

Chapter 20

Procedures for Dismissal under the Teacher Tenure Act

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Chapter 20

Procedures 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 for one or more of fifteen grounds set out in the act and only according to the procedures set out in the act. Chapter 19 discusses the grounds and this chapter discusses the procedures.

In dismissing a tenured teacher, a local board of education must afford the teacher due process of law. That is because once a teacher gains tenure, the teacher's job becomes his or her property. To dismiss the teacher is to take that property away. As discussed in section 202 of this book, for a government—such as a local school board—to take away an individual's property the government must follow the requirements of due process. The procedures required by the Teacher Tenure Act fully meet all requirements of due process. If they are properly followed, there can be little room for argument that a dismissed teacher was denied due process.

Almost all teacher dismissal actions are actions of the local board of education. As discussed in the first chapter of this book, the local board is the employer and exercises hiring and firing authority over employees generally, including teachers.

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

2. As discussed at length in chapter 18 of this book, the employees fully protected by the Teacher Tenure Act include those who fit the definition of "teacher" set out in G.S. 115C-325(a)(6) and who have achieved tenure. Also protected during the contract year (but not in the end-of-the-year contract renewal decision) 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. Collectively all these employees—those who enjoy tenure act protections through tenure, those who enjoy them during the probationary year, and those who enjoy them during the contract term—are termed "career employees." G.S. 115C-325(a)(1a).

In one limited set of circumstances, however, the decision to dismiss a teacher is made by the State Board of Education, not the local school board. That occurs when the school to which the teacher is assigned is designated as low performing under the School-Based Management and Accountability Program and the evaluations of the teacher by the assistance team assigned to the school are negative. (For a discussion of the procedures for dismissal in these special circumstances, see section 2008.)

Section 2000 Dismissal Contrasted with Nonrenewal

There are two distinct ways in which an action by a local board of education may cause the termination of a teacher's employment. One is dismissal. Dismissal is the subject of chapter 19 and this chapter. The other is nonrenewal. Nonrenewal applies only to probationary teachers (that is, teachers subject to the Teacher Tenure Act who have not yet obtained tenure). (Nonrenewal is discussed in section 1802; for purposes of this discussion, nonrenewal includes a board vote against granting tenure, as discussed in section 1803.)

Dismissal and nonrenewal differ in five significant ways.

First, dismissal and nonrenewal differ in when they can occur. Dismissal may occur at any time—at the beginning of the school year, during the school year, at the end of the school year, or over the summer. A nonrenewal decision may be made only near the end of the school year. During the school year the termination of employment of a probationary teacher may be accomplished only by dismissal, not by nonrenewal.

Second, dismissal and nonrenewal differ in the grounds that the law requires for them. Dismissal may occur only for one of the fifteen grounds set out in Chapter 115C, Section 325(e) of the North Carolina General Statutes (hereinafter G.S.) discussed in chapter 19. In a dismissal decision, the local board of education must be satisfied that the grounds, as put forward by the superintendent, are true and substantiated. Nonrenewal may occur for any reason the board deems sufficient, so long as the nonrenewal decision is not arbitrary, capricious, discriminatory, personal, or political.

Third, dismissal and nonrenewal differ in the applicability of due process requirements. Dismissal deprives a teacher of property and so must be done in compliance with due process. Nonrenewal does not deprive a probationary teacher of property. Because the Teacher Tenure Act does not give to a probationary teacher a "legitimate claim of entitlement,"³ it does not create a property interest. Therefore nonrenewal need not be done in compliance with due

3. See section 202.

process. It need only be done in compliance with the nonrenewal requirements set out in the Teacher Tenure Act.

Fourth, in a dismissal, the teacher must be apprised of the grounds for the dismissal. In a nonrenewal, there is no requirement that the teacher be told the reasons.⁴

And fifth, in a dismissal, the teacher has the right to hearings before a case manager and the local board of education. In a nonrenewal, there is no right to a hearing, but a nonrenewed teacher who believes that the nonrenewal was arbitrary, capricious, discriminatory, personal, or political may bring an action in superior court, as discussed in section 1802.

Section 2001 Dismissal Step One: Superintendent's Decision and Notice to the Teacher

Dismissal of a teacher must begin with the recommendation of the superintendent. The Teacher Tenure Act explicitly provides that a teacher "may not be dismissed except upon the superintendent's recommendation."⁵ The one exception is dismissal by the State Board of Education under the School-Based Management and Accountability Program, discussed in sections 402, 1900, and 2008.

Requirement of the Superintendent's Recommendation

As discussed in section 1200, G.S. Chapter 115C repeatedly sets up a standard scheme in school hiring, calling for the board of education to make hiring decisions "upon the recommendation of the superintendent." As explained in that section, the meaning of that phrase is not entirely clear. This is the best reading: while the superintendent has an obligation to make recommendations to the local board of education, the board of education is free to hire whomever it chooses, whether it is the person recommended by the superintendent or not.

Similarly, as discussed in section 1802, G.S. Chapter 115C sets up the same scheme for nonrenewal of probationary teachers at year's end. The statute provides that the board may refuse to renew a probationary teacher's contract for the following year "upon recommendation of the superintendent." The best reading of that provision is that the superintendent is required to make a recommendation with regard to renewal of probationary teachers, but the local board of education may exercise its discretion to decide to nonrenew a teacher even in the absence of a recommendation of nonrenewal by the superintendent.

4. See section 1802.

5. G.S. 115C-325(h)(1).

With respect to dismissals, however, the statute appears to set the scheme up differently. Rather than merely stating that the board of education may vote to dismiss a teacher “upon the recommendation of the superintendent,” the statute provides that a teacher “may not be dismissed . . . except upon the superintendent’s recommendation.” That is, without the recommendation of the superintendent, dismissal of a teacher may not occur.

