

Chapter 19

Grounds for Dismissal under the Teacher Tenure Act

Detailed Contents

Section 1900 Dismissal Related to Job Performance Concerns	404
Inadequate Performance	404
Neglect of Duty	408
Failure to Fulfill the Statutory Duties of a Teacher	411
Insubordination	411
Failure to Comply with the Reasonable Requirements of the Board	415
Section 1901 Dismissal Related to Conduct or Character Concerns	416
Immorality	416
Use of Alcohol and Drugs	422
Conviction of a Felony or Crime Involving Moral Turpitude	424
False Application Information	425
Section 1902 Dismissal Related to Concerns Regarding Physical or Mental Capacity	425
Incapacity	426
Relationship to the Americans with Disabilities Act	427
Section 1903 Dismissal Related to Concerns Regarding the Teacher's License	427
Failure to Keep Certificate Current	427
Cause for Revocation of a Certificate	428

Section 1904 Dismissal Related to Concerns about Citizenship 430

Failure to Repay Money Owed to the State 430

Advocating the Overthrow of the Government 431

Section 1905 Dismissal in a Reduction in Force 431

Chapter 19

Grounds for Dismissal under the Teacher Tenure Act

The basic thrust of the Teacher Tenure Act¹ is that public school employees under its protection² may be dismissed or demoted only according to the procedures set out in the act and only for one or more of fifteen grounds set out in the act. Chapter 20 discusses the procedure and this chapter discusses the grounds.

The fifteen grounds for dismissal fall logically into six categories: dismissals related to job performance concerns, dismissals related to conduct or character concerns, dismissals related to concerns regarding physical or mental capacity, dismissals related to concerns regarding the teacher's license, dismissals related to concerns about citizenship, and dismissals as part of a reduction in force. The statute does not group them this way. In fact, they appear in the statute in a seemingly meaningless order. But this grouping may make it easier to understand the legal principles behind each ground for dismissal.

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

2. As discussed at length in chapter 18, the employees fully protected by the Teacher Tenure Act include those who fit the definition of "career employee" set out in G.S. 115C-325(a)(1a). That definition includes teachers who meet the requirements laid out in G.S. 115C-325(a)(6) and who have achieved tenure. Also fully protected during the contract year but not at the end of the year are probationary teachers who fit the definition of "teacher" but who have not yet achieved tenure. Finally, directors, supervisors, principals, and assistant principals employed by term contracts under the Administrator Term Contract Law are protected by the act during the term of their contracts. *See* section 1703 of this book.

Section 1900 Dismissal Related to Job Performance Concerns

The first category includes five grounds for dismissal that relate directly to the manner in which a teacher performs his or her duties. Those five grounds are

- inadequate performance,³
- neglect of duty,⁴
- failure to fulfill the statutory duties of a teacher,⁵
- insubordination,⁶ and
- failure to comply with the reasonable requirements of the board.⁷

Inadequate Performance

The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for “inadequate performance.”⁸

Only three cases involving “inadequate performance” under the Teacher Tenure Act have been decided by the North Carolina appellate courts. But the decisions of those three cases are sufficient to make three principles clear. First, school systems have an obligation to inform teachers of ways in which their performance is inadequate and give them an opportunity to improve. Second, the ground of “inadequate performance” can be used to support a dismissal even where it is subjective evaluations that lead to the conclusion of inadequacy of performance. And third, the ground will apply both to teaching methods and control of the students.

Obligation to the teacher whose performance is inadequate. The Teacher Tenure Act does not define “inadequate performance.” In a case arising in the Chapel Hill–Carrboro school system, a teacher dismissed for inadequate performance argued that the phrase is so vague that it cannot be constitutionally applied.⁹ That is, it does not give fair notice of the kinds of behavior or conduct that can lead to dismissal, and therefore it violates the due process requirements of the Fourteenth Amendment to the U.S. Constitution. The North Carolina Court of Appeals rejected this argument, saying, “We believe that the term

3. G.S. 115C-325(e)(1)(a).

4. G.S. 115C-325(e)(1)(d).

5. G.S. 115C-325(e)(1)(i).

6. G.S. 115C-325(e)(1)(c).

7. G.S. 115C-325(e)(1)(j).

8. G.S. 115C-325(e)(1)(a).

9. *Nestler v. Chapel Hill–Carrboro City Sch. Bd. of Educ.*, 66 N.C. App. 232, 311 S.E.2d 57, *disc. review denied and appeal dismissed*, 310 N.C. 745, 315 S.E.2d 703 (1984).

‘inadequate performance’ is one that a person of ordinary understanding can comprehend in regard to how he is required to perform.”¹⁰

It is possible, however, for a statute to be sufficient on its face yet be unconstitutionally vague in the way it is applied in a particular instance. The court in the Chapel Hill–Carrboro case noted that the teacher had been advised on several occasions of the ways in which his teaching methods were inadequate—he was placed on conditional status after in-class observations—and that in the face of those warnings “a person of ordinary understanding could determine how he must comply.”¹¹

In a second case, arising from the old Durham County school system, a teacher dismissed for inadequate performance also sought a ruling that the statute was unconstitutionally vague as applied to her.¹² The court of appeals this time noted that the statute is not unconstitutionally vague for the reason that the term “inadequate performance” can be “readily understood by any person of ordinary intelligence who knows what the job entails.” In this case, which turned on the teacher’s failure to maintain discipline in the classroom, the court said that the teacher was fully aware that her job as teacher involved maintaining discipline. She was warned that she was failing in that regard but she persisted in her failure.

The lesson to be taken from the Chapel Hill–Carrboro and Durham cases is that before dismissing a teacher for inadequate performance, a school system should make sure that the teacher understands what is expected and should give the teacher adequate warning of what the inadequacies are and an opportunity to overcome them. Following that path will eliminate any opportunity that the statute will be found to be vague as applied. It will also serve the purpose of helping a marginal teacher improve to being a good teacher.

This lesson is consistent with a requirement regarding performance evaluations found right in the Teacher Tenure Act. A section of that act provides that “[i]n determining whether the professional performance of a career teacher is adequate, consideration shall be given to regular and special evaluation reports prepared in accordance with the published policy of the employing local school administrative unit and to any published standards of performance which shall have been adopted by the board. *Failure to notify a career teacher of an inadequacy in his performance shall be conclusive evidence of satisfactory performance.*”¹³

10. *Nestler*, 66 N.C. App. at 238, 311 S.E.2d at 60.

11. *Nestler*, 66 N.C. App. at 238, 311 S.E.2d at 60.

12. *Crump v. Durham County Bd. of Educ.*, 74 N.C. App. 77, 327 S.E.2d 599 (1985).

13. G.S. 115C-325(e)(3) (emphasis added).

Use of subjective evaluations. In the Chapel Hill–Carrboro case, the allegations against the teacher concerned his teaching methodology. There was evidence that he had an excellent grasp of the material he taught—high school chemistry—and there was no evidence that his students performed more poorly than the students of other chemistry teachers. Yet, based on observations of his teaching, school administrators concluded that he had poor “anticipatory set” (helping students “mentally shift gears” from their previous class), failed to establish a clear objective for the day’s class, inadequately checked on all students’ comprehension by asking questions, talked in a monotone, lectured too much, constructed poor laboratory experiments, and gave inadequate homework assignments. When he failed to improve sufficiently in his teaching methods, the superintendent recommended his dismissal and the board voted to dismiss.

The court of appeals noted the evidence in the teacher’s favor—such as his grasp of the subject matter—but it upheld the board’s finding of inadequate performance based on the teacher’s “poor organization in the classroom and a failure to show an acceptable amount of initiative in trying to find more effective means of achieving his objectives.”¹⁴ In so doing, the court noted that the administrators evaluating the teacher applied “certain objective standards” (though it did not explain what they were) and that the application of those standards was inevitably somewhat subjective. “The persons observing the [teacher] were no doubt somewhat subjective, as any human would be, in applying these standards,” the court said, “but we believe it could be and the evidence in this case shows that the standard was fairly applied.”¹⁵

This case makes clear that review of a teacher’s performance for purposes of determining its adequacy will inevitably to some extent be subjective and that fact alone does not invalidate a finding of inadequacy.¹⁶

Inclusion of teaching methods and control of students. Of the three inadequate-performance cases that have reached the appellate courts, two have concerned poor teaching performance. One is the Chapel Hill–Carrboro case discussed above. The second is a case arising from the Winston-Salem/Forsyth school system.¹⁷ The court of appeals did not make clear in its discussion of the facts just what the inadequacies of the teacher’s performance were, but it did indicate that they related to shortcomings in students’ progress. As in the Chapel Hill–Carrboro case, the administrators in the Winston-Salem/Forsyth case took pains to assist the teacher and to help her improve, but the amount of improvement was unsatisfactory.

