

## Chapter 18

# The Scope of the Teacher Tenure Act

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## Chapter 18

# The Scope of the Teacher Tenure Act

The most important control imposed by law on employment in North Carolina's public schools is the Teacher Tenure Act. Employees who benefit from its protections may be dismissed only for one of fifteen grounds set out in the statute and only through the procedures set out in the statute. This chapter introduces the basic notions of tenure, identifies the employees who are protected by tenure, and explains how tenure is attained and lost. Chapter 19 details the fifteen grounds for dismissing a tenured employee. Chapter 20 outlines the procedure for dismissal. And chapter 21 discusses suspensions under the Teacher Tenure Act.

### Section 1800 Basic Notions of Tenure

This section looks briefly at several basic notions under the Teacher Tenure Act.

#### Use of the Term "Teacher Tenure Act"

Throughout this book the provisions in Chapter 115C of the North Carolina General Statutes (hereinafter G.S.) governing the employment of teachers<sup>1</sup> are collectively called the "Teacher Tenure Act," but that is a title that reflects common usage and is not an official statutory title. When the original act was passed in 1971, its title referred to it as an "Orderly System of Employment and Dismissal of Public School Personnel."<sup>2</sup> The title of a 1973 act amending the

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1. Found at Chapter 115C, Section 325, of the North Carolina General Statutes (hereinafter G.S.).

2. 1971 N.C. Sess. Laws ch. 883.

tenure law referred to the law as the “Teacher Fair Employment and Dismissal Act.”<sup>3</sup> A second 1973 act referred in its title to the “Teacher Employment and Dismissal Act.”<sup>4</sup> An act in 1983 again referenced the “Teacher Fair Employment and Dismissal Act.”<sup>5</sup> Only in 1991 did the word “tenure” creep into the title of an act, where the law was referred to as the “Public School Tenure Law,”<sup>6</sup> a reference repeated in substance in a 1993 act.<sup>7</sup>

In fact, never has the General Assembly assigned a short title to what is generally called the Teacher Tenure Act. In G.S. Chapter 115C, the section containing the act is labeled “System of Employment for Public School Teachers.”

### Use of the Term “Tenure”

Throughout this book the term “tenure” is used to mean the set of protections that teachers and some other public school employees enjoy under the Teacher Tenure Act. It is the term that is most commonly used throughout the public school system. It distinguishes those employees from term contract employees such as assistant superintendents and at-will employees such as teacher assistants. In fact, the term “tenure” does not appear in the Teacher Tenure Act.<sup>8</sup> The term employed by the act is “career status.”<sup>9</sup> A teacher who has met the requirements for tenure is a “career teacher,”<sup>10</sup> defined to mean a teacher who has obtained career status. “Career status” is equivalent to tenure, and a “career teacher” is a tenured teacher.

The tenure held by most tenured school employees is teacher tenure. Before the passage of the Administrator Term Contract Law, it was possible for principals and supervisors to achieve tenure as administrators. Administrators who achieved administrative tenure by June 30, 1997,<sup>11</sup> retain their administrative tenure. After that date, only teacher tenure is possible.

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3. 1973 N.C. Sess. Laws ch. 315.

4. 1973 N.C. Sess. Laws ch. 782.

5. 1983 N.C. Sess. Laws ch. 770.

6. 1991 N.C. Sess. Laws ch. 942.

7. 1993 N.C. Sess. Laws ch. 210.

8. A separate section of Chapter 115C—G.S. 115C-304—uses the term “tenure” in providing that “[t]enure for teachers shall be determined in accordance with the provisions of G.S. 115C-325.”

9. G.S. 115C-325(a)(1) and (c)(1).

10. G.S. 115C-325(a)(1).

11. For a full discussion, see section 1702 of this book.

### Use of the Term “Teacher”

The Teacher Tenure Act makes the possibility of tenure available only to “teachers” as the act defines that term. While the individuals who enjoy that possibility are, mostly, classroom teachers, there are many others to whom it applies. For example, the statute itself explicitly extends the protections of the act to supervisors or principals (though the Administrator Term Contract Law has changed that for supervisors and principals after 1997). Figuring out just which employees are in fact covered is a matter of applying the statutory definition of “teacher” to the individual employee involved. By that process, which is discussed in section 1801 of this book, school guidance counselors and media specialists, for example, are “teachers” covered by the act, even if they never in fact act as classroom teachers.

For ease of discussion, this chapter and the three succeeding chapters will use the term “teacher” to denote an individual who is covered by the act.

### What Tenure Is

The essence of tenure is protection from loss of salary. Here is the statutory statement of the tenure protection, quoted from the act: no tenured teacher may “be dismissed or demoted or employed on a part-time basis” except for one or more of the fifteen stated grounds and except by the procedures set out in the act.<sup>12</sup> Each of these—dismissal, demotion, and reduction to half time—is, in essence, a loss of salary. That is, in fact, the way “demote” is defined in the act: “to reduce the salary of a teacher.”<sup>13</sup> A teacher who is reduced to part-time employment of course loses income. And dismissal is the ultimate loss of income.

So long as a teacher does not suffer a reduction in pay, there can be no violation of the Teacher Tenure Act. Transfer from a desirable teaching assignment at a preferred school to a less desirable assignment at another school, for example, cannot constitute a violation of the act, unless there is a reduction in pay. Similarly, a reassignment from teaching one particular set of subjects to teaching another set, not involving a reduction in pay, is not enough to trigger the protections of the act. A school system might assign a tenured high school principal to teach history in a middle school without violating the act, so long as it maintains the principal’s salary at the level it had been.

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12. G.S. 115C-325(e)(1).

13. G.S. 115C-325(a)(4).

## Due Process Protection

As discussed in section 202, the Fourteenth Amendment to the U.S. Constitution provides that government may not deprive citizens of property without due process of law. A tenured teacher's job (most precisely, the salary that goes with the job) is his or her property. For the board of education to dismiss or demote a tenured teacher is the government taking that teacher's property. That can be done only through due process. The elaborate procedures described in chapter 20 more than adequately provide due process.