The requirement that the process of dismissal must begin with the superintendent serves due process. In the dismissal procedure outlined in the sections that follow in this chapter, the superintendent in effect serves as prosecutor, and the board of education, in effect, sits as jury. If the board could initiate the dismissal process itself, the board would in effect be both prosecutor and jury, perhaps in conflict with due process requirements.⁶

Notice to the Teacher

Before the superintendent communicates to the board of education his or her decision to recommend the dismissal of a teacher, the superintendent must give notice of that decision to the teacher. The statute sets out seven specific requirements regarding that notice.⁷

First, the superintendent must meet in person with the teacher and explain to the teacher that the superintendent intends to recommend dismissal—the statute requires “an explanation of the basis for the charges.” The teacher should then be given an opportunity to respond. This face-to-face conference is required by G.S. 115C-325(h)(2) and is consistent with the requirements of due process outlined in section 202. [Such a meeting may already have taken place in connection with a suspension without pay in contemplation of dismissal under G.S. 115C-325(f)(1). See section 2102. If it has, it need not be repeated.] After the teacher has had the opportunity to respond, the superintendent should decide whether he or she wishes to go forward with the dismissal recommendation.

Second, if the dismissal is to go forward, the superintendent must give a written notice. It must be delivered in person at the face-to-face conference, if one is held, or it may be delivered by certified mail. The superintendent should, of course, retain a copy of the notice. If the delivery is by certified mail, the superintendent should retain the post office’s verification of delivery

6. *But see* Hope v. Charlotte-Mecklenburg Bd. of Educ., 110 N.C. App. 599, 603–4, 430 S.E.2d 472, 474–75 (1993): “[T]here is no per se violation of due process when an administrative tribunal acts as both investigator and adjudicator on the same matter” (citations omitted).

7. G.S. 115C-325(h)(2).

notice when it is returned. If the delivery is by personal delivery, the teacher should be required to sign the copy, which the superintendent will retain, verifying delivery. If the teacher refuses to sign the copy, the superintendent should make a notation to that effect right on the face of the notice and sign and date that notation.

Third, the notice must clearly state the superintendent's intention to recommend to the board of education the teacher's dismissal. It must not be equivocal or ambiguous. It should say something like: "This is to notify you that I intend to recommend to the board of education your dismissal from employment."

Fourth, the notice must clearly state the grounds for the superintendent's recommendation. The actual wording of the statute requires that the superintendent "shall set forth as part of his recommendation the grounds upon which he believes such dismissal is justified."⁸ The statute does not require an explanation of the grounds, or an elaboration of the superintendent's reasoning, so it is probably sufficient that the notice simply recite the portions of G.S. 115C-325(e)(1) upon which the superintendent relies. That is, it is probably sufficient to state, for instance, something like: "The grounds upon which I believe your dismissal is justified are insubordination and neglect of duty within the meaning of G.S. 115C-325(e)(1)(c) and (d)."⁹

Fifth, the notice must contain a statement of the teacher's right to have the superintendent's recommendation reviewed. Specifically, the statute requires that the notice must include a statement to the effect that if the teacher requests a review within fourteen days after the date of receipt of the notice, he or she will be entitled to have the proposed recommendations of the superintendent reviewed by a case manager.¹⁰ The notice might say, for instance, something like, "You may have my recommendation that you be dismissed from employment reviewed by a case manager. If you wish to do so, you must make a request to me in person or in writing. If the request is made in person, you must make it within fourteen days of your receipt of this notice. If the request is made in writing, it must be postmarked within fourteen days of your receipt of this notice."

Sixth, the notice must be accompanied by a copy of the Teacher Tenure Act, G.S. 115C-325.

8. G.S. 115C-325(h)(2).

9. "A finding that the evidence of any of the grounds listed under [current G.S. 115C-325(e)(1)] was substantial justified dismissal where, as here, the teacher was notified that dismissal was based on that ground." *Baxter v. Poe*, 42 N.C. App. 404, 416, 257 S.E.2d 71, 78, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 298 (1979).

10. G.S. 115C-325(h)(2).

And seventh, the notice must be accompanied by a current list of the case managers.

A teacher may, in response to the superintendent's notice, request a hearing before a case manager, as allowed by the statute. The statute provides, in addition, that the teacher may, at his or her option, skip the hearing before the case manager and have the superintendent's recommendation reviewed at a hearing before the board of education.¹¹ The statute does not require that the superintendent's notice spell this option out to the teacher—it's up to the teacher to learn that from the copy of the Teacher Tenure Act that accompanies the notice. Similarly, it is up to the teacher to learn for himself or herself the provision found in the statute that if the teacher does not request a hearing within the fourteen-day time period, the superintendent may proceed with his or her recommendation to the board. Of course, nothing prevents the superintendent from informing the teacher of these facts, if the superintendent chooses to.

Section 2002 Dismissal Step Two: Teacher's Response to the Superintendent's Notice

A teacher who receives a notice of the superintendent's intention to recommend his or her dismissal has three options. First, the teacher may make no response at all. Second, the teacher may request a hearing before a case manager. Or third, the teacher may request a hearing before the board of education.

If the Teacher Makes No Hearing Request

If the teacher makes no hearing request within the fourteen-day period, the superintendent may file his or her recommendation with the board, and the board, if it sees fit, may by voted resolution reject the superintendent's recommendation, or accept it or modify it and dismiss, demote, or suspend the teacher. No hearing is required. In this instance, the teacher would not be entitled to a court review of the board's decision under the review provisions of the Teacher Tenure Act. The statute explicitly says so.¹²

11. G.S. 115C-325(h)(3).

12. G.S. 115C-325(n). *See Church v. Madison County Bd. of Educ.*, 31 N.C. App. 641, 230 S.E.2d 769 (1976), *disc. review denied*, 292 N.C. 264, 233 S.E.2d 391 (1977); *Rhodes v. Board of Educ. of Person County Sch. Admin. Unit*, 58 N.C. App. 130, 293 S.E.2d 295, *disc. review denied*, 58 N.C. App. 130, 293 S.E.2d 295 (1982).