14. *Nestler*, 66 N.C. App. at 234, 311 S.E.2d at 58.

15. *Nestler*, 66 N.C. App. at 237, 311 S.E.2d at 60.

16. *Compare with Iversen v. Wall Bd. of Educ.*, 522 N.W.2d 188 (S.D. 1994).

17. *Davidson v. Winston-Salem/Forsyth County Bd. of Educ.*, 62 N.C. App. 489, 303 S.E.2d 202, *disc. review denied*, 309 N.C. 320, 307 S.E.2d 163 (1983).

The third case, from Durham, turned on the teacher's inability to maintain good order in her classroom.¹⁸ "[I]t is fundamental and generally known, that students cannot effectively learn and teachers cannot effectively teach in an unruly, chaotic, noisy, disruptive classroom," the court said, but "that is just the kind of classroom that [this teacher] had and was apparently satisfied to have over a long period of time, according to the testimony of the three professional educators who had seen or heard students misbehave in her classroom on many different occasions."¹⁹ The misconduct included students' loud talking, squirting water, throwing papers at each other and at the teacher, climbing in and out of windows, and playing cards.

Teachers in low-performing schools. Three special circumstances of dismissal for inadequate performance involve teachers²⁰ in schools that have been identified as low-performing schools under the School-Based Management and Accountability Program. (See section 402 of this book for a description of that program.) In both circumstances, the dismissal action is taken by the State Board of Education, not the local school board. All three instances follow the identification of a school as low performing, based on measures of student performance. When a school is identified as low performing, the State Board of Education may assign an assistance team to the school. The assistance team evaluates the performance of teachers, among other duties.

The first circumstance occurs when the state board receives two consecutive evaluations from the assistance team regarding a particular teacher that contain written findings of inadequate performance and a recommendation of dismissal. In this circumstance, the state board is directed by statute to dismiss the teacher.²¹ It is not left to the discretion of the state board. "These findings and recommendations," the statute provides, "shall be substantial evidence of the inadequate performance of the teacher."²²

The second circumstance occurs when, despite the efforts of the assistance team, the school fails to make satisfactory improvement. The assistance team may recommend to the State Board of Education that particular teachers be dismissed on the grounds of inadequate performance or any other ground set out in the Teacher Tenure Act. In this circumstance, the state board is authorized by the statute to dismiss the teacher, but it is not obligated to.²³

The third circumstance occurs when a teacher in a low-performing school to which an assistance team has been assigned fails for a second time a general

18. *Crump v. Durham County Bd. of Educ.*, 74 N.C. App. 77, 327 S.E.2d 599 (1985).

19. *Crump*, 74 N.C. App. at 81, 327 S.E.2d at 601.

20. Principals, assistant principals, supervisors, and directors, as well. See section 1704.

21. G.S. 115C-325(q)(2).

22. G.S. 115C-325(q)(2).

23. G.S. 115C-325(q)(2).

knowledge test designated by the state board. Chapter 115C, Section 105.38A, of the North Carolina General Statutes (hereinafter G.S.) requires that a teacher take the general knowledge test if the principal of the school or an assistance team assigned to the school determines that the teacher's performance is impaired by a lack of general knowledge. The state board administers the test and sets the passing score. If the teacher fails the test, he or she is required to participate in a remediation plan devised by the state board. The state board is to reimburse an institution of higher education that participates in the remediation for tuition and fees. If the plan requires the teacher to engage in a full-time course of study or training, the teacher is to be considered on leave with pay. If the teacher fails the designated general knowledge test a second time, the statute requires the state board to begin dismissal proceedings.

See section 2008 for a discussion of the procedures by which dismissals may occur in these three circumstances.

Neglect of Duty

The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for "neglect of duty."²⁴

Only three cases involving "neglect of duty" under the Teacher Tenure Act have been decided by the North Carolina appellate courts. Four principles emerge from those decisions. First, the term is to be given a commonsense interpretation. Second, before a teacher may be dismissed for neglect of duty the teacher must have been afforded a chance to understand what his or her duty was. Third, neglect of duty may consist of matters other than merely not showing up, such as failing to maintain discipline. And fourth, neglect of duty may, in the proper circumstance, consist of just one incident.

Commonsense meaning. In a case arising from the old Goldsboro city school system, the North Carolina Supreme Court, noting that the term "neglect of duty" is not defined in the Teacher Tenure Act, said that a review of cases from other states demonstrates that it "is uniformly accorded a common sense definition: failure to perform some duty imposed by contract or law."²⁵ That is, whether there is neglect of duty can be determined only by reference to a duty that exists, because neglect is "an abstraction until viewed in light of the facts surrounding a particular case."²⁶

24. G.S. 115C-325(e)(1)(d).

25. *Overton v. Goldsboro Bd. of Educ.*, 304 N.C. 312, 318, 283 S.E.2d 495, 499 (1981) (citations omitted).

26. *Overton*, 304 N.C. at 319, 283 S.E.2d at 499 [quoting *Gubser v. Department of Employment*, 271 Cal. App. 2d 240, 242, 76 Cal. Rptr. 577, 579 (Cal. App. 1969)].

Requirement that teacher have a chance to know what the duty is. In the Goldsboro case, the state supreme court ruled that a dismissal of a teacher on the ground of neglect of duty cannot be upheld “unless it is proven that a reasonable man under those same circumstances would have recognized the duty and would have considered himself obligated to conform.”²⁷ In that case a tenured teacher learned by a radio news report that he had been indicted by a grand jury on felony drug charges. He immediately called the principal of his school to report that he was in trouble and would not be at school that day and perhaps not for the remainder of the year. He requested that the principal secure a substitute teacher. Two days later the teacher met with the superintendent to inform him of the charges and to profess his innocence. The teacher indicated to the superintendent that he felt it best if he did not return to school until his name was cleared. The superintendent neither instructed the teacher to return to work nor indicated approval of his absence. At some point the teacher requested a leave without pay. That request was never responded to. Instead, the board voted to request the teacher’s resignation. The teacher refused to resign. Then, approximately two weeks after the original radio newscast, during which time the teacher had been absent from school, the board, on the superintendent’s recommendation, voted to suspend the teacher without pay. Proceedings began for dismissal on the grounds of neglect of duty. The board eventually voted to dismiss the teacher, and the matter made its way to the supreme court.

The supreme court reversed the board’s dismissal of the teacher. It held that a reasonable man “could assume that his continued absence was approved until he was instructed otherwise,” and that an approved absence cannot be the basis for a dismissal for neglect of duty. A teacher must have the opportunity to know what is expected of him or her before the failure to do that thing is neglect of duty. In this Goldsboro case the teacher could very reasonably not have known that he was expected to be at school. If it was reasonable that he not know that, the failure to be at school cannot be neglect of duty.

The case does not hold, or even imply, that every aspect of a teacher’s responsibilities must be laid out. Some matters of duty are clear to any reasonable person even if not explicitly delineated. On the other hand, some duties that would normally seem quite clear, such as the duty to show up for work, can, in the proper circumstances, such as this Goldsboro case, not be clear at all. When the duty is one that a reasonable person might not perceive, failure to perform is not neglect of duty.