## Section 1801 Who Is Covered by the Teacher Tenure Act

As discussed earlier in this chapter, the tenure protections of the Teacher Tenure Act apply only to "teachers" as the act defines that term. To understand who is covered by the act, then, it is necessary to understand how the act defines teacher.

### The Elements of the Definition of "Teacher"

The definition of "teacher" found in the Teacher Tenure Act states the following:

"Teacher" means a person who holds at least a current, not provisional or expired, Class A certificate or a regular, not provisional or expired, vocational certificate issued by the Department of Public Instruction; whose major responsibility is to teach or directly supervise teaching or who is classified by the State Board of Education or is paid as a classroom teacher; and who is employed to fill a full-time, permanent position.<sup>14</sup>

This definition contains three elements: certification, responsibility, and nature of the position. To be eligible for tenure, the person must meet all three elements.

**Certification.** First, to be eligible for tenure, a public school employee must hold an unexpired class A certificate or regular vocational certificate. See chapter 8 of this book for a discussion of certification and sections 804 and 809 for discussions of the relationship between certification and tenure. Whether

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14. G.S. 115C-325(a)(6).

an individual meets the certification requirement is generally fairly clear. It is not often a matter of contention or disagreement.

The statute uses the term “certificate,” but, as discussed in chapter 8, the term used more frequently in the Administrative Code and *State Board of Education Policy Manual* is “license.” The two terms are equivalent and are used interchangeably.

**Responsibility.** Second, to be eligible for tenure a public school employee must meet one of the following requirements:

- have as a major responsibility teaching,
- have as a major responsibility the direct supervision of teaching,
- be classified by the State Board of Education as a classroom teacher, or
- be paid as a classroom teacher.

Whether an individual meets one of these four criteria is sometimes not clear at all and may be a matter of contention or disagreement. The determination is to be made by the local board of education. If the determination is that the person involved does not meet one of the criteria, the person adversely affected may seek review of that determination in the courts.

The first of the four requirements is having teaching as a major responsibility. Nowhere in G.S. Chapter 115C or in the regulations of the State Board of Education is “teaching” defined. In nearly all instances, however, it will be clear whether a person has as a major responsibility “teaching.”

The second of the four is having as a major responsibility the direct supervision of teaching. As with teaching itself, nothing in the Teacher Tenure Act or in State Board of Education regulations gives guidance as to what “direct supervision” of teaching is. The North Carolina Court of Appeals, in a 1986 case arising from the Buncombe County public schools, held that a principal does have the direct supervision of teaching as a major responsibility.<sup>15</sup> That case is not very helpful in determining what positions meet the “direct supervision” standard for two reasons. One, it was already clear under the law of that time that principals and supervisors met the requirement because the Teacher Tenure Act itself specifically contained tenure provisions for them. And second, with the passage of the new Administrator Term Contract Law,<sup>16</sup> new principals and supervisors are no longer eligible for tenure, even if they do directly supervise teaching. No principal, assistant principal, supervisor, or director employed by contract under the Administrator Term Contract Law is eligible for tenure as an

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15. *Warren v. Buncombe County Bd. of Educ.*, 80 N.C. App. 656, 343 S.E.2d 225 (1986).

16. G.S. 115C-287.1.

administrator or to gain tenure as a teacher.<sup>17</sup> Similarly, superintendents, associate superintendents, and assistant superintendents are not eligible for tenure in their administrative positions or to gain tenure as teachers, even if their work involves the direct supervision of teaching.

The third of the four ways is to be classified by the State Board of Education as a classroom teacher. The State Board of Education has never issued any kind of listing of such classifications.

And the fourth way is to be paid as a classroom teacher. Any position that fits onto the salary schedule for teachers presumably satisfies this requirement. Those positions, in addition to classroom and vocational teachers, include school social workers and school counselors.

**Nature of the position.** As a final element in eligibility for tenure, a public school employee must be employed to fill a full-time, permanent position. Interim or temporary teachers do not qualify.<sup>18</sup>

### Applying the Elements to Particular Positions

Given the definition of “teacher,” which particular positions in the public schools fit the definition and thus make their holders eligible for tenure, and which do not?

**Classroom teachers.** Yes, these employees are eligible for tenure. They must hold at least A certificates. Their major responsibility is to teach, and they are in permanent, full-time positions. These are, of course, the people most obviously eligible for tenure.

**School social workers.** Yes, these employees are eligible for tenure. They must hold at least A certificates. They are paid on the teacher salary schedule, and they are in permanent, full-time positions.<sup>19</sup>

**Guidance counselors.** Yes, these employees are eligible for tenure. They must hold at least A certificates.<sup>20</sup> They are paid on the teacher salary schedule, and they are in permanent, full-time positions.<sup>21</sup>

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17. Attorney general opinion letter from Thomas J. Ziko to Wendell Murray, superintendent of Pender County schools (June 20, 1996).

18. In *Campbell v. Board of Educ. of Catawba County*, 76 N.C. App. 495, 497–98, 333 S.E.2d 507, 509 (1985), *cert. denied*, 315 N.C. 390, 338 S.E.2d 878 (1986), the court noted that while G.S. 115C-325 “does not define the status of interim or other temporary teachers, . . . it is, however, a matter of common knowledge that such personnel are employed routinely by local school boards.” Noting that G.S. 115C-295 authorizes employment of “temporary personnel,” the court concluded that the General Assembly did not intend to include interim or temporary teachers within the definition of “teacher.”

19. See attorney general opinion letter from Andrew A. Vanore, Jr., to George T. Register, Jr., attorney for the Wake County Board of Education (Feb. 8, 1980).

20. In fact, they must hold the higher G certificate.

21. See attorney general opinion letter from Andrew A. Vanore, Jr., to George T. Register, Jr., attorney for the Wake County Board of Education (Feb. 8, 1980).