If the Teacher Requests a Hearing before a Case Manager

If the teacher requests a hearing before a case manager, then the review procedure described throughout the remainder of this chapter begins. First, the teacher and the superintendent engage in a process to select the case manager, and then the case manager takes charge. Once the case manager has completed the hearing, he or she makes a report to the superintendent, reporting findings of fact and a recommendation as to whether or not the findings of fact substantiate the grounds for dismissal. The superintendent then makes his or her decision whether to continue to recommend dismissal to the board of education. If the superintendent's decision is to continue to recommend dismissal, then there will be a limited hearing before the board if the teacher requests one.

If the Teacher Requests a Hearing Directly before the Board of Education

If the teacher elects to skip the hearing before a case manager, he or she may request a hearing to be held within ten days, directly before the local board of education, in which case the teacher's only hearing will be a limited-evidence hearing, as discussed in section 2003.

Section 2003 Dismissal Step Three: Optional Case Manager Hearing

This section describes the procedure to be followed if a teacher exercises the second option described in section 2002—requesting a hearing before a case manager.

Teacher Request for a Hearing and Choice of Case Manager

The notice that the teacher receives from the superintendent of the superintendent's intention to recommend dismissal must include a statement that the teacher has fourteen days in which to request a review of that recommendation by a case manager. The notice must also include a list of the case managers.¹³

Each year the State Board of Education selects and maintains a master list of no more than forty-two case managers. To be selected, an individual must be a

13. The case manager procedure for teacher dismissal cases was added by the General Assembly in 1997, eliminating a similar procedure by which cases were heard before panels of the Professional Review Committee.

certified North Carolina Superior Court mediator, be a member of the American Arbitration Association's roster of arbitrators and mediators, or have comparable certification in alternative dispute resolution. He or she must complete a training course approved by the state board. The state board sets the pay for case managers who handle cases.

Selection of a case manager for a particular dismissal proceeding may happen in one of two ways. First, the superintendent and the teacher may agree on a person to serve and simply select that person. In that case, the person selected need not be on the State Board of Education's approved list. The state superintendent of public instruction will appoint that person to be the case manager, so long as he or she agrees to serve and can meet the procedure's time deadlines. Second, if there is not immediate agreement, the local superintendent and the teacher may each eliminate from the state board's list up to one-third of the names on the list. The local superintendent then notifies the state superintendent—within two days of receiving the teacher's request for a case manager hearing—of the request for the hearing and of the names eliminated from the list, if any. Failure to strike names from the list at this stage constitutes a forfeiture of the right to do so. The state superintendent then, within three days of receiving the notice from the local superintendent, chooses a case manager from the master list, as reduced by the local superintendent and the teacher.

Duties of the Case Manager

In general, the case manager is responsible for overseeing the procedures in the case from the time he or she is appointed through the issuance of a report to the superintendent.

Work within tight time lines. The time lines set by statute for action by the case manager are unrealistic. In essence, the case manager is required to complete all of his or her work—all prehearing procedures, the conduct of the hearing, and the preparations and submission of a report—within fifteen days of being appointed.¹⁴ A person who is approached to be a case manager in a particular dismissal should—in deciding whether he or she can undertake the case—ascertain immediately whether the superintendent and the teacher are likely to be willing to agree to an extension of the time lines (as the statute permits)¹⁵ or whether the entire procedure will have to move within the fifteen days.

14. The statute says that the limit is ten days but that the case manager may in fact extend the time an additional five days, maximum, if the case manager determines "that justice requires that a greater time be spent in connection with the investigation and the preparation of the report." G.S. 115C-325(i1)(1).

15. G.S. 115C-325(i1)(1).

Conduct the hearing. The most visible duty of the case manager is the conduct of the hearing and prehearing procedures. They are the subject of discussion below.

Make findings of fact. Perhaps the most significant duty of the case manager is “to make all necessary findings of fact”¹⁶ and to include them in his or her report.

Preponderance-of-the-evidence standard. The case manager is to make the findings of fact based on “the preponderance of the evidence.” The “preponderance of the evidence” standard is the ordinary standard used in civil cases. It is also known as the greater weight of the evidence standard; the terms are synonymous.¹⁷ For the standard to be met, it must simply be “more likely than not” that the grounds for dismissal are true: “The greater weight of the evidence does not refer to the quantity of the evidence but rather to the quality and convincing force of the evidence. It means that you must be persuaded, considering *all* of the evidence, that the necessary facts are more likely than not to exist.”¹⁸

Board of education bound by case manager’s fact findings. The significance of this duty lies in the statutory provision that, if the matter eventually ends up in a hearing before the board of education, the board must “accept the case manager’s findings of fact unless a majority of the board determines that the findings are not supported by substantial evidence,” in which case the board may make its own findings. (See section 2005.)

Findings required on every ground. The case manager must make findings of fact “on all issues related to each and every ground for dismissal” put forward by the superintendent.¹⁹ The case manager does not have the freedom to decide not to deal with a particular ground. If the case manager believes, for instance, that the facts clearly and overwhelmingly support one ground for dismissal but that on other grounds the question is not so clear, the case manager should nonetheless prepare findings relating to all grounds pursued at the hearing.

Findings required on related matters. In addition, the statute directs the case manager to make findings of fact “on all relevant matters related to the question of whether the superintendent’s recommendation is justified.”²⁰ It is not clear just what the scope of this directive is, and, because the statute is so new at the time of this writing, there are no court decisions interpreting it. It appears, however, to give the case manager some leeway in making findings of fact that are

16. G.S. 115C-325(i1)(2).

17. 1 BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 41, at 140 (4th ed. 1993).