Matters constituting neglect. The few cases dealing with neglect of duty have identified two matters as constituting neglect: failure to show up for work

27. *Overton*, 304 N.C. at 319, 283 S.E.2d at 500.

without excuse (that is the Goldsboro case) and neglecting the duty to encourage order and discipline in the classroom by tolerating fighting between students (a case arising from the Wake County school system).²⁸ In the Wake County case, the board of education dismissed a teacher on several grounds, including neglect of duty. That ground, the board found, consisted of the teacher's tolerating fighting between students as a way of resolving disputes. The court of appeals held that toleration of fighting constituted neglect of duty relating to the encouragement of order and discipline. The state supreme court did not disagree that toleration of fighting may constitute neglect of duty, but it held that the evidence that the teacher in fact allowed fighting was insubstantial and would not support a finding of neglect of duty.²⁹

Neglect consisting of one incident. The court in the Wake County case, in overturning the finding of neglect of duty, noted that the evidence indicated at most that the teacher tolerated one fight. In fact, the court held, the evidence was not substantial that the teacher did in fact tolerate that fight. The court went on to say, "If a career teacher's ability to maintain good order and discipline at school is to be judged solely by *one* incident, the evidence of that incident should be clear."³⁰ The implication from the court is that in the proper circumstance, with clear evidence, one incident may constitute neglect of duty.

Relationship to similar grounds. It is difficult to determine the full contours of the meaning of "neglect of duty" under the Teacher Tenure Act in the absence of a statutory definition and with only three appellate court case decisions interpreting the phrase. It is also difficult to know just what its scope is in light of the other grounds for dismissal that are related to job performance concerns. Two of those grounds are directly related to neglect of duty: failure to fulfill the statutory duties of a teacher (discussed immediately below) and failure to comply with the reasonable requirements of the board (discussed later in this section). Though the courts have not directly ruled on the matter, it seems clear that the same action or inaction that constitutes the failure to fulfill the statutory duties of a teacher, for example, would also constitute neglect of duty. And the same action or inaction that constitutes neglect of duty may also amount to inadequate performance. These grounds are related and overlapping, not mutually exclusive.

28. *Thompson v. Wake County Bd. of Educ.*, 31 N.C. App. 401, 230 S.E.2d 164 (1976), *rev'd on other grounds*, 292 N.C. 406, 233 S.E.2d 538 (1977).

29. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977).

30. *Thompson*, 292 N.C. at 415, 233 S.E.2d at 544.

Failure to Fulfill the Statutory Duties of a Teacher

The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for “failure to fulfill the duties and responsibilities imposed upon teachers by the General Statutes of this State.”³¹ G.S. 115C-307 sets out the following duties of teachers:

- to maintain order and discipline,
- to provide for the general well-being of students,
- to provide some medical care to students,
- to teach the students,
- to enter into the superintendent’s plans for professional growth,
- to discourage nonattendance,
- to make required reports, and
- to take care of school buildings.

The appellate courts of the state have not yet had before them a teacher dismissal case that turned on this ground.

Twice the courts have cited this recitation of teachers’ duties as support for their decisions to uphold dismissals on other grounds. In the Durham case discussed earlier, a teacher’s dismissal on the grounds of inadequate performance was based on her inability to maintain order and discipline in her classroom. The court cited the statutory duty of teachers to “maintain order and discipline” as conclusive proof that the teacher was adequately on notice that that was an element of her job. In a case arising from the New Bern-Craven County school system, a teacher’s dismissal on the grounds of excessive use of alcohol (see section 1901 for a discussion of the case) was upheld by the state supreme court, which cited the statutory duty to “provide for general well-being of students” as support for its holding.³²

Insubordination

The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for “insubordination.”³³

Five state appellate court cases have dealt with this ground for dismissal, and from those cases three main principles may be distilled. First, as the courts

31. G.S. 115C-325(e)(1)(i).

32. *Faulkner v. New Bern-Craven County Bd. of Educ.*, 311 N.C. 42, 316 S.E.2d 281 (1984).

33. G.S. 115C-325(e)(1)(c).

have interpreted the term, insubordination constitutes a narrow ground for dismissal. Second, some ground exists for a slightly broader interpretation. And third, courts tend to rely on it as a sustainable ground for dismissal.

Insubordination as a narrow ground. The first insubordination case under the Teacher Tenure Act to reach the North Carolina Court of Appeals arose in the Wake County school system.³⁴ The court defined the term as “a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders.”³⁵ By this definition, before there can be insubordination there must be either (1) express or implied directions or (2) reasonable orders. And after the directions or orders there must be willful disregard or refusal to obey. Only then can there be a finding of insubordination.

In the Wake County case the board of education had dismissed the teacher on several grounds,³⁶ including insubordination. The insubordination consisted of the use of inappropriate language, inappropriate physical corrections of student behavior, and toleration of card games in study hall. The court of appeals, applying its newly adopted definition of insubordination, found that the ground of insubordination was not supported in the record. While the teacher’s conduct was questionable, the court said, “there is no evidence that the acts here objected to were continued *after* [the teacher] was admonished or counseled to behave differently.”³⁷ That is, there could not be insubordination unless there was first an instruction to act differently and then a failure or refusal to do so.

The court of appeals in the Wake County case gave the concept of insubordination this narrow reading despite saying that “it would be unrealistic to require local school boards to counsel teachers in advance against all possible types of misconduct before those teachers could be found guilty of insubordination, and that repeated acts of teacher misconduct which are obviously contrary to accepted standards of behavior in the teaching profession and the community in general should constitute insubordinate conduct. Further we find it difficult to believe that petitioner did not know, or should not have known, that his behavior violated the implied if not the express policies of the board.”³⁸ Even so, the court said, it did not appear here that the teacher continued with objectionable conduct after being told to stop, so there was no insubordination.

The four cases that have considered a charge of insubordination since the Wake County case have all upheld the dismissal on the insubordination ground.

34. *Thompson*, 31 N.C. App. 401, 230 S.E.2d 164.

35. *Thompson*, 31 N.C. App. at 425, 230 S.E.2d at 177–78 [citing *School Dist. v. Superior Court*, 433 P.2d 28 (Ariz. 1967)].

36. The case is discussed in both section 1900 (neglect of duty) and section 1901 (immorality).

37. *Thompson*, 31 N.C. App. at 425, 230 S.E.2d at 178 (emphasis in original).

38. *Thompson*, 31 N.C. App. at 425, 230 S.E.2d at 178 (emphasis in original).

Three of them have clearly applied the narrow reading favored by the court in the Wake County case, finding that specific directives were specifically disobeyed. In one, a 1979 case arising from the Charlotte-Mecklenburg school system, the court found that a teacher had applied corporal punishment to orthopedically handicapped students after direct orders from the principal not to.³⁹ In a second case, a 1986 decision arising from the Hickory city school system, the court found that a teacher permitted himself to be alone in a driver training car with a female student despite direct orders from the principal not to permit that to happen.⁴⁰ That order had been issued more than a year before, following an incident with a female student in a car, and had not been rescinded. Its age did not negate its effect, the court said. And in a third case, a 1993 decision arising from Charlotte-Mecklenburg, the court found that a teacher continued to conduct a doll-making project in class after the principal directed her to stop, that the teacher refused to meet with the principal despite being instructed to do so, and that the teacher refused to implement a professional growth plan that the principal told her to implement.⁴¹ In all three of these cases, the court found that the teachers involved refused to obey direct instructions.

Possibility of a slightly broader interpretation. The only other case involving insubordination to be decided since the development of the narrow definition of insubordination in the Wake County case hints—but only hints—at a notion of insubordination that is broader in a couple of ways. It is a 1980 decision in a case arising from the Buncombe County school system.⁴² The first way in which it hints at a broader concept of insubordination is that it upheld a finding of insubordination not because of a teacher's failure to follow *direct* orders, like the three cases cited above, but because of the teacher's failure to follow more general school policy. The court found that the teacher signed in and out of work for a week in advance "when the rule required him to do so on a daily basis."⁴³ There was no evidence that he had engaged in this misconduct after having been directly instructed to follow that rule. And the court found that when the principal asked the teacher to explain his grading procedure, the teacher had simply referred the principal to a page in the school handbook.

39. *Baxter v. Poe*, 42 N.C. App. 404, 257 S.E.2d 71, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 298 (1979).