**Speech-language pathologists and audiologists.** Yes, these employees are eligible for tenure. They must hold at least A certificates.<sup>22</sup> They are in permanent, full-time positions,<sup>23</sup> and the salary schedule upon which they are paid is a derivative of the state salary schedule.<sup>24</sup>

**Vocational education teachers.** Yes, these employees are eligible for tenure. They must hold at least a vocational certificate. Their major responsibility is to teach, and they are in permanent, full-time positions.

**School psychologists.** Yes, these employees are eligible for tenure. They meet the first and third elements of the definition of teacher—that is, they must hold at least A certificates<sup>25</sup> and they are employed in permanent, full-time positions. While they do not teach or directly supervise teaching and they are not classified as teachers, they are paid on a school psychologist salary schedule that is a derivative of the state salary schedule.<sup>26</sup>

**School nurses.** No, these employees are not eligible for tenure. They do not meet the first or second elements. First, nurse certification is not the responsibility of the Department of Public Instruction but of the American Nurses' Association or the National Association of School Nurses. And second, nurses do not teach or directly supervise teaching, they are not classified as teachers, and they are not paid as teachers, but are paid on separate salary schedules depending on their certification.<sup>27</sup>

**Teacher assistants.** No. Teacher assistants are not required to hold an A certificate. For that reason, these employees are not eligible for tenure as teacher assistants.

**Principals.** Yes and no. Some principals are tenured as administrators and some are not. Until the 1995 Administrator Term Contract Law took effect, principals were eligible to achieve tenure in their principal positions. With the passage of that 1995 act, those principals who had already attained administrator tenure—by June 30, 1995—kept it; those who could attain it by June 30, 1997, remained eligible for it. Since June 30, 1997 no principal has ever again been eligible for tenure; since then all new principals have been employed on term contracts under the Administrator Term Contract Law. (See section 1701.) A principal with administrator tenure may be assigned teacher duties; he or she simply is entitled to at least the salary received as a principal. A principal

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22. In fact, they must hold the higher G certificate.

23. See attorney general opinion letter from Andrew A. Vanore, Jr., to George T. Register, Jr., attorney for the Wake County Board of Education (Feb. 8, 1980).

24. See attorney general opinion letter from Edwin M. Speas, Jr., to Jim Deni, vice chair of the Watauga County Board of Education (Aug. 21, 1997).

25. In fact, they must hold the higher G certificate.

26. See attorney general opinion letter from Edwin M. Speas, Jr., to Jim Deni, vice chair of the Watauga County Board of Education (Aug. 21, 1997).

27. State Board of Education, Department of Public Instruction, *North Carolina Public School Personnel State Salary Schedule* (July 1, 1995), 58.

employed under a term contract retains tenure as a teacher at the end of the term contract if he or she had teacher tenure in the same school system before entering the term contract.

**Supervisors.** Yes and no. The situation for some supervisors is just like the situation for principals described in the discussion immediately above, but for others it is entirely different. That is because there are three different types of supervisors for purposes of applying the Teacher Tenure Act and the Administrator Term Contract Law.

First, there are those who directly supervise teaching, within the meaning of the Teacher Tenure Act. Their situation is just like that of principals described in the discussion above. Some are eligible for tenure and some are not: those who had already acquired tenure before the effective date of the Administrator Term Contract Law, or who got it by June 30, 1997, keep it. All others of these supervisors must be employed by term contracts and will never be eligible for tenure.

Second, there are supervisors who do not directly supervise teaching but whose major function includes the “indirect supervision of teaching or of any other part of the instructional program”<sup>28</sup> within the meaning of the Administrator Term Contract Law. These supervisors were, before the passage of the Administrator Term Contract Law, at-will employees, not protected at all by the Teacher Tenure Act. Now they are entitled to the protections of the Administrator Term Contract Law. If such a supervisor is not renewed at the end of the term contract, the supervisor retains teacher tenure if he or she earned that tenure in that same system before entering the term contract.

All other supervisors are at-will employees, protected by neither the Teacher Tenure Act nor the Administrator Term Contract Law. Among this group are employees with such titles as supervisor of food services or supervisor of transportation. These individuals are not eligible for teacher tenure. If they once had teacher tenure, they forfeited it upon entering an at-will position.

**Directors.** Yes and no. For purposes of applying the Teacher Tenure Act and the Administrator Term Contract Law, there are three different types of directors.

First, there are directors who were granted administrative tenure by their school systems under the Teacher Tenure Act by June 30, 1995, the effective date of the Administrator Term Contract Law. An amendment to the Teacher Tenure Act passed at the time of the adoption of the Administrator Term Contract Law specifically provides that those directors keep their administrative tenure status.<sup>29</sup>

Second, there are directors whose major function “includes the direct or in-

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28. G.S. 115C-287.1(a)(3).

29. G.S. 115C-325(a)(3).

direct supervision of teaching or of any other part of the instructional program," within the meaning of the Administrator Term Contract Law who did not acquire tenure by June 30, 1995. Those directors are to be employed on term contracts under that law. If such a director is not renewed at the end of the term contract, the director retains teacher tenure if he or she earned that tenure in that same system before entering the term contract.

And third, there are directors who are not protected by tenure and do not have responsibilities in the instructional program. These directors are at-will employees, protected by neither the Teacher Tenure Act nor the Administrator Term Contract Law. Among this group are employees with such titles as director of food services or director of transportation. These individuals are not eligible for teacher tenure. If they once had teacher tenure, they relinquished it upon entering an at-will position.

**Assistant principals.** No, mainly. For purposes of applying the Teacher Tenure Act and the Administrator Term Contract Law, there are two different types of assistant principals.

First, there are assistant principals who were granted administrative tenure by their school systems under the Teacher Tenure Act by June 30, 1995, the effective date of the Administrator Term Contract Law. An amendment to the Teacher Tenure Act passed at the time of the adoption of the Administrator Term Contract Law specifically provides that those assistant principals keep their administrative tenure status.<sup>30</sup> There are very few individuals in this category.