18. BRANDIS & BROUN, at 140–41 (emphasis in original).

19. G.S. 115C-325(i1)(2).

20. G.S. 115C-325(i1)(2).

not strictly limited to the grounds for dismissal, such as perhaps findings related to dissimilar treatment of other teachers not dismissed in similar circumstances.

Make recommendations. The statute directs the case manager to “make a recommendation as to whether the findings of fact substantiate the superintendent’s grounds for dismissal.”²¹ The recommendation is, of course, not binding on the superintendent.

Make a report. The case manager is to include his or her findings of fact and recommendations in a report, delivered to the superintendent and the teacher. No particular method of delivery is specified. There are no statutory guidelines or case law guidelines for the preparation of the report. For case law guidance on the preparation of a report following a hearing by the board of education, see section 2005.

Respond to requests for further findings. Recognizing the critical importance of the case manager’s findings of fact, the statute provides avenues for interested parties to request that the case manager supplement his or her findings of fact.

Request by superintendent or teacher. Within three days of receiving the case manager’s report, the superintendent may, if he or she “contends” that the report fails to address a critical factual issue, request that the case manager prepare a supplement to the report. The superintendent must specify the omitted factual issue. If the case manager then determines that the report did in fact so fail, he or she “may prepare” the supplement, the statute says, and deliver it to the superintendent and the teacher.²² Similarly, if the teacher appeals his or her case to the board of education for a hearing, the teacher may request a supplemental report if the teacher “contends” that the original report failed to address a critical factual issue.²³ In both cases, the statutes provide that the failure of the case manager to prepare a supplemental report or to address a critical factual issue is not a basis for appeal.

Request by board of education. If the matter ends up before the board of education for a hearing, the board may, as described above, determine by majority vote that findings of fact by the case manager are not supported by substantial evidence. In that case, the board may make its own findings. The statute also provides, however, that if a majority of the board determines that the case manager did not address a critical factual issue, the board may remand the findings of fact to the case manager to complete the report to the board. If the case manager does not submit the supplemental report within seven days, the board may determine its own findings on the omitted issues.

21. G.S. 115C-325(i1)(2).

22. G.S. 115C-325(i1)(4).

23. G.S. 115C-325(j1)(2).

Case Manager's Conduct of Hearing

The statutory provisions for the hearing before the case manager—found at G.S. 115C-325(j)—are designed to allow the introduction by the superintendent and the teacher of all evidence relevant to the question of the facts, as found by the case manager, to substantiate the superintendent's grounds for dismissal. They are designed, in addition, to meet the requirements of due process, as discussed in section 202.

Nature of the hearing: full-evidence versus limited-evidence hearings.

The case manager review is the third step in the teacher dismissal process—after the superintendent's decision and the teacher's response. The possible next step is a hearing before the board of education. The case manager hearing differs from a board hearing in three significant ways. First, the case manager's recommendation on whether the facts substantiate the grounds for dismissal is merely that, a recommendation, which the superintendent may follow or not. The board's decision following its hearing, by contrast, is a final decision. Second, the case manager hearing is held, of course, before one individual. The board hearing is held before the entire board, and a majority vote there determines the outcome. And third, the hearing before the case manager is a full-evidence hearing. That is, the superintendent and the teacher have the full right "to present through witnesses any competent testimony relevant to the issue of whether grounds for dismissal or demotion exist,"²⁴ and the case manager is empowered to subpoena witnesses and require them to give testimony and produce records and documents. By contrast, the hearing before the board of education is a limited-evidence hearing. That is, the statute provides that the board is to review specified documentary material and hear statements and arguments from the superintendent and the teacher (or their attorneys), but that, with exceptions discussed in detail below, no new evidence is to be presented. The board is bound by the case manager's findings of fact and does not engage in the taking of testimony itself. The General Assembly's purpose in structuring the process in this way was to lessen the burden on the parties—they would have to present their full cases only once—and to lessen the burden on the board of education—in typical cases it would not have to conduct a full-evidence hearing at all. The board hearing is discussed in section 2004.

Rules for conducting the hearing. The Teacher Tenure Act provides that a case manager hearing is to be conducted "in accordance with reasonable rules and regulations adopted by the State Board of Education."²⁵ In fact, the only such rules adopted by the state board are found in the Administrative Code

24. G.S. 115C-325(j)(3).

25. G.S. 115C-325(j)(2).

and simply direct the local superintendent to provide the facility in which the hearing is to be conducted and employ a certified court report to record and if requested to transcribe the proceedings.²⁶

The North Carolina Court of Appeals (in a decision entered at a time that the Teacher Tenure Act called for full-evidence hearings before the board of education) has indicated that it will give great latitude to boards of education in conducting hearings, so long as the basic considerations of fairness inherent in due process are served. “Boards of Education, normally composed in large part of non-lawyers, are vested with general control and supervision of all matters pertaining to the public schools in their respective units, a responsibility differing greatly from that of a court,” the court of appeals has said. “The carrying out of such a responsibility requires a wider latitude in procedure and in the reception of evidence than is allowed in court.”²⁷ The appeals court would likely, if faced with the question, apply the same reasoning to procedures used by case managers.

Evidence that may be considered. Case managers in dismissal hearings are not bound by the rules of evidence that apply in court trials and may admit and consider evidence that would not be admissible in court.

Admission of a broad range of evidence. The Teacher Tenure Act is reasonably clear on the kinds of evidence that may be considered in a case manager hearing: “[T]he case manager may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent persons in the conduct of serious affairs.”²⁸ North Carolina courts have on several occasions invoked this evidence-at-hearings statute to approve—under former dismissal proceedings before the 1997 introduction of the case manager proceedings—the admission of evidence in dismissal hearings that might not be admissible in court. In a case arising in the Charlotte-Mecklenburg school system, a teacher objected on appeal to the admission of hearsay evidence at the hearing before the board of education.²⁹ The North Carolina Court of Appeals first noted its agreement with the evidence-at-hearings statute: “It allows the boards of education to consider a wide range of evidence, as they properly should, in reaching their decisions.”³⁰ The court next noted its view that consideration of hearsay evidence was entirely proper, saying that hearsay evidence can, “and in this case did, provide the necessary background for understanding the matter into which the

26. N.C. ADMIN. CODE tit 16, ch. 6C § .0502.

27. *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) (statutory citation and internal quotation marks omitted).

