swan* is remarkable in two respects. First, the test was there employed to define "unprofessional conduct," rather than to define the limit beyond which criticism loses the protection of the constitutional guarantee of freedom of speech. Second, the inference from *Owens* is that a school board cannot dismiss a teacher to prevent anticipated harm, but must refrain from acting until disruption or impairment in the schools has occurred.²² Stripped to its essentials, the holding was that *Owens'* public criticism did not constitute

office. The court reasoned that such conduct would lead to a disruption of the school process since it tended to stir up strife among the students.

¹⁸ 41 Cal. 2d 546, 261 P.2d 261 (1953), *cert. denied*, 347 U.S. 937.

¹⁹ *Accord*, *Neuwald v. Brock*, 12 Cal. 2d 662, 675-76, 86 P.2d 1047, 1053 (1939); *Kennedy v. State Personnel Board*, 6 Cal. 2d 340, 344, 57 P.2d 486, 488 (1936); *Monahan v. Department of Water and Power*, 48 Cal. App. 2d 746, 754, 120 P.2d 730, 734 (1941).

²⁰ U.S. CONST. amends. I, XIV, § 1; CAL. CONST. art. I, § 9.

²¹ 41 Cal. 2d at 556, 261 P.2d at 268 (emphasis added). See also *Pranger v. Break*, 186 Cal. App. 2d 551, 556, 9 Cal. Rptr. 293, 297 (1960); *City of Los Angeles v. Los Angeles Bldg. & Const. Trades Council*, 94 Cal. App. 2d 36, 48-49, 210 P.2d 305, 312-13 (1949); *Christal v. Police Commission*, 33 Cal. App. 2d 564, 569, 92 P.2d 416, 419-20 (1939).

²² See *Goldsmith v. Board of Educ.*, 66 Cal. App. 157, 225 Pac. 783 (1924); *Adams v. State ex rel. Sutton*, 69 So. 2d 309 (Fla. Sup. Ct. 1954).

unprofessional conduct because there had been no disruption or impairment of the school system. The misapplication of the *Swan* test does not, however, lead necessarily to the conclusion that the school board was justified in dismissing Owens; it does lead to the conclusion that the courts are in need of guidance in handling the problems that arise in this sensitive area.²³

The significance of *Owens* does not lie in the abortive application of the "disruption or impairment" test, but in the fact that the teacher was allowed to obtain protection in the courts against dismissal for public criticism of the school system.²⁴ It is highly desirable that the public have the benefit of the views of its teachers in the vital area of education. Because of their first-hand knowledge of school practices, teachers are in a far better position than other members of society to offer responsible criticism of school administration. Were teachers unable to obtain the protection of the courts against retaliatory dismissal by those criticized, the public would be deprived of the benefit of their invaluable views.

*James D. Mart**

²³ As a result of the *Owens* decision a bill was introduced in the California legislature in 1963, which proposed that "unprofessional conduct" as a ground for dismissal be deleted from 13403 of the Education Code. The bill was referred to the Assembly Education Subcommittee on Personnel which is currently investigating the problem, but has not as yet submitted its report. Assembly Bill 1235, FINAL CALENDER OF LEGISLATIVE BUSINESS 429 (1963). One reason for this proposed legislation is that unprofessional conduct offers no clear standard on which teachers may base future action. San Francisco Chronicle, Nov. 13, 1963, p. 42, col. 1. It is doubtful that the proposed legislation would be a solution. Since section 13403 was enacted, there have been nine changes in its provisions by amendment. See WEST'S ANNOT. CAL. EDUC. CODE § 13403 and accompanying historical note. The proposed legislation would seem to be another piecemeal attempt to afford a temporary remedy. Such piecemeal legislation more often leads to confusion rather than clarification.

²⁴ Aside from the cases, unofficial support for the proposition that teachers are privileged to publicly criticize the school system can be found in the National Code of Ethics drafted by the National Education Association, and recently adopted by the California Teachers Association. The Code states, with respect to commitment to the profession: "In filling our obligations to the profession, we . . . Maintain our integrity when dissenting by basing our public criticism of education on valid assumptions as established by careful evaluation of facts or hypotheses." CTA Action, Dec. 13, 1963, p. 6 col. 3.

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