Second, there are all other assistant principals. They are to be employed by term contracts under the Administrator Term Contract Law. Under the old Teacher Tenure Act, time spent employed as an assistant principal counted toward accrual of tenure as a teacher because the status of assistant principal was seen as simply the status of teacher with extra duties for extra pay. It is clear now, with the passage of the Administrator Term Contract Law, that the status of assistant principal is not the status of teacher, but is an administrative status like principal, director, or supervisor. Therefore time spent under contract as an assistant principal does not count as time toward teacher tenure. If an assistant principal is not renewed at the end of the term contract, the assistant principal retains teacher tenure if he or she earned that tenure in that same system before entering the term contract.

**Superintendents and associate and assistant superintendents.** No. As discussed in chapter 16, these employees are employed under statutes completely separate from the Teacher Tenure Act or the Administrator Term Contract Law and are not eligible for tenure in any status. If they once had teacher

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30. G.S. 115C-325(a)(3).

tenure, they forfeited it upon becoming superintendent or associate or assistant superintendent.

**School finance officers.** No. The school finance officer occupies a unique position. By a special provision in G.S. Chapter 115C, the finance officer “is appointed or designated by the superintendent of schools and approved by the board of education, with the school finance officer serving at the pleasure of the superintendent.”<sup>31</sup> The school finance officer is not subject to the Teacher Tenure Act.

**Physical therapists.** No. Physical therapists are not required to hold an A certificate. They do not meet the first element of the definition of “teacher” and are therefore not subject to the Teacher Tenure Act.

**Bus drivers.** No. Bus drivers are not required to hold an A certificate. They do not meet the first element of the definition of “teacher” and are therefore not subject to the Teacher Tenure Act.

**School secretaries.** No. Secretaries and other office support personnel are not required to hold an A certificate. They do not meet the first element of the definition of “teacher” and are therefore not subject to the Teacher Tenure Act.

**Classified employees generally.** Many positions occupied by employees of local boards of education do not require certification. They are referred to generally as classified positions. Because they do not require certification they do not meet the first element of the definition of “teacher” and the employees holding the positions are not eligible for tenure. A provision in G.S. Chapter 115C directs the State Board of Education “to develop position evaluation descriptions covering those positions in local school administrative units for which certification by the State Board of Education is not normally a prerequisite.”<sup>32</sup> The State Board of Education has responded to that directive most recently with the *Class Specifications for Noncertified Public School Employees*.<sup>33</sup> Following is a list of classified positions covered by that publication, all of which are outside the scope of the Teacher Tenure Act.<sup>34</sup>

- brailist
- carpenter
- carpentry supervisor
- child nutrition assistant
- child nutrition manager

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31. G.S. 115C-435. The superintendent may dismiss the finance officer without the approval of the board of education. Attorney general opinion letter from Grayson G. Kelley to Grady L. Hunt (October 29, 1998).

32. G.S. 115C-12(15).

33. State Board of Education, Department of Public Instruction, *Class Specifications for Noncertified Public School Employees* (Apr. 1995).

34. This list does not include every position covered by the publication.

- child nutrition supervisor
- child nutrition director
- custodian
- custodian supervisor
- electrician
- electrician supervisor
- groundskeeper
- laborer
- locksmith
- maintenance director
- occupational therapist
- painter
- physical therapist
- transportation mechanic

## Section 1802 Probationary Teachers

A tenure track employee—that is, a teacher within the meaning of the Teacher Tenure Act—who has not yet acquired tenure is called a probationary teacher. A probationary teacher is on the way to tenure. As long as the probationary teacher stays employed in that status long enough—generally speaking, four years—he or she will gain tenure. The statutory definition is “a certificated person, other than a superintendent, associate superintendent, or assistant superintendent, who has not obtained career-teacher status and whose major responsibility is to teach or to supervise teaching.”<sup>35</sup>

By its literal terms, this definition sweeps in many principals, directors, supervisors, and assistant principals subject to the Administrator Term Contract Law and would seem to imply that individuals employed in those capacities under term contracts might simultaneously be probationary teachers on the way to tenure. However, as discussed in section 1803, the better reading of the Administrator Term Contract Law holds that an individual cannot be simultaneously employed under the Teacher Tenure Act (as a probationary teacher, say) and under the Administrator Term Contract Law.

### Dismissal during the Contract Year

The Teacher Tenure Act specifically provides that a probationary teacher may not be dismissed during the school year except on the same grounds and

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35. G.S. 115C-325(a)(5).

by the same procedure that applies to the dismissal of a tenured teacher.<sup>36</sup> Thus a probationary teacher who has just begun employment—who has worked, say, ten days—is entitled to all the protections of a tenured teacher during the school year. Those protections are the subjects of chapters 19, 20, and 21.

### **Nonrenewal at the End of the First, Second, and Third Years**

While the provisions for dismissing a probationary teacher during the contract year are the same as the provisions for dismissing a tenured teacher, the provisions for deciding not to renew a probationary teacher's contract at the end of the first, second, and third contract years are very different from any provision that relates to tenured teachers. It is in the very nature of *probationary* employment that the board of education may terminate the employment relationship by meeting a much lower standard than is required for dismissing a tenured teacher. The procedures are different at the end of the first, second, and third probationary years, when tenure is not about to attach, and at the end of the fourth year, when tenure does attach. The procedures to be followed at the end of the fourth year are discussed in section 1803.

### **Procedure for Nonrenewal after First, Second, and Third Years**

The procedure for the board of education's decision not to renew the contract of a probationary teacher begins with the recommendation of the superintendent. A provision of the Teacher Tenure Act states that the board may refuse to renew the contract "upon the recommendation of the superintendent."<sup>37</sup> That recommendation, the North Carolina Court of Appeals has said, is "only advisory," and "ultimate responsibility rests with the board."<sup>38</sup>

**No right to a hearing.** The courts have repeatedly held that neither the U.S. Constitution nor the Teacher Tenure Act require the board of education to allow the probationary teacher to have a hearing before the board on the question of nonrenewal.<sup>39</sup>

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36. G.S. 115C-325(m)(1). See the definition of "career employee," which includes probationary teachers during the contract year. G.S. 115C-325(a)(1a)c.