40. *Crump v. Board of Educ., Hickory Sch. Admin. Unit*, 79 N.C. App. 372, 339 S.E.2d 483, *disc. review denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

41. *Hope v. Charlotte-Mecklenburg Bd. of Educ.*, 110 N.C. App. 599, 430 S.E.2d 472 (1993).

42. *Weber v. Buncombe County Bd. of Educ.*, 46 N.C. App. 714, 266 S.E.2d 42, *vacated*, 301 N.C. 83, 282 S.E.2d 228 (1980).

43. *Weber*, 46 N.C. App. at 718, 266 S.E.2d at 45.

Again, there was no direct order not to do that. The court also found that the teacher had “violated school policy” by missing an assembly and failing to complete a year-end evaluation form. This slightly broader concept of insubordination is probably consistent with the original definition in the Wake County case, which cited willful disregard of “implied directions of the employer.” A policy statement is, probably, at least an implied direction.

The second way in which this case hints at a broader concept of insubordination is found in the court’s conclusions regarding the teacher’s “attitude.” The court said that while “each of these acts in itself shows insubordination on the part of [the teacher], the cumulative effect documents [the teacher’s] insubordinate attitude toward the school administration in general.”⁴⁴ In another section of the opinion, the court refers to the teacher’s “contempt for the school administration.”⁴⁵ The court seemed to be saying that the contempt that the teacher was showing was itself insubordination.

It is possible that in an appropriate future case, the North Carolina appellate courts would apply the broader notion from the Buncombe County case, that insubordination can consist of failure to obey school policy as well as failure to obey a specific direct order. Whether the courts will be willing to follow the lead that insubordination for purposes of dismissal may be found in a teacher’s attitude is more questionable. The persuasiveness of the Buncombe County decision on either of these points is undermined by the fact that the North Carolina Supreme Court vacated the decision because the school board had never made findings of fact and conclusions of law. The case never came back to the appellate courts.

Court reliance on this ground for upholding dismissals. Five cases involving the ground of insubordination have been dealt with by the North Carolina appellate courts. In three of them additional grounds for dismissal were before the court, but the court chose to uphold the dismissals on the ground of insubordination and not to deal with the other grounds. That was so in the 1979 Charlotte-Mecklenburg decision involving corporal punishment of handicapped children. The court noted that there appeared to be substantial evidence of inadequate performance and neglect of duty, but it chose to rely on insubordination.⁴⁶ It was so in the 1986 Hickory decision involving the driver education teacher discussed earlier in this section. The court said that having upheld the dismissal for insubordination, “we need not pass on the other ground, immorality.”⁴⁷ And it was so in the 1993 Charlotte-Mecklenburg deci-

44. *Weber*, 46 N.C. App. at 719, 266 S.E.2d at 45.

45. *Weber*, 46 N.C. App. at 718, 266 S.E.2d at 45.

46. *Baxter v. Poe*, 42 N.C. App. at 416, 257 S.E.2d at 78, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 298 (1979).

47. *Crump v. Board of Educ., Hickory Sch. Admin. Unit*, 79 N.C. App. 372, 339 S.E.2d 483, *disc. review denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

sion involving doll making. The court said that because it found insubordination, “we need not address the remaining grounds for dismissal.”⁴⁸

Because the courts have given the concept of insubordination a narrow reading, they find it easier to determine whether evidence to support it exists in the record. Once they determine that such evidence does exist, their job is at an end.

Failure to Comply with the Reasonable Requirements of the Board

The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for “failure to comply with such reasonable requirements as the board may prescribe.”⁴⁹ Only one decision has directly addressed this ground for dismissal, a 1979 decision in a case arising from the Winston-Salem/Forsyth school system.⁵⁰

In that case a teacher was dismissed by the board of education on the grounds of inadequate performance, insubordination, and failure to comply with the requirements of the board regarding corporal punishment. The superior court judge held that the record did not substantiate the findings of inadequate performance or insubordination, but that the teacher’s actions in striking several students about the head and striking or grabbing others with sufficient force to cause bruises amounted to violations of the board’s corporal punishment policies. Those policies authorized the use of reasonable force to maintain order but restricted the ways in which corporal punishment could be administered, including a prohibition against striking or slapping students about the face or head. On appeal to the court of appeals, the teacher argued that she was not meting out corporal punishment—and so could not be in violation of the corporal punishment policy—when she made physical contact with the students, but was acting to keep the students from harming themselves or others. The court noted that the board had found that the physical contact was administered as punishment and that as such it was in violation of the board’s corporal punishment policy. Therefore the dismissal was upheld.

This ground for dismissal is very similar to insubordination as a ground for dismissal, especially insubordination in its broader construction, as described above in the section on insubordination.

48. *Hope v. Charlotte-Mecklenburg Bd. of Educ.*, 110 N.C. App. at 606, 430 S.E.2d at 476 (1993).

49. G.S. 115C-325(e)(1)(j).

50. *Kurtz v. Winston-Salem/Forsyth Bd. of Educ.*, 39 N.C. App. 412, 250 S.E.2d 718 (1979).

Section 1901 Dismissal Related to Conduct or Character Concerns

The second of the categories of grounds for dismissal includes four grounds for dismissal that relate to something questionable about the conduct or character of the employee. Those four grounds are

- immorality,⁵¹
- habitual or excessive use of alcohol or nonmedical use of drugs,⁵²
- conviction of a felony or crime involving moral turpitude,⁵³ and
- false application information.⁵⁴

With respect to all of these grounds, it should be kept clearly in mind that the North Carolina courts have expressed their willingness to hold teachers to a higher standard of conduct or character than is generally applied to people in the conduct of their ordinary affairs. The state supreme court has said:

[T]eachers . . . are entrusted with the care of small children and adolescents. We do not hesitate to conclude that these men and women are intended by parents, citizenry, and lawmakers alike to serve as good examples for their young charges. Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil. It is not inappropriate or unreasonable to hold our teachers to a higher standard of personal conduct, given the youthful ideals they are supposed to foster and elevate.⁵⁵

Immorality

The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for “immorality.”⁵⁶ Two appellate court decisions have dealt directly with the meaning of the term.⁵⁷ A third appellate court decision upholds the dismissal of a teacher found to have engaged in sexual relations with a student

51. G.S. 115C-325(e)(1)(b).

52. G.S. 115C-325(e)(1)(f).

53. G.S. 115C-325(e)(1)(g).

54. G.S. 115C-325(e)(1)(o).

55. *Faulkner v. New Bern-Craven County Bd. of Educ.*, 311 N.C. 42, 59, 316 S.E.2d 281, 291 (1984).

56. G.S. 115C-325(e)(1)(b).

57. *Thompson v. Wake County Bd. of Educ.*, 31 N.C. App. 401, 230 S.E.2d 164 (1976),

at school.⁵⁸ That opinion does not directly tie the behavior to the statutory term “immorality.”

The older decision directly dealing with the term “immorality” is a court of appeals decision in a case arising in the Wake County school system—the same case discussed in connection with insubordination and neglect of duty in section 1900. The superintendent recommended that an elementary school teacher be dismissed on the ground of immorality (along with the other grounds) because (1) he repeatedly used the terms “damn” and “hell” in the classroom when angry, (2) he referred to his female students as “whores,” and (3) he entered the girls’ restroom to retrieve a female student for punishment. By the time the matter reached the court of appeals, the only allegedly immoral conduct found to be supported by evidence in the record was one incident of referring to a student as a whore. The court of appeals concluded, “While we deplore [the teacher’s] use of language in the presence of his students, we do not think that the language used in this case warrants a finding of immorality.”⁵⁹

The newer decision directly dealing with the term “immorality” is a court of appeals decision in a case arising in the Caldwell County school system.⁶⁰ A tenured high school mathematics teacher approached a pool room armed with a 12-gauge shotgun and a concealed handgun. In response to screams from outside the pool room, two law enforcement officers opened the door and saw the teacher facing the pool room entrance with the shotgun pointed toward it. The officers ordered the teacher to put down his guns and eventually he did so. The teacher told the officers he was “looking for a friend.” One of the officers asked, “Why, to show him the gun?” and the teacher responded, “No, to show him the bullets.” The teacher pled guilty to first degree trespass and received a six-month suspended sentence. The board of education, after a hearing, ordered the teacher’s dismissal for “immorality.”