28. G.S. 115C-325(j)(4).

29. *Baxter*, 42 N.C. App. 404, 257 S.E.2d 71.

30. *Baxter*, 42 N.C. App. at 409, 257 S.E.2d at 75.

Board was inquiring.”³¹ In cases arising in the Pender County system,³² the Edenton-Chowan system,³³ and the Wake County system,³⁴ courts have similarly stressed that the range of admissible evidence at dismissal hearings is broad under the evidence-at-hearings statute.

Admission of evidence relating to matters more than three years old. An issue regarding evidence at teacher dismissal hearings stems from a provision³⁵ in the Teacher Tenure Act that, generally speaking, dismissal of a teacher may not be based on conduct or actions that occurred more than three years before the issuance of the superintendent’s notice of intent.³⁶ Given that limitation, may the case manager hear evidence of teacher conduct or actions more than three years old? In a 1979 decision the court of appeals—again, in a decision under former procedures calling for full-evidence hearings before the board of education—squarely answered that question yes.³⁷ The statute prohibits basing a decision on conduct more than three years old, the court said, not merely hearing about it: “There is no prohibition against the Board *hearing* evidence of this nature. . . . It was proper for the Board to hear this type of evidence in order to learn of the background of the case before it.”³⁸ The board may hear evidence of prior misconduct to better understand the charges related to current misconduct, but it may not base its decision on the prior misconduct.

The parties to the hearing. At a case manager hearing, the parties facing each other are the superintendent (or the superintendent’s designee) and the teacher. The superintendent has made the determination that grounds for dismissal of the teacher exist and has notified the teacher of his or her intention to

31. *Baxter*, 42 N.C. App. at 410, 257 S.E.2d at 75.

32. *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).

33. *Satterfield v. Edenton-Chowan Bd. of Educ.*, 530 F.2d 567 (4th Cir. 1975).

34. *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).

35. G.S. 115C-325(e)(4).

36. There are three exceptions to this provision, all found in G.S. 115C-325(e)(4). By one exception, dismissal may be based on a conviction of a felony or crime involving moral turpitude, even if the conviction occurred more than three years earlier. By the second, dismissal may be based on the grounds of providing false information or knowingly omitting a material fact on an application for employment or in response to a preemployment inquiry, even if that conduct occurred more than three years earlier. By the third exception, dismissal on the grounds of immorality may be based on a teacher’s sexual misconduct toward or sexual harassment of students or staff more than three years earlier.

37. *Baxter*, 42 N.C. App. 404, 257 S.E.2d 71. *See also* *Gregory v. Durham County Bd. of Educ.*, 591 F. Supp. 145, 155 (M.D.N.C. 1984).

38. *Baxter*, 42 N.C. App. at 410, 257 S.E.2d at 75.

recommend that the board dismiss the teacher. The teacher has requested the hearing for a review of that recommendation.

The role of the superintendent. The superintendent (or the superintendent's designee) is entitled to be present at the hearing, to be heard, to present evidence, and to be represented by counsel.³⁹ He or she may also cross-examine witnesses.⁴⁰ The superintendent's task is to present evidence leading to a finding by the case manager that the facts as found by the case manager substantiate the grounds for dismissal. In pursuing that task, the superintendent has the role of prosecutor, making the case to the panel or board. Nowhere, however, does the statute specifically assign to the superintendent the burden of proof.

The role of the teacher. Like the superintendent, the teacher is entitled to be present at the hearing, to be heard, to present evidence, and to be represented by counsel.⁴¹ He or she may also cross-examine witnesses.⁴² The teacher's task is to try to convince the case manager that the facts do not substantiate the superintendent's grounds for dismissal. In pursuing that task, the teacher has the role of defendant, calling into question any aspect of the superintendent's case.

The role of the case manager. The case manager has the duty to see that the parties are afforded a full, fair, and orderly hearing. A difficult task for the case manager is the consideration of legal issues that may be raised in the course of the hearing. An attorney representing one of the parties may object to questions asked to a particular witness, or to the admission of particular documents as evidence, or to the order in which matters are being considered, or to any of a wide variety of matters that may arise. In some instances the case manager will have a ready response with which he or she feels comfortable. In other instances, however, the case manager may need legal assistance. The parties and the case manager should discuss beforehand how this problem will be handled. They may agree, for example, that the case manager will call on the legal staff of the education section of the state attorney general's office for assistance. One reason for the General Assembly's 1997 creation of the position of case manager was to put individuals in charge of these teacher dismissal hearings who will be competent to handle difficult problems that arise in the course of a hearing, such as these legal issues. The statute specifically provides that the case manager is to decide all procedural issues necessary for a fair and efficient hearing.

39. G.S. 115C-325(j)(3).

40. The right to cross-examine witnesses is an element of due process applicable to the teacher but not to the superintendent. In fact, the 1997 actions of the General Assembly deleted the specific grant of authority to both parties to cross-examine witnesses, formerly found at G.S. 115C-325(i)(3) and (l)(2). The effect of this deletion is unclear.

41. G.S. 115C-325(j)(3).

42. See note 43.

Gathering and exchanging evidence. The statutory provisions governing case manager hearings provide for the superintendent and the teacher to gather evidence and for those two parties to exchange evidence before the hearing.