37. G.S. 115C-325(m)(2). For a full discussion of the meaning of "upon the recommendation of the superintendent" in many school employment contexts, see section 1200 of this book.

38. *Abell v. Nash County Bd. of Educ.*, 71 N.C. App. 48, 53, 321 S.E.2d 502, 506 (1984), *cert. denied*, 313 N.C. 506, 329 S.E.2d 389 (1985).

39. *See, e.g., Satterfield v. Edenton-Chowan Bd. of Educ.*, 530 F.2d 567 (4th Cir. 1975) ("Under the North Carolina tenure statute, a probationary teacher lacks any pre-nonrenewal procedural rights"); *Kryder v. Chapel Hill-Carrboro City Sch. Bd. of Educ.*, 120 N.C. App.

**Possible decisions by the board.** At this point there are four possible combinations of outcomes: (1) the superintendent recommends renewal and the board by vote upholds that recommendation, (2) the superintendent recommends nonrenewal but the board votes nonetheless to renew, (3) the superintendent recommends nonrenewal and the board by vote upholds that recommendation, or (4) the superintendent recommends renewal but the board votes not to renew.

*Decisions to renew.* In the first two possible combinations, the vote of the board is in favor of renewal of the probationary teacher. Under the law as it was in effect until 1998, such a vote at the end of the probationary teacher's third year caused tenure to attach. Now the procedures for votes that cause tenure to attach are different, as discussed in section 1803.

*Decision not to renew in accord with superintendent's recommendation.* In the third combination, the vote of the board is against renewal of the probationary teacher, and that ends the employment relationship between the board and the teacher at the end of the contract year. A provision of the Teacher Tenure Act provides that the board may make the nonrenewal decision "for any cause it deems sufficient," so long as it is not "arbitrary, capricious, discriminatory or for personal or political reasons."<sup>40</sup> At one time the courts seemed to say that if the superintendent recommended nonrenewal and the board voted for nonrenewal relying simply on the superintendent's recommendation, that procedure was enough for a lawful decision.<sup>41</sup> The courts have subsequently made clear, however, that for the board simply to rely on the superintendent's recommendation without understanding and acting on the basis underlying the superintendent's recommendation is not enough for a lawful decision.<sup>42</sup> That kind of action, the courts say, violates the requirement that the nonrenewal decision not be arbitrary or capricious. At a minimum, the board must ascertain from the superintendent the basis underlying his or her recommendation.

In cases arising from Nash County<sup>43</sup> and Chapel Hill-Carrboro city<sup>44</sup> school systems, the courts have made clear that the board need not "make exhaustive inquiries or formal findings of fact."<sup>45</sup> Rather, it is enough that the administrative

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646, 463 S.E.2d 431 (1995) (unpublished opinion; may not be cited in any other case in any court for any purpose), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996); *Williams v. Hyde County Bd. of Educ.*, 490 F.2d 1231 (4th Cir. 1974).

40. G.S. 115C-325(m)(2).

41. *Hasty v. Bellamy*, 44 N.C. App. 15, 260 S.E.2d 135 (1979).

42. *Abell v. Nash County Bd. of Educ.*, 71 N.C. App. 48, 321 S.E.2d 502 (1984).

43. *Abell*, 71 N.C. App. 48, 321 S.E.2d 502.

44. *Kryder*, 120 N.C. App. 646, 463 S.E.2d 431 (unpublished opinion; may not be cited in any other case in any court for any purpose), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996).

45. *Abell*, 71 N.C. App. at 53, 321 S.E.2d at 506.

record discloses the basis for the board's action, whether in the personnel file, in the board minutes, in a recommendation memorandum, or elsewhere.<sup>46</sup> That is, the superintendent must articulate the basis for his or her recommendation and point to elements in the administrative record that disclose that basis. The board of education must understand that basis and rely upon it in voting not to renew. That procedure is sufficient.

*Decision not to renew contrary to the superintendent's recommendation.* The fourth combination, where the superintendent recommends renewal but the board votes to the contrary, places a special burden on the board—and on its attorney—to ensure that the proper rational basis exists to support the nonrenewal decision. It may not so easily be able to rely simply on the evidence that the superintendent brings to its attention.

**Open meetings law.** The board's discussion of the question of renewing the contract of a probationary teacher may take place in closed session, but the vote must be taken in open session.<sup>47</sup>

**Notice to the teacher.** A probationary teacher whose contract will not be renewed for the next school year must be notified of that fact by June 15.<sup>48</sup> It is not clear what the consequences are of failing to give this notice in a timely way at the end of the first, second, and third probationary years.<sup>49</sup>

### Grounds for Nonrenewal

A board of education may decide not to renew the contract of a probationary teacher at the end of the contract year for any reason satisfactory to the board, so long as the nonrenewal decision is not "arbitrary, capricious, discriminatory or for personal or political reasons."<sup>50</sup>

**"Arbitrary" or "capricious."** The Teacher Tenure Act does not define the terms "arbitrary" and "capricious." The North Carolina courts have said, however, that arbitrary or capricious reasons "are those without any rational basis in the record, such that a decision made thereon amounts to an abuse of discretion."<sup>51</sup> To prevail on a claim of arbitrary or capricious nonrenewal, a probationary teacher must prove that the board's decision was based *solely* on an arbitrary or capricious reason. That is, any rational reason demonstrated in the record will support a decision not to renew a probationary teacher. As an example, where a

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46. *Abell*, 71 N.C. App. at 53, 321 S.E.2d at 506–7.

47. G.S. 143-318.11(a)(6). See section 503.

48. G.S. 115C-325(o).

49. The consequences of untimely notice at the end of the fourth year are spelled out in G.S. 115C-325(c)(1) and discussed below.