The teacher appealed the dismissal to superior court, arguing that the statutory standard of “immorality” is unconstitutionally vague as written and as applied to the facts of his case. When the superior court upheld the board’s decision, the teacher sought review from the North Carolina Court of Appeals. The court of appeals affirmed the teacher’s dismissal.

“Immorality” in the context of dismissing a career teacher is not a vague standard, the court held, so long as it is viewed “in the context of or ‘in regard to a [teaching] job.’”⁶¹ That is, “‘immorality’ in the context of a teacher

rev’d on other grounds, 292 N.C. 406, 233 S.E.2d 538 (1977); *Barringer v. Caldwell County Bd. of Educ.*, 123 N.C. App. 373, 473 S.E.2d 435 (1996).

58. *Evers v. Pender County Bd. of Educ.*, 104 N.C. App. 1, 407 S.E.2d 879 (1991), *aff’d*, 331 N.C. 380, 416 S.E.2d 3 (1992).

59. *Thompson*, 31 N.C. App. at 425, 230 S.E.2d at 178.

60. *Barringer*, 123 N.C. App. 373, 473 S.E.2d 435.

61. *Barringer*, 123 N.C. App. at 379, 473 S.E.2d at 439 (citation omitted).

dismissal, signifies a standard directly related to the teacher's fitness for service. Although North Carolina courts had had no case before this one in which the constitutionality of the term was raised, the court said, it is one that can be readily understood by a person of ordinary intelligence who knows what the job of teaching entails: it means such conduct that by common judgment reflects unfavorably upon a teacher's fitness to teach.

The teacher argued that even if the "immorality" standard was not unconstitutionally vague as written, it was unconstitutionally vague as applied to him in this circumstance because it did not give him fair warning that conduct such as his was prohibited. The appeals court disagreed. One of a teacher's statutory duties is to maintain discipline in school and to encourage temperance and morality. A "reasonable public school teacher of 'ordinary intelligence,'" the court said, would know that this conduct was "likely to become known to the general student population at the school where the teacher was employed, and would reflect to the teacher's 'young charges' [citation omitted] a poor example manifesting approval of violence and taking the law into one's own hands, consequently placing the teacher's professional position in jeopardy."⁶²

The third decision, which does not directly deal with the term "immorality," is a court of appeals decision in a case arising in the Pender County school system. The superintendent recommended dismissal of a high school teacher on the grounds of inadequate performance, neglect of duty, failure to fulfill the duties of a teacher, and conduct justifying revocation of the teacher's certificate, as well as immorality. The court found substantial evidence that the teacher had engaged in sexual intercourse with a fifteen-year-old student during school time on school property. From that evidence, the court said, the board of education "could properly conclude that the grounds for the superintendent's recommendation to dismiss [the teacher] were true and substantiated."⁶³ The court did not explicitly say that the conduct satisfied the statutory ground of "immorality," but the implication is clear—as common sense would indicate.

These three decisions demonstrate very different kinds of conduct that might be described as immoral: referring to a schoolchild as a "whore," brandishing a shotgun in a threatening way, and engaging in sexual intercourse with a minor student at school. Human beings are capable of many other types of conduct that might be considered immoral. In imagining how the North Carolina courts might deal in the future with conduct alleged to be immoral, school officials are guided by the requirement that there be a link between the immoral conduct and the teacher's fitness to perform his or her duties as a

62. 123 N.C. App. at 382, 473 S.E.2d at 441 (citation omitted).

63. *Evers*, 104 N.C. App. at 26, 407 S.E.2d at 893.

teacher. A second issue, however, remains largely unaddressed: against what standard is conduct to be judged immoral?

Question of link to job fitness. In many other states, the law—either directly by statute or by court interpretation—requires that dismissal of a tenured teacher on the ground of immorality (or other similar term) be based on a link between the immoral conduct by the teacher and fitness of the teacher to teach, just as the 1996 Caldwell County decision requires from North Carolina. Courts base the requirement of the link on two main considerations. The first is avoidance of constitutional problems of vagueness and ensuring basic fairness. The second is avoiding undue invasion of privacy.

The vagueness and basic fairness considerations were the fundamental concerns of the California Supreme Court in one of the leading cases in the country applying the immorality standard.⁶⁴ In that case a teacher had, at a time of emotional stress, engaged over the course of a week in homosexual, but lawful, conduct with a male friend. Six years later the State Board of Education revoked the teacher's license on the grounds of immoral conduct⁶⁵ because of the homosexual activity, and the teacher appealed. The California Supreme Court overturned the revocation, saying that before a license could be revoked for immorality, there must be a showing that the allegedly immoral conduct caused the teacher to be unfit to teach. The court said that unfitness to teach must be a part of the finding of immorality, first, to avoid unconstitutional vagueness. "[S]tatutes must be sufficiently clear as to give fair warning of the conduct prohibited," the court said, "and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies."⁶⁶ To provide that the conduct must render the teacher unfit to teach provides the clarity required and sets the standard by which boards of education and courts can judge the conduct, the court said. Second, fitness to teach must be a part of the judgment of immorality for reasons of basic fairness, the court said. Without such a requirement of a link to fitness to teach, every teacher in the state would be subject to dismissal because "[i]n the opinion of many people laziness, gluttony, vanity, selfishness, avarice, and cowardice constitute immoral conduct."⁶⁷

In contrast is a 1994 decision of the Alaska Supreme Court, in a case in which a teacher with a ten-year spotless teaching record in Alaska was fired when the school board learned that he had engaged in sexual contact with a

64. *Morrison v. State Bd. of Educ.*, 82 Cal. Rptr. 175, 461 P.2d 375 (1969).

65. Strictly speaking this is not a dismissal case but a license revocation case. The court pointed out, however, that the effect of the revocation of the license was to make the teacher unemployable.

66. *Morrison*, 461 P.2d at 387.

67. *Morrison*, 82 Cal. Rptr. at 183, 461 P.2d at 383.

fifteen-year-old student a dozen years earlier in Idaho.⁶⁸ The court specifically held that “there need not be a separate showing of a nexus between the act or acts of moral turpitude and the teacher’s fitness or capacity to perform his duties.”⁶⁹ An explanation for the court’s holding, however, can be discovered in the Alaska statute’s definition of “immorality”: “the commission of an act that, under the laws of this state, constitutes a crime involving moral turpitude.”⁷⁰ Before a teacher may be dismissed for immorality in Alaska, there must be a showing that the conduct was criminal. It may be that the Alaska court believed that this requirement ensured that the application of the immorality standard would not be unconstitutionally vague or unfair.

A second reason courts have put forward for requiring a showing of a link between the conduct of the teacher and his or her fitness to teach is the avoidance of undue interference with individual privacy rights. As the Supreme Court of West Virginia said in a 1981 decision, privacy interests of the individual must be balanced against the interests of the school board.⁷¹ The conduct of a teacher ceases to be private, the court said, when it “affects the performance of the occupational responsibilities of the teacher.”⁷²

Interestingly the regulations of the North Carolina State Board of Education for revocation of a teacher’s license, found in the Administrative Code, list as grounds for revocation the fact that a teacher has been dismissed by a local board of education for immorality or has engaged in unethical or lascivious conduct. The regulations specifically provide, however, that before the license may be revoked on these grounds, there must be shown “a reasonable and adverse relationship between the underlying misconduct and the continuing ability of the person to perform any of his/her professional functions in an efficient manner.”⁷³

Standard by which immorality is judged. A question left largely unanswered by the North Carolina cases is the standard by which the morality of a teacher’s conduct is to be judged. After all, as the Commonwealth Court of Pennsylvania pointed out in a 1993 case involving a dismissal, on the grounds of immorality, of a school director who assaulted an administrator, “we recognize that not all unprofessional conduct automatically rises to the level of immorality.”⁷⁴

68. *Toney v. Fairbanks North Star Borough Sch. Dist., Bd. of Educ.*, 881 P.2d 1112 (Alaska 1994).

69. *Toney*, 881 P.2d at 1114.

70. *Toney*, 881 P.2d at 1113 n.2.