Gathering evidence by subpoena. Both the superintendent and the teacher may present evidence for the case manager to consider.⁴³ Each is entitled to have subpoenas issued by the case manager to compel witnesses to attend and testify and to produce documents.

*Exchanging evidence.*⁴⁴ At least five days before the hearing, the superintendent must provide to the teacher a list of witnesses the superintendent intends to present at the case manager hearing, a brief statement of the nature of the testimony of each witness, and a copy of any documentary evidence to be presented. At least three days before the hearing, the teacher is to provide the corresponding information to the superintendent. Additional witnesses or documentary evidence may not be presented except upon a finding by the case manager that the new evidence is critical to the matter at issue and that the party making the request could not, with reasonable diligence, have discovered and produced the evidence in a timely way.

In one case under former procedures in which boards of education conducted full-evidence hearings, the board itself called two witnesses, neither of whom had been named by the superintendent or the teacher in the exchange of evidence before the hearing.⁴⁵ The court held that it was likely that this procedure did not amount to a violation of the statute because the statute—as it then stood—permitted the board to allow additional witnesses by its own majority vote. Even though there was nothing in the record to indicate that a vote had in fact been taken, it might be inferred that one had. In any event the teacher had not objected to the calling of the witnesses at the time, so any objection was waived and the testimony stood.

In another case,⁴⁶ a witness testifying during the superintendent's case misstated a fact and the superintendent's attorney showed her a document containing the correct information so that she might correct her testimony. The document had not been on the superintendent's evidence list provided to the teacher before the hearing. The court held that the use of the document was not a violation of the statute because the document itself was not introduced as evidence but was used merely to refresh the witness's recollection.

43. G.S. 115C-325(j)(3).

44. G.S. 115C-325(j)(5).

45. *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).

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

In a third case,⁴⁷ the superintendent provided the pre-hearing evidence information to the teacher orally seven days before the hearing and in writing less than five days before the hearing, clearly in violation of the statute. Noting simply that the teacher “was not prejudiced by this procedure,”⁴⁸ the Court of Appeals rejected the teacher’s appeal.

The Hearing Must Be Private

Concerning a dismissal hearing before a case manager or a board of education, the statute⁴⁹ says bluntly, “The hearing shall be private.” This forthright statutory provision appears to leave little room for the parties to open the hearing up. A federal appeals court, commenting on this statute in a case in which it did not directly apply, said, “The purpose of the provision is as much for the protection of the teacher involved as for the school officials. It is a provision that finds a counter part in other types of proceedings, for the public hearing or trial concept, while embedded in the Sixth Amendment as a requirement at criminal trials, is not inflexibly applied in all civil trials.”⁵⁰ The North Carolina Court of Appeals, faced with the argument that the private hearing provision is an “anomaly” in light of the state’s open meetings law, said, “It may be an anomaly, but it is the law as adopted by the General Assembly. The Board was bound by it.”⁵¹

In a 1994 decision, the North Carolina Court of Appeals considered an appeal in a case in which a witness at a dismissal hearing was a minor child and the parents of the child were allowed to attend while their daughter testified. The parents’ presence violated the “private hearing” requirement, the teacher claimed. The court said, “A review of the evidence indicates that [the teacher’s case] was not unduly prejudiced by the presence of the minor child’s parents in the hearing room, and we therefore overrule this argument.”⁵²

Recording the hearing and preparing a transcript. It is the responsibility of the superintendent to employ a certified court reporter to record and, if requested, to transcribe the proceedings.⁵³ If the teacher contemplates a hearing before the board of education or an appeal to court, he or she is entitled to a transcript of the case manager proceedings at no charge.

47. *Davis v. Public Sch. of Robeson County*, 115 N.C. App. 98, 443 S.E.2d 781, *disc. review denied*, 337 N.C. 690, 448 S.E.2d 519 (1994).

48. *Davis*, 115 N.C. App. at 102, 443 S.E.2d at 784.

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

50. *Satterfield v. Edenton-Chowan Bd. of Educ.*, 530 F.2d 567, 573 (4th Cir. 1975).

51. *Kurtz v. Winston-Salem/Forsyth Bd. of Educ.*, 39 N.C. App. 412, 419, 250 S.E.2d 718, 722 (1979).

52. *Davis*, 115 N.C. App. at 102, 443 S.E.2d at 784.

53. N.C. ADMIN. CODE tit. 16, ch. 6C § .0502(2); G.S. 115C-325(j)8.

End of Case Manager's Role

As discussed above, once the hearing has ended, the case manager has the responsibility of making a report, to be delivered to the superintendent and the teacher, containing findings of fact and a recommendation as to whether the findings of fact substantiate the superintendent's grounds for dismissal. That ends the case manager's role in the matter, unless, as discussed above, one of two things happen. First, either the superintendent or the teacher may request that the case manager make findings of fact in addition to those already made. In that case, the statute says, the case manager "may prepare" a supplemental report with additional findings "[I]f the case manager determines that the report failed to address a critical factual issue."⁵⁴ That is, the statute authorizes the case manager to do so, but it does not direct that he or she do so. Second, the board of education—in connection with a subsequent hearing before it—may request that the case manager make findings of fact in addition to those already made. In that case, the statute says nothing about the case manager's determination that the report failed to address a critical factual issue. It merely says that "[I]f the case manager does not submit the report within seven days receipt [sic] of the board's request, the board may determine its own findings of fact regarding the critical factual issue not addressed by the case manager."⁵⁵ Once the case manager has responded to a request for further factual findings (or has chosen not to respond), his or her role in the proceeding is over.

The Superintendent's Options in Response to the Case Manager's Report

Within two days of receiving the report of the case manager, the superintendent must exercise one of two options. The superintendent's options are exactly the same whether the case manager finds that the facts substantiate the grounds for dismissal or whether the case manager finds to the contrary. First, the superintendent may drop the charges against the teacher and so notify the teacher. In that case the matter is ended. Or second, the superintendent may decide to submit to the board of education a written recommendation of dismissal, demotion, or disciplinary suspension without pay. In that case the superintendent must submit to the teacher a written notice of his or her intent.