50. G.S. 115C-325(m)(2).

51. *Abell*, 71 N.C. App. at 53, 321 S.E.2d at 506 (1984).

math teacher who was an assistant football coach was not renewed—despite good performance as a math teacher—because the new football coach wanted to assemble his own staff of assistants, the court held that the nonrenewal was not arbitrary or capricious. It had a rational basis.<sup>52</sup>

**“Discriminatory.”** The Teacher Tenure Act does not define the term “discriminatory,” and the courts have not applied it in the context of nonrenewal of a probationary teacher. Its meaning therefore can only be guessed, but it seems likely that the courts would apply standards similar to those used in the enforcement of federal statutes barring employment discrimination on the grounds of race, sex, religion, age, national origin, color, and disability. (See sections 301, 302, and 303.)

**“Personal.”** The Teacher Tenure Act does not define the term “personal,” but one decision of the North Carolina Court of Appeals, arising from the Winston-Salem/Forsyth school system,<sup>53</sup> gives some guidance for its meaning. In that case a probationary teacher who was not renewed claimed that the nonrenewal was for personal reasons, in that the school officials assigned to help her with her work and to evaluate her work exhibited ill will, spite, and malice toward her. They therefore failed to help her improve and they evaluated her unduly harshly, leading to her nonrenewal.

First, the case makes clear that nonrenewal may be unlawfully “personal” if the board members themselves act for personal reasons. The court of appeals, rejecting the teacher’s claim, noted that the teacher failed to produce evidence that the *board members themselves* were biased against her, and in fact the evidence showed that the board members simply acted in reliance on reasons for nonrenewal put forward by the superintendent.

And second, the case seems to imply that a nonrenewal decision may be unlawfully “personal” if the ill will, spite, or malice of school officials sufficiently taints the decision-making process below the level of the board members. That is, if the reasons for the nonrenewal recommendation put forth to the board by the superintendent have personal animosity at their foundation, the action not to renew may be unlawful even if none of the board members had any unlawful “personal” motivation. In the Winston-Salem case, however, there was an investigation of allegations of ill will, and so forth, by school officials not alleged to be involved, and the board even permitted the teacher to be heard before it voted on the renewal. These circumstances were sufficient, the court held, “to remove any taint that may have existed in the support team’s evaluation” caused by personal animosity by the support team.

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52. *Abell v. Nash County Bd. of Educ.*, 89 N.C. App. 262, 365 S.E.2d 706 (1988) (hereinafter *Abell II*).

53. *Spry v. Winston-Salem/Forsyth Bd. of Educ.*, 105 N.C. App. 269, 412 S.E.2d 687, *aff’d*, 332 N.C. 661, 422 S.E.2d 575 (1992).

So long as board members do not harbor personal ill will,<sup>54</sup> and so long as a good faith investigation is made into accusations that ill will by school officials is tainting the evaluation process, boards of education should have little difficulty avoiding liability for nonrenewals for “personal” reasons.

**“Political.”** The Teacher Tenure Act does not define the term “political,” and the courts have not applied it in the context of nonrenewal of a probationary teacher. Its meaning therefore can only be guessed, but it seems likely that the courts would apply standards similar to those used in the enforcement of free speech rights under the United States Constitution. (See section 201.)

### Review of the Nonrenewal Decision

A probationary teacher whose contract is not renewed by the board of education and who believes that the nonrenewal was for arbitrary, capricious, personal, political, or discriminatory reasons may challenge the nonrenewal in superior court.<sup>55</sup>

**New trial versus judicial review.** Under the law as it stood until 1997, it was clear that the probationary teacher’s superior court action was a full evidentiary trial before a jury. Even before the 1997 changes, it seemed logical that the matter might be heard as a matter of administrative review—before a judge without a jury and on the record created in the school system not on new evidence—under either of the two statutes found in G.S. Chapter 115C providing for such reviews: G.S. 115C-45 and G.S. 115C-305. (See chapter 15.) However, in 1971, in a case arising from the Buncombe County school system under the teacher employment law preceding the Teacher Tenure Act, the state supreme court held that review of a teacher’s dismissal by a board was not reviewable under G.S. 115C-45 because the board’s action did not affect the teacher’s “character or right to teach” as that statute required for appeals to the superior court.<sup>56</sup> In 1981 the General Assembly added G.S. 115C-305, which permits appeals to the superior court from a much wider range of decisions, “including decisions affecting character or the right to teach.” Even though the courts subsequently held that this new statute is broader in scope than G.S. 115C-45 and logically might include appeals of nonrenewal decisions from probationary

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54. Or, if they do harbor ill will, they do not allow it to play a role in their decision.

55. G.S. 115C-325(n). *Sigmon v. Poe*, 528 F.2d 311 (4th Cir. 1975) (per curiam); *Abell*, 71 N.C. App. at 49, 321 S.E.2d at 504 (1984); *Spry*, 105 N.C. App. 269, 412 S.E.2d 687. Review is not generally available in federal court because there is no property interest involved. *Bullock v. Vance County Bd. of Educ.*, No. 5.95-CV-1075-BR3 (E.D.N.C. Jan. 22, 1997). See section 202.

56. *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971).

teachers,<sup>57</sup> they did not change the rule that such appeals are the subjects of lawsuits for trial by jury.<sup>58</sup>

In 1997 the General Assembly acted to change the law, but it is not yet clear just how the change will be interpreted by the courts. The change was an amendment to G.S. 115C-325(n), the provision in the Teacher Tenure Act spelling out that teachers have the right to appeal dismissal or demotion decisions to the superior court. By the change, that section was expanded to include the appeals of probationary teachers whose contracts are not renewed. It appears that the intent of the change was to cause appeals of nonrenewals by probationary teachers to be handled in the superior courts as administrative reviews on the record by a judge, not as new lawsuits to be tried on the taking of new evidence before a jury. That is, after all, the way that appeals of dismissals by tenured teachers are handled. (See section 2007.) Yet G.S. 115C-325(n) does not itself expressly provide for such an administrative review, and the provisions adding probationary teacher nonrenewals to its coverage also do not expressly provide for such reviews.