71. *Golden v. Board of Educ.*, 285 S.E.2d 665 (W. Va. 1981).

72. *Golden*, 285 S.E.2d at 669.

73. N.C. ADMIN. CODE tit. 16, ch. 6C §§ .0312(3) and (8).

74. *Horton v. Jefferson County-Dubois Area Vocational Technical Sch.*, 630 A.2d 481 (Pa. Commw. Ct. 1993).

In the North Carolina immorality case from Wake County, the court of appeals said that the local board of education “found [the teacher’s] characterization of a female student as a whore to be an immoral act, *contrary to accepted community standards.*”⁷⁵ The court then went on, as discussed above, to find that the single incident of the use of that term did not constitute immorality, but in so doing the court did not indicate whether the proper standard for judging immorality was “accepted community standards.” The court simply said “*we do not think that the language used in this case warrants a finding of immorality,*”⁷⁶ apparently meaning the members of the court itself.

The Supreme Court of Oregon summarized many of the issues involved in choosing a standard by which to determine immorality with the following analysis in a 1986 opinion: “Among these issues are whether ‘immorality’ refers to what people profess or what they do, and what part of the public is entitled to set standards of morality for the population as a whole. There are issues whether ‘immorality’ refers to conduct that those admitted to the standard-setting ‘public’ consider immoral for themselves, or more particularly for their children, or for school teachers, or for one sex and not the other.”⁷⁷ Because of these difficulties the Oregon court ordered the state Fair Dismissal Appeals Board (as to which there is no corresponding agency in North Carolina) not to look to the community for standards of morality, but to develop them itself.

In another example of how other states have dealt with this question, the California courts judge a teacher’s conduct by asking seven questions: (1) What is the likelihood that the conduct may have adversely affected students or fellow teachers? (2) What degree of such adversity is anticipated? (3) How long ago was the conduct? (4) What kind of teaching certificate did the teacher have? (5) What extenuating or aggravating circumstances existed? (6) What is the likelihood that the conduct will recur? and (7) To what extent will disciplinary action adversely affect the constitutional rights of this teacher or other teachers?⁷⁸ Of course the California courts, in asking these questions, are looking to the extent to which there is a link between the immoral conduct and the teacher’s fitness, as discussed above.

The North Carolina law remains unclear on the standard against which the morality of the teacher’s conduct is to be judged. In the Caldwell County case, the court said that it had determined that immorality means “such conduct that by common judgment reflects upon a teacher’s fitness to teach.”⁷⁹

75. *Thompson v. Wake County Bd. of Educ.*, 31 N.C. App. 401, 425, 230 S.E.2d 164, 178 (1976), *rev’d on other grounds*, 292 N.C. 406, 233 S.E.2d 538 (1977) (emphasis added).

76. *Thompson*, 31 N.C. App. at 425, 230 S.E.2d at 178 (emphasis added).

77. *Ross v. Springfield Sch. Dist. No. 19*, 716 P.2d 724, 727 (Or. 1986) (en banc).

78. *See* *Governing Bd. of ABC Unified Sch. Dist. v. Haar*, 28 Cal. App. 4th 369, 33 Cal. Rptr. 2d 744 (Ct. App. 1994).

79. *Barringer v. Caldwell County Bd. of Educ.*, 123 N.C. App. 373, 381, 473 S.E.2d at 440 (1996).

Use of Alcohol and Drugs

The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for “habitual or excessive use of alcohol or nonmedical use of a controlled substance as defined in Article 5 of Chapter 90 of the General Statutes.”⁸⁰ Article 5 is the Controlled Substances Act, and it lists more than 200 drugs that may not be legally possessed. Two appellate court cases, one arising from the New Bern-Craven County school system⁸¹ and one arising from the Rutherford County school system,⁸² have applied this ground for dismissal.

In the New Bern-Craven County case, the state’s highest court found that a teacher was drinking at school, after being warned not to, in a way that was obvious to students, parents, and others. That conduct it found, amounted to “excessive” use of alcohol. What lesser conduct might amount to excessive use remains to be determined by courts in future cases.

In the Rutherford County case, the court of appeals upheld the dismissal of a teacher who had been arrested on felony marijuana charges. The teacher had been suspended while the criminal case was pending. After the criminal charges were dropped the board of education voted to dismiss the teacher on the grounds of “nonmedical use of a controlled substance.” At the hearing before the board several law enforcement officers testified to the search of the teacher’s property, the discovery of the marijuana, and the teacher’s admission to them that he used marijuana. On appeal to the courts the teacher argued that the criminal charges had been dismissed because the search of his property had been unconstitutional and that the evidence from the search should not be used against him in the dismissal proceeding. The court of appeals noted that nothing in the record of the dismissal proceeding showed why the criminal charges were dismissed and that the teacher had not objected at the dismissal hearing to the testimony of the law enforcement officers. Therefore it let the evidence of the search stand and affirmed the dismissal.

Habitual or excessive use of alcohol. In the New Bern-Craven County case, the board of education dismissed a tenured teacher on two grounds, one of which was habitual or excessive use of alcohol. The evidence showed that on several occasions teachers, students, and parents had detected the odor of alcohol on the teacher’s breath at school. The court of appeals overturned the dismissal on the grounds of alcohol use.⁸³ In so doing it cited a dictionary for

80. G.S. 115C-325(e)(1)(f).

81. *Faulkner v. New Bern-Craven County Bd. of Educ.*, 311 N.C. 42, 316 S.E.2d 281 (1984).

82. *In re Freeman*, 109 N.C. App. 100, 426 S.E.2d 100 (1993).

83. *Faulkner v. New Bern-Craven County Bd. of Educ.*, 65 N.C. App. 483, 309 S.E.2d 548 (1983), *rev’d*, 311 N.C. 42, 316 S.E.2d 281 (1984).

definitions of “excessive” (“characterized by or present in excess; . . . very large, great or numerous”) and “habitual” (“doing, practicing, or acting in some manner by force of habit: customarily doing a certain thing”).⁸⁴ The court held that the evidence in this case did not rise to the level of those definitions. It said, “If the charge were drinking during school duty hours the decision would be otherwise; but, of course, the Legislature has not seen fit to make that a ground for discharging career teachers.”⁸⁵

The state supreme court reversed the decision of the court of appeals, saying, “[A] course of conduct involving the use of alcohol by a teacher on school property during school hours, the same being obvious to his students and other school personnel and parents, repeated after continued warnings, is ‘excessive’ within the meaning of [the Teacher Tenure Act].”⁸⁶

Use of drugs. In the Rutherford County case the evidence against the teacher was overwhelming: law enforcement officers testified to finding marijuana on his premises and to the teacher’s statements to them that he smoked marijuana. We can only speculate about what lesser evidence of use would justify a dismissal. The controlled substances referred to in this ground for dismissal are those covered by the Controlled Substances Act, meaning that their very possession is a crime. It seems likely that even one incident of use of such drugs would support an action of dismissal by the board. The “habitual” or “excessive” standard that applies for dismissal for alcohol use does not, it appears, apply to drug use. After all, alcohol possession is lawful.

Question of necessity of link to job performance. The earlier section on immorality as a ground discusses the requirement that a dismissal on that ground, to withstand judicial review, include a finding that there is a link between the immoral conduct of the teacher and the teacher’s fitness for teaching. The same issues arise with respect to habitual or excessive use of alcohol. In the New Bern–Craven County case, the court’s finding that the teacher drank at school in a way that was obvious to others at school made unnecessary a discussion of whether a finding of a link was necessary—the link was obvious. In another case, perhaps involving drinking away from school in a manner that does not in any way involve students, parents, or other teachers, the issue of the need for a link may arise.

The need for demonstration of a link may arise in cases involving illegal drugs as well, though the very illegality of the substances may make the courts more willing to support dismissals without requiring demonstration of a link. No discussion of the need for such a link was found in the Rutherford County case.

84. *Faulkner*, 65 N.C. App. at 490, 309 S.E.2d at 552.

85. *Faulkner*, 65 N.C. App. at 491, 309 S.E.2d at 552.

86. *Faulkner*, 311 N.C. at 59, 316 S.E.2d at 291.