The Teacher's Options in Response to the Superintendent's Decision

If, upon receiving the report of the case manager, the superintendent decides to drop the charges, the matter is ended and the teacher need do nothing.

54. G.S. 115C-325(i1)(4) and (j1)(2).

55. G.S. 115C-325(j2)(7).

If, on the other hand, the superintendent has given notice to the teacher that the superintendent intends to recommend dismissal, demotion, or suspension to the board, the teacher has two options. (Whichever option the teacher exercises, the statute requires the teacher to inform the superintendent in writing within two days of receiving the superintendent's notice.)⁵⁶ The teacher may decide not to request a hearing before the board of education, in which case the superintendent may make the dismissal recommendation and the board may, by resolution, dismiss, demote, or suspend the teacher. Or the teacher may request a hearing before the board. In that case the superintendent may make the dismissal recommendation to the board, in writing, within two days of receiving the teacher's request, with a copy to the teacher.

Setting the Hearing before the Board

Within two days after receiving the superintendent's notice of intent to recommend the dismissal of the teacher, the board of education must set a time and a place for a hearing and notify the teacher by certified mail or by personal delivery. The time may be no less than seven and no more than ten days from the time of the notice to the teacher, unless the parties agree to an extension.

Section 2004 Dismissal Step Four: Hearing before the Local Board of Education

The fourth step in the dismissal process is a hearing before the local board of education. For the hearing to occur, the teacher must have requested it. Without a timely request from the teacher, the board of education may consider the superintendent's recommendation and may, without a hearing, reject the recommendation or accept it or modify it and dismiss, demote, suspend, or reinstate the teacher.

Three Ways the Hearing May Come About

The hearing before the board of education may come about in three possible ways. First, there may have been a hearing before a case manager with a recommendation that the findings of fact do substantiate the grounds for dismissal. Second, there may have been a hearing before a case manager with a recommendation that the findings of fact do not substantiate the grounds for dismissal.

56. G.S. 115C-325(j1)(1) provides that the request is timely if the teacher can show that it was postmarked within the two-day period.

And third, there may have been no case manager hearing at all, the teacher having exercised his or her option to proceed directly before the board.

No matter which of these three ways the matter comes before the board, the hearing before the board is a limited-evidence hearing. As discussed above, the hearing before the case manager is a full-evidence hearing. The superintendent and the teacher both put on evidence through the testimony of witnesses, and there are procedures to subpoena witnesses and documents. But, also as discussed above, the hearing before the board of education in a teacher dismissal proceeding is a limited-evidence hearing, and that is true whether or not there has been a case manager hearing and irrespective of what the case manager's recommendation is. As discussed in the following sections, however, there are some differences in the evidence before the board of education in the limited-evidence hearing, depending on whether there has been a case manager hearing or not.

Evidence the Board May Consider

Consistent with the notion of a limited-evidence hearing, the statute sets out the types of evidence that the board of education may consider in its review of the superintendent's dismissal recommendation.

Matters to be considered by the board when there has been a case manager hearing. In the typical situation, a teacher who is notified of the superintendent's intention to recommend the teacher's dismissal will request a hearing before a case manager, and that hearing will proceed as described above. If the superintendent persists after receiving the case manager's report in the intention to recommend dismissal, the teacher may then request a hearing before the board. At that hearing, the board may consider the following matters:

- The whole record from the case manager hearing, including the transcript, exhibits, and documents submitted to the case manager at that hearing
- The case manager's findings of fact, which the board is to accept, unless a majority of the board determines that the findings are not supported by substantial evidence when reviewing the record as a whole; in that case the board may make new findings.
- The case manager's recommendation as to whether the findings of fact substantiate the grounds for dismissal.
- The superintendent's recommendation and stated grounds for recommendation.

- A written statement by the superintendent, which must be submitted at least three days before the hearing.
- A written statement by the teacher, which must be submitted at least three days before the hearing.
- Oral arguments to the board by the superintendent, based on the record before the board; presumably, the argument may be made by the attorney for the superintendent.
- Oral arguments to the board by the teacher, based on the record before the board; presumably, the argument may be made by the attorney for the teacher.

These are the only matters that the board of education is to consider in its limited-evidence review of the superintendent's recommendation to dismiss a tenured teacher, when there has been a prior hearing before a case manager.

Matters to be considered by the board when there has not been a case manager hearing. A teacher who is notified of the superintendent's intention to recommend the teacher's dismissal may opt to skip the hearing before a case manager and go straight to a hearing before the board of education. In that case, the board may consider the following matters:

1. Any documentary evidence the superintendent intends to use to support the recommendation; the superintendent must provide the documentary evidence to the teacher seven days before the hearing.
2. Any documentary evidence the teacher intends to use to rebut the superintendent's recommendation; the teacher must provide the documentary evidence to the superintendent three days before the hearing.
3. A written statement by the superintendent, which must be submitted at least three days before the hearing.
4. A written statement by the teacher, which must be submitted at least three days before the hearing.
5. Oral arguments to the board by the superintendent, based on the record before the board; presumably, the argument may be made by the attorney for the superintendent.
6. Oral arguments to the board by the teacher, based on the record before the board; presumably, the argument may be made by the attorney for the teacher.

These are the only matters that the board of education is to consider in its limited-evidence review of the superintendent's recommendation to dismiss a tenured teacher, when there has not been a prior hearing before a case manager.

Possibility of receiving new evidence. The statute provides that no new evidence is to be presented at a board of education limited-evidence hearing, except in one circumstance. New evidence may be presented if there has been a prior case manager hearing and, at the board hearing, a majority of the board finds that there is new evidence critical to the matter and issue and that the party making the request could not, with reasonable diligence, have discovered and produced the evidence at the case manager hearing. There is no provision for receiving new evidence at a board hearing when there has been no prior case manager hearing.