It simply remains, at the time of this writing, to be seen whether the courts will interpret this new statutory provision as displacing the old case law calling for new trials by jury for nonrenewed probationary teachers.

**Burden of proof on the probationary teacher.** At the trial, the burden rests with the probationary teacher to prove that his or her nonrenewal was for an unlawful reason.<sup>59</sup> This burden is made difficult to meet by the provision in G.S. Chapter 115C that “[i]n all actions brought in any court against a local board of education, the order or action of the board shall be presumed to be correct and the burden of proof shall be on the complaining party to show the contrary.”<sup>60</sup> Whether the nonrenewal action of the school board was arbitrary or capricious or otherwise unlawful is a mixed question of fact and law.<sup>61</sup> The jury determines the facts—that is, decides what happened and why—and then the judge applies the law to those facts to determine whether they constitute a violation of the law.

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57. *Warren v. Buncombe County Bd. of Educ.*, 80 N.C. App. 656, 658, 343 S.E.2d 225, 226 (1986).

58. See the discussion in *Spry*, 105 N.C. App. at 272, 412 S.E.2d at 689.

59. *Abell II*, 89 N.C. App. 262, 365 S.E.2d 706 (1988).

60. G.S. 115C-44(b).

61. *Abell II*, 89 N.C. App. at 266, 365 S.E.2d at 708 (1988).

## Relationship between Probationary Status and Initial License Status

A teacher just beginning his or her career, entering first employment as a teacher, is issued an initial license.<sup>62</sup> Whether the teacher will be granted a continuing license at the end of the initial license period is a decision made at the state level. Whether a probationary teacher will be renewed at the end of a contract year, and eventually granted tenure, is a decision made at the local level.<sup>63</sup>

## Section 1803 Achieving and Losing Tenure

This section looks at the way teachers may attain and lose tenure. The rules are, for the most part, spelled out in the Teacher Tenure Act.

### Achieving Tenure

All teachers in order to achieve tenure must serve a period as a probationary teacher. The typical length of time for probationary service is four years, but the time may vary depending on whether the teacher is just beginning a teaching career or has previously been tenured as a teacher, and where. These variations are discussed in this section.

**New teachers.**<sup>64</sup> A teacher who has not previously attained tenure in any North Carolina public school system must be hired as a probationary teacher. His or her contract may then be renewed or not renewed at the end of the first year, at the end of the second year, or at the end of the third year, on the grounds and according to the procedures explained in section 1802. If at any point the contract is not renewed, the teacher's employment comes to an end.

For a probationary teacher nearing the end of his or her fourth year, the vote by the board of education is not a vote on renewal or not, but rather a vote on whether to grant the teacher tenure. The procedures described in this section were added to G.S. 115C-325(c) (part of the Teacher Tenure Act) by the General Assembly in 1997.

*Preparation of list of tenure-eligible teachers.* Near the end of the school year—at least thirty days before the board vote on tenure for eligible probationary teachers—the superintendent submits to the board of education a list

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62. Unless the teacher is entering by lateral entry, alternative entry, or emergency license. See section 801.

63. State Board of Education, *State Board of Education Policy Manual* (1997), ID no. QP-A-022.

64. G.S. 115C-325(c)(1).

of the names of all eligible probationary teachers. That list is, by statute, a public record. The statutory provisions for renewal of probationary teachers' contracts, discussed above, make clear that the superintendent has the duty of recommending whether a particular teacher's contract should be renewed or not. The 1997 amendments that added the new procedure for voting on tenure for probationary teachers at the end of their probationary time do not specifically call for such a recommendation. The best practice, however, would be to read the statute as applying to the tenure vote the same requirements as apply to the nonrenewal vote, so that the superintendent should make a recommendation to the board.

*Board vote and legal standard.* At least thirty days after receiving the list, the board votes on whether to grant the probationary teacher tenure. The statute does not spell out the legal standard for this vote. Is the granting of tenure an at-will decision solely within the discretion of the board, like the vote on renewal of a superintendent's contract? Or is the board constrained, as it is in votes on renewal of probationary teachers' contracts, that its actions may not be arbitrary, capricious, personal, political, or discriminatory? Before the 1997 changes in the statute, the board did not directly vote on granting tenure. Rather, it voted at the end of the probationary period on whether to renew the probationary teacher's contract, and a favorable vote had the effect of granting tenure. Under that old scheme, it was clear that the arbitrary, capricious, and so forth, standard fully applied to the decision that in effect granted tenure. Presumably, the General Assembly intended the same result for the direct vote on granting tenure under the new scheme, but as of this writing no court decision has answered that uncertainty.

*Effect of vote in favor of tenure.* The board must notify the teacher by June 15 of the outcome of the tenure vote. If a majority of the board voted in favor of tenure, the board may not rescind its decision once it has notified the teacher. Tenure attaches at that point. If from that point forward the board wishes to terminate the teacher's employment, it must do so on the grounds and through the procedures required for dismissing a tenured teacher.

*Effect of vote against tenure.* If a majority of the board voted against tenure, the teacher may not continue to teach in that school system beyond the end of the current school term. (Whether this statutory provision means that the teacher may *never* again be employed in that school system is unclear.)

*Effect of failure to make a timely decision.* The statute requires that the board vote on the tenure decision by June 15. If it fails to do so, the statute provides that the teacher is, as of June 16, entitled to one month's pay as compensation for the board's failure to vote, and for an additional month's pay for every thirty days after June 16 that the board continues to fail to vote. Until the vote is taken, the board may not reemploy the teacher for another school year.