Conviction of a Felony or Crime Involving Moral Turpitude

The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for “conviction of a felony or a crime involving moral turpitude.”⁸⁷ No North Carolina appellate court cases have interpreted this statutory provision.

A felony is generally a serious crime, punishable by at least two years in prison.⁸⁸ The North Carolina Supreme Court has described a crime of moral turpitude as one that involves “an act of inherent baseness in the private, social, or public duties which one owes to his fellowmen or to society, or to his country, her institutions and her government.”⁸⁹ Crimes of moral turpitude in North Carolina have been found to include murder and kidnapping,⁹⁰ giving a worthless check for merchandise,⁹¹ burglary,⁹² solicitation of robbery,⁹³ misappropriation of client funds by a lawyer,⁹⁴ and embezzlement.⁹⁵ Crimes found not to encompass moral turpitude include filing a false income tax return,⁹⁶ trespassing,⁹⁷ and driving while impaired.⁹⁸

Felonies and crimes of moral turpitude are gross examples of immoral conduct. It seems likely that courts will uphold dismissals on this ground under the Teacher Tenure Act without any further showing, not requiring a link between the crime and the teacher’s fitness for the job. This is true for three reasons: First, felonies and crimes involving moral turpitude are very serious offenses. The unfitness of the criminal can be presumed. Second, because they are crimes, the elements of the offenses are clearly delineated. There can be little doubt about what the teacher did. And third, this ground for dismissal requires that there be a *conviction*. That means that the teacher’s guilt has been proved in the criminal courts beyond a reasonable doubt. Where a teacher has been convicted of one of these crimes, the propriety of a dismissal should not be in doubt.

87. G.S. 115C-325(e)(1)(g).

88. *See generally* G.S. ch. 14.

89. *State v. Mann*, 317 N.C. 164, 170, 345 S.E.2d 365, 369 (1986).

90. *Averitt v. Rozier*, 119 N.C. App. 216, 458 S.E.2d 26 (1995).

91. *Harris v. Temple*, 99 N.C. App. 179, 392 S.E.2d 752, *disc. review denied*, 327 N.C. 428, 395 S.E.2d 678 (1990).

92. *State v. Surles*, 230 N.C. 272, 52 S.E.2d 880 (1986).

93. *Mann*, 317 N.C. 164, 345 S.E.2d 365.

94. *North Carolina State Bar v. Speckman*, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

95. *Gibby v. Murphy*, 73 N.C. App. 128, 325 S.E.2d 673 (1985).

96. *Licensing Bd. v. Coe*, 19 N.C. App. 84, 198 S.E.2d 19 (1973).

97. *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975).

98. *Willis*, 288 N.C. 1, 215 S.E.2d 771.

False Application Information

The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for “providing false information or knowingly omitting a material fact on an application for employment or in response to a preemployment inquiry.”⁹⁹ No appellate court decisions have interpreted this ground for dismissal. This ground was added by the General Assembly in 1992 in response to a ruling in a case that did not reach the appellate courts that lying on the job application was not “immoral” and did not fit other grounds for dismissal.¹⁰⁰ To make sure that a school system can dismiss an employee who provides false information or omits material facts in the job selection process, this statutory provision was added.

Section 1902 Dismissal Related to Concerns Regarding Physical or Mental Capacity

The third category contains only one ground for dismissal: the employee’s physical or mental incapacity. The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for “physical or mental incapacity.”¹⁰¹ The North Carolina appellate courts have directly considered this ground for dismissal in two cases. In one of them, a case arising in the Wake County school system, the school board found that a teacher had engaged in certain kinds of misconduct (using the words “damn” and “hell” in his elementary school classroom and referring to some of his students as “whores”) that justified dismissal on grounds of immorality and neglect of duty.¹⁰² Further, the board found, use of such language demonstrated a lack of control and therefore constituted mental incapacity. The superior court rejected such bootstrapping (calling the conclusion of mental incapacity “a clear product of predisposition overlooking a non sequitur”)¹⁰³ and the court of appeals agreed.

In the second case, arising in the Hertford County school system, the court of appeals made three elements of this ground for dismissal clear: (1) when the “incapacity” must exist to support a dismissal, (2) the definition of the term that should guide future decisions, and (3) how long the incapacity must last.¹⁰⁴

99. G.S. 115C-325(e)(1)(o).

100. 1991 N.C. Sess. Laws ch. 942 (1992 Reg. Sess.).

101. G.S. 115C-325(e)(1)(o).

102. *Thompson v. Wake County Bd. of Educ.*, 31 N.C. App. 401, 230 S.E.2d 164 (1976), *rev’d on other grounds*, 292 N.C. 406, 233 S.E.2d 538 (1977).

103. *Thompson*, 31 N.C. App. at 424, 230 S.E.2d at 177.

104. *Bennett v. Hertford County Bd. of Educ.*, 69 N.C. App. 615, 317 S.E.2d 912, *cert. denied*, 312 N.C. 81, 321 S.E.2d 893 (1984).

Incapacity

When the incapacity must exist. In the Hertford County case, a teacher with a number of ailments was unable to work for sporadic periods during 1978, 1979, and 1980. Finally at the beginning of the 1980–81 school year she took a leave of absence, which was extended when her condition failed to improve sufficiently. Finally, she returned to work with two months left in the school year and finished the year without missing any further work. Three weeks after she returned, the superintendent informed her that he would recommend her dismissal on the ground of physical incapacity, and during the summer the board voted to dismiss her on that ground. When the matter reached the court of appeals, that court reversed the dismissal, saying that for physical incapacity to stand as a ground for dismissal, the incapacity must exist *at the time of the dismissal*.

The board of education argued to the court of appeals that the teacher's physical problems had adversely affected her teaching performance in the past and that her past conduct and medical history constituted evidence of her present unfitness for the job. The court of appeals disagreed. Past performance may be an indicator of future performance in those instances where the charge against the teacher is inadequate performance or neglect of duty, the court said, but "the same is not necessarily so with respect to past health conditions, especially in view of indications, as here, that past health problems have been alleviated if not cured."¹⁰⁵

Definition of "incapacity." In the Hertford County case, the court said that physical incapacity "refers to a present and continuing inability to perform the duties and meet the responsibilities and physical demands customarily associated with the individual's job as a career teacher in the public schools." In this way the court tied the incapacity to the fitness for the job in a way similar to the court's treatment of immorality.

While the court was explicitly defining the term "physical incapacity" because that was the issue before it, its definition would seem to apply equally and fully to "mental incapacity."

How long the incapacity must last. In the Hertford County case the court said that for the dismissal to be grounded on incapacity, "[t]he projected duration of the incapacity must be long term or indefinite with no reasonable prospect for rapid rehabilitation."¹⁰⁶

105. *Bennett*, 69 N.C. App. at 621, 317 S.E.2d at 917.

106. *Bennett*, 69 N.C. App. at 619, 317 S.E.2d at 916.

Relationship to the Americans with Disabilities Act

Section 303 contains a discussion of the Americans with Disabilities Act, a federal statute that prohibits discrimination in employment on account of disability. An individual with a disability may be dismissed under the federal act only if he or she is unable, with reasonable accommodation from the employer, to perform the essential elements of the job. Because it is very likely that any physical or mental incapacity that would justify dismissal under the Teacher Tenure Act would also be a disability protected by the federal act, school systems must be careful when basing a dismissal under the Teacher Tenure Act on the ground of mental or physical incapacity. The school system must consider whether there are accommodations it could make that would permit the teacher to perform the essential elements of the job. To fail to do so would be a violation of the Americans with Disabilities Act.

Section 1903 Dismissal Related to Concerns Regarding the Teacher's License

The fourth category contains two grounds for dismissal that relate to the teacher's teaching certificate.¹⁰⁷ They are:

- failure to keep a certificate current and
- any reason that is cause for revocation of a teaching certificate.