*Appeal of unfavorable vote.* As discussed above, nonrenewed probationary teachers may appeal the nonrenewal decision to superior court, but, following the 1997 amendments to the Teacher Tenure Act, it is not clear whether that appeal is for an administrative review by a judge or for a trial before a jury. The same uncertainties surround an appeal of an unfavorable tenure vote. In fact, the uncertainty is greater, because, by its literal terms, the statute does not provide at all for appeals from adverse tenure votes. These uncertainties will remain puzzles until the statutes are interpreted by the appellate courts or amended by the General Assembly.

**Previously tenured teachers.**<sup>65</sup> A school system has three options with respect to the time to tenure for a teacher newly hired who previously was tenured in any school system in North Carolina, including the one currently hiring the teacher. First, it may grant the teacher tenure immediately upon hiring. Second, it may take the vote on tenure at the end of the first year. Third, it may vote on renewal at the end of the first year, adding a second probationary year, and then take the vote on tenure at the end of the second year.

**Teachers returning from administrator term contracts.**<sup>66</sup> A teacher who previously achieved tenure and then entered service in the same school system as a principal, assistant principal, supervisor, or director on a term contract under the Administrator Term Contract Law retains tenure as a teacher if he or she is not offered a new administrator contract at the end of a contract term. However, it is possible for the teacher to agree, in entering the administrator term contract, to relinquish the right to retain tenure. (See section 1703.)

Before the passage of the Administrator Term Contract Law, it was clear that time spent as an assistant principal counted as time toward acquiring tenure as a teacher, as the status of assistant principal was as a teacher with extra duties. It seems clear under the Administrator Term Contract Law, however, that the status of contract administrator (including assistant principal) and teacher are two separate statuses, and time spent employed as a contract administrator does not count as time toward acquiring tenure as a teacher.<sup>67</sup>

**Interim or temporary teachers.** To be eligible for tenure, a teacher must be employed in a permanent, full-time position.<sup>68</sup> Interim or temporary teachers cannot meet this requirement, irrespective of the number of schooldays they may work in a particular year.<sup>69</sup>

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65. G.S. 115C-325(c)(2).

66. G.S. 115C-287.1(g).

67. Attorney general opinion letter from Thomas J. Ziko to Wendell Murray, superintendent of Pender County schools (June 20, 1996).

68. G.S. 115C-325(a)(6).

69. *Campbell v. Board of Educ. of Catawba County*, 76 N.C. App. 495, 333 S.E.2d 507 (1985), *cert. denied*, 315 N.C. 390, 338 S.E.2d 878 (1986).

**Counting the time to tenure.** There are two key requirements that must be met for time spent as a probationary teacher to count toward tenure. First, for a year to count, the teacher must perform at least 120 workdays as a full-time, permanent teacher within a school year.<sup>70</sup> There is no guidance in the statute or in State Board of Education regulations as to which particular days count and which do not. The word “perform,” however, indicates that the teacher must actually be working on those 120 days, which would mean that vacation time and sick leave time would not count. Teacher workdays, when students are not present, however, would seem to count.

Second, for a set of four years<sup>71</sup> to count toward tenure, they must be four *consecutive* years. Once the chain of years is broken—that is, a teacher fails to perform 120 workdays in, say, the third year—then a new chain of years must begin. That is true unless the reason that the teacher failed to perform 120 workdays is sick leave, disability leave, or a combination. In that case, the year does not count as one of the four years to tenure but neither does it count as a break in the string of four *consecutive* years.<sup>72</sup> So, if a teacher works two years, takes a year off to travel, and then works two more years, that teacher is only two years toward the four necessary for tenure. But if a teacher works two years, then fails to get in the 120 days because of sick leave and disability leave, and then works two more years, he or she is eligible for tenure.

## Losing Tenure

A teacher loses tenure when he or she “no longer performs the responsibilities of a teacher.”<sup>73</sup> That can happen by dismissal, resignation or retirement, or moving to a nonteacher position. These possibilities are the subject of this section.

**Dismissal.** A teacher who is dismissed from the employment of the board of education under the provisions of the Teacher Tenure Act of course ceases to perform the duties of a teacher and loses his or her tenure. Dismissal under the act is the subject of chapters 19 and 20.

**Resignation or retirement.** A teacher who resigns the employment of the board of education ceases to perform the duties of a teacher and loses his or her tenure, as does an employee who retires. The same is true of a teacher who takes long-term disability retirement.<sup>74</sup>

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70. G.S. 115C-325(c)(1).

71. Or less for a teacher previously tenured.

72. G.S. 115C-325(c)(5).

73. G.S. 115C-325(c)(3).

74. *Meacham v. Board of Educ.*, 47 N.C. App. 271, 267 S.E.2d 349 (1980). There are two interesting aspects to this case. First, there is no discussion of the effect of taking advantage

**Moving to a nonteaching position.** When a teacher moves to a position that does not fit the definition of “teacher” under the Teacher Tenure Act,<sup>75</sup> he or she loses tenure.<sup>76</sup> If a teacher becomes an assistant superintendent, for instance, or a director of personnel, or a community schools coordinator, tenure is lost. This is true even if the teacher was unaware of this tenure consequence. The one exception is moving to an administrator position under the Administrator Term Contract Law. That act specifically provides, as discussed in the section on achieving tenure, above, that a tenured teacher who moves into a principal, assistant principal, supervisor, or director position on an administrator term contract under that law retains tenure as a teacher if the administrator contract is not renewed.

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of short-term disability benefits, as discussed in section 1004. Presumably, taking short-term disability does not terminate tenure. Second, in this case the teacher applied for disability retirement on the recommendations of the superintendent and the school finance officer, who may have misled her as to the tenure consequences. The court held in a subsequent proceeding in the same case that the teacher was entitled to a trial on the question of whether she was entitled to rely on those misrepresentations. 59 N.C. App. 381, 297 S.E.2d 192 (1982), *disc. review denied*, 307 N.C. 577, 299 S.E.2d 651 (1983).

75. G.S. 115C-325(a)(6).

76. G.S. 115C-325(c)(3).