Their inclusion as grounds for dismissal of a tenured teacher is consistent with the statutory requirement that “[a]ll teachers employed in the public schools of the State . . . shall be required either to hold or be qualified to hold a certificate.”¹⁰⁸

Failure to Keep Certificate Current

The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for “failure to maintain his certificate in a current status.”¹⁰⁹ No appellate court decision applies or discusses this provision, probably because it is so straightforward and clear. The requirements for maintaining a certificate in current status

107. See section 800 for a discussion of the fact that the terms “certificate” and “license” are equivalent terms.

108. G.S. 115C-295(a). *See also* G.S. 115C-315(f).

109. G.S. 115C-325(e)(1)(m).

are spelled out in the Administrative Code.¹¹⁰ The laws and regulations relating to teaching certificates are the subject of chapter 8 of this book. Section 802 details the requirements for maintaining a license in current status.

Generally speaking, graduates of approved teacher education programs who are new to the teaching profession must serve an initial license period of three years. If they are successful, their licenses will be converted to continuing licenses. A continuing license is valid for a five-year period. To maintain a continuing license in current status, a teacher must accrue fifteen units of renewal credit during the five-year period, through combinations of college courses, teaching experience (one unit for each year taught), local in-service workshops, and other approved activities.

Cause for Revocation of a Certificate

The Teacher Tenure Act provides that a tenured teacher may be dismissed or demoted for “any cause which constitutes grounds for the revocation of such career teacher’s teaching certificate.”¹¹¹ That is, if something is grounds for revocation of a license, it is also grounds for dismissal, even if the license revocation does not happen. One appellate court case has applied this ground for dismissal.¹¹²

Grounds for revocation of a certificate. The grounds for revocation are found in regulations adopted by the State Board of Education in the Administrative Code.¹¹³ They are discussed extensively in section 810. In summary, they are

- fraud in the process of applying for certification;
- changes in the certification documentation that make the person ineligible;
- conviction or plea of no contest to a crime if there is a reasonable and adverse relationship between the crime and the teacher’s continuing ability to perform his or her duties in an effective manner;
- dismissal of the teacher by a local board of education on the grounds of immorality if there is a reasonable and adverse relationship between the misconduct and the teacher’s continuing ability to perform his or her duties in an effective manner;
- dismissal of the teacher by a local board of education on the grounds of physical or mental incapacity;

110. N.C. ADMIN. CODE tit. 16, ch. 6C §§ .0301 through .0312.

111. G.S. 115C-325(e)(1)(k).

112. *Burrow v. Randolph County Bd. of Educ.*, 61 N.C. App. 619, 301 S.E.2d 704 (1983).

113. N.C. ADMIN. CODE tit. 16, ch. 6C § .0312.

- resignation from the employment of a local board of education without thirty days' notice, except with the prior consent of the superintendent;
- revocation of a teaching certificate by another state;
- any other illegal, unethical, or lascivious conduct by a person, if there is a reasonable and adverse relationship between the misconduct and the teacher's continuing ability to perform his or her duties in an effective manner; and
- failure to report physical or sexual abuse of a child.

Relationship between these grounds and grounds for dismissal. Two of these certificate-revocation grounds overlap directly with statutorily stated grounds for dismissal and appear in some ways broader and in some ways narrower than the statutory-dismissal grounds.

The first of the two overlaps involves convictions of crimes. The statutory-dismissal ground is conviction of a felony or crime involving moral turpitude. The certificate-revocation ground—which by this provision of law becomes a ground for dismissal as well—is conviction of any crime, as long as there is “a reasonable and adverse relationship between the underlying crime and the continuing ability of the person to perform any of his/her professional functions in an effective manner.” This certificate-revocation ground is in one way broader than the statutory-dismissal ground: it applies to *any crime*, whereas the statutory-dismissal ground applies only to felonies and crimes involving moral turpitude. But this certificate-revocation ground may be narrower in that it clearly requires a relationship between the crime and the ability of the teacher to teach, whereas the statutory-dismissal ground may not. In the one case to apply the certification-revocation ground (a case arising from the Randolph County school system),¹¹⁴ the state court of appeals found that there was a reasonable and adverse relationship between involuntary manslaughter—a teacher shot her husband—and a teacher's ability to perform her duties. Whether the statutory-dismissal ground requires such a link is discussed in section 1901. The manner in which the Office of Administrative Hearings has dealt with the issue of the link in certificate-revocation cases is discussed in section 810.

The second of the two overlaps involves the statutory-dismissal ground of immorality and the certificate-revocation ground of “other illegal, unethical, or lascivious conduct.” Again, the certificate-revocation ground requires a link between the underlying conduct and the ability to perform the job. As discussed in the section on immorality, so does the statutory-dismissal ground of immorality.

114. *Burrow*, 61 N.C. App. 619, 301 S.E.2d 704.

Teachers in low-performing schools. As discussed in sections 402 and 1900, the State Board of Education may, upon certain findings regarding student performance, identify a particular school as low-performing under the School-Based Management and Accountability Program. The state board may assign an assistance team to a school so identified, and the assistance team is responsible for reviewing the performance of all teachers in the school. The assistance team may, by virtue of a statute enacted at the same time as the School-Based Management and Accountability Program, recommend that the state board revoke a teacher's license for any of the grounds for license revocation identified in the list above.¹¹⁵

Section 1904 Dismissal Related to Concerns about Citizenship

The fifth category contains two grounds for dismissal that relate to concerns about the teacher's sense of civic responsibility. They are

- failure to repay money owed the state and
- advocating the overthrow of the government.

Failure to Repay Money Owed to the State

The Teacher Tenure Act provides that a state-paid tenured teacher may be dismissed for "failure to repay money owed to the State in accordance with the provisions of Article 60, Chapter 143 of the General Statutes."¹¹⁶ Article 60 by its own terms applies to employees of the state of North Carolina, employees of community colleges, and employees of boards of education.¹¹⁷ It provides that such employees "who owe money to the State and whose salaries are paid in whole or in part by State funds must make full restitution of the amount owed as a condition of continuing employment."¹¹⁸ In the one case that has come before the appellate courts (involving an employee of a community college), the court of appeals upheld the dismissal of an employee who owed but did not repay a college loan debt to East Carolina University.¹¹⁹

The statute provides that the employer—such as a board of education—must terminate the employee's employment if after written notice the employee does not repay the money owed within a reasonable period of time.¹²⁰ An em-

115. G.S. 115C-296(d).

116. G.S. 115C-325(e)(1)(n).

117. G.S. 143-552(1).

118. G.S. 143-553(a).

119. *Battle v. Nash Technical College*, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

120. G.S. 143-553(b).

employee may elect in writing to have at least 10 percent of his or her net disposable earnings periodically withheld for applications toward the debt, and so long as that withholding is ongoing, the employee is not subject to dismissal under this statute.

The statute also provides that the employer may determine that a particular employee is for some extraordinary reason unable to pay the debt and may continue to employ that person so long as the person is making a good-faith effort to repay.

Advocating the Overthrow of the Government

The Teacher Tenure Act provides that a state-paid tenured teacher may be dismissed for “advocating the overthrow of the government of the United States or of the State of North Carolina by force, violence, or other unlawful means.”¹²¹ This ground for dismissal has never been applied or interpreted by the appellate courts, and any attempt by a board of education to dismiss a teacher on this ground would surely be met by a challenge from the teacher on grounds that the dismissal is a violation of the teacher’s free speech rights under the First Amendment to the United States Constitution. As explained in section 201, in such a challenge a court would be called upon to conduct a balancing of the interests. It would ask which interest in a particular case is more important: the interest of the employee in speaking out or the interest of the board of education in avoiding disruption and disturbance. In the case of advocacy of violence, the balance would likely be struck in favor of the board of education.

Section 1905 Dismissal in a Reduction in Force

The last category for teacher dismissal is different from the other five in that the one ground for dismissal that it contains—reduction in force—permits the dismissal of an employee protected by the Teacher Tenure Act even if there are no concerns about the teacher’s job performance, conduct or character, physical or mental capacity, licensure status, or citizenship. In a reduction in force situation, a teacher may have exhibited excellent performance and be of exemplary character and yet still be dismissed because of a “justifiable decrease in the number of positions due to district reorganization, decreased enrollment, or decreased funding.”¹²² For a full discussion of the law related to reductions in force, see section 1206.

121. G.S. 115C-325(e)(1)(h).

122. G.S. 115C-325(e)(1)(l).