Requirement of Privacy for the Hearing

As with case manager hearings, the statute governing board hearings says bluntly, “The hearing shall be private.”⁵⁷ As with case manager hearings, that appears to leave little room for opening the meetings to the public. See the discussion above.

Voir Dire of Board Members

As an element of due process, the teacher is entitled to have his or her hearing before a board of education that is an unbiased, impartial decision-maker.⁵⁸ As the North Carolina Supreme Court has held, if even one participating member of the board of education is biased against the teacher, due process is denied.⁵⁹ No North Carolina decision squarely holds that, as a matter of due process, the teacher (or the teacher’s attorney, if there is one) has the right to ask the members of the board of education about their potential biases in the matter (a process known in court as voir dire). It seems likely, however, that, faced with the question, the courts might well rule that the teacher does have a right to ask members questions designed to uncover bias. How else can a lack of bias be ensured?

Bias, the state’s supreme court has said,⁶⁰ is a predisposition to decide an issue in a certain way, a prejudgment of the adjudicative facts. It results from the mind of a board member being fixed and not susceptible to change as a result of what the evidence shows at the hearing.

57. G.S. 115C-325(j2)(1).

58. *Crump v. Board of Education*, 326 N.C. 603, 392 S.E.2d 579 (1990). See section 202.

59. *Crump*, 326 N.C. at 618, 392 S.E.2d at 587.

60. *Crump*, 326 N.C. at 615, 392 S.E.2d at 585; see Jonathan Blumberg, “The Law on Disqualifying Personal Bias in Teacher Dismissal Cases,” *School Law Bulletin* 22 (Summer 1991): 1.

Bias does not result, the supreme court has taken great care to say, merely from the fact that board members have acquired knowledge about the teacher's case before the hearing. As the court said:⁶¹

Members of a school board are expected to be knowledgeable about school-related activities in their district. Board members will sometimes have discussed certain issues that later become the subject of board deliberations; such knowledge and discussions are inevitable aspects of their multi-faceted roles as administrators, investigators and adjudicators. However, when performing their quasi-judicial function during a board hearing and any resulting deliberations, members must be able to set aside their prior knowledge and preconceptions concerning the matter at issue, and base their considerations solely upon the evidence adduced at the hearing.

The Role of the School Board Attorney

During the hearing, the school board attorney typically acts as counsel for the superintendent as the superintendent fulfills his or her role as prosecutor at the hearing. That is a natural arrangement. The superintendent and the board attorney have likely worked together over time and have an established relationship. More important, it is likely that the board attorney will have assisted the superintendent as the superintendent was considering whether to recommend the dismissal of the teacher.

Yet, the client of the school board attorney is really the board of education itself, not the superintendent. It is reasonable, based on that relationship of attorney and client, that the board would turn to the board attorney for assistance in dealing with legal issues that may arise in the course of the hearing. In that instance, the board attorney would be called upon to assist two different actors at once—the superintendent and the board—who are not executing exactly the same function. The superintendent is a party to the hearing and the board is the jury.

There is a common solution for this dilemma. The board attorney for the purposes of the dismissal hearing assists the superintendent and only the superintendent. The board of education engages the services of an independent attorney to render legal assistance to the board during the hearing. There is obviously extra expense involved, but the expense is frequently viewed as reasonable considering the gains in efficiency and fairness.

61. *Crump*, 326 N.C. at 616, 392 S.E.2d at 586.

On three occasions the North Carolina appellate courts have considered appeals from hearings in which this solution was not used. In each of those instances the school board attorney (or a member of that attorney's law firm) provided advice for the board during the hearing while at the same time representing the superintendent. In each instance, the court held that in the absence of a showing that the dual role of the attorney caused actual bias on the part of the board or actual harm to the teacher, there was no constitutional or statutory violation. Those cases arose in the Wake County,⁶² Pender County,⁶³ and Charlotte-Mecklenburg⁶⁴ systems. In the Wake County and Pender County cases, the board attorney himself gave assistance to both the superintendent and the board. In the Charlotte-Mecklenburg case, the lawyer representing the superintendent and the lawyer advising the board worked in the same law firm. The teacher claimed that the conflicting roles played by the two closely associated lawyers deprived her of an impartial decisionmaker and thus of due process. The argument does not hold up, the North Carolina Court of Appeals said, because "[t]he Board is the decision maker, not its attorney, who acts only in an advisory capacity."⁶⁵ Even so, the best practice is to engage an independent attorney to advise the board.

Recording the Hearing and Preparing a Transcript

The statute specifically provides that the board is not required to provide a transcript of the hearing to the teacher, but that if the board elects to make a transcript it must provide a copy to the teacher at no charge, so long as the teacher contemplates an appeal to court and requests a copy.⁶⁶ The teacher may have the hearing before the board transcribed by a court reporter at the teacher's own expense. The statutory provision for recording a hearing before a case manager is quite different. See section 2003.

62. *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).

63. *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).

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

65. *Hope*, 110 N.C. App. at 603, 430 S.E.2d at 474.

66. G.S. 115C-325(j2)(8).

Section 2005 Dismissal Step Five: The Board's Decision

At the conclusion of its hearing, the board must “make a determination,”⁶⁷ and may reject the superintendent’s recommendation, or it may accept the recommendation and dismiss, demote, or suspend the teacher, or it may modify the recommendation and dismiss, demote, or suspend the teacher. If it rejects the recommendation, it may reinstate the teacher, and the matter is at an end.

Board Vote and the Open Meetings Act

The Teacher Tenure Act does not spell out in any detail how the determination is to be made. Presumably, the board after the hearing will conduct deliberations in closed session, as a continuation of the private hearing and as permitted by the state’s open meetings act.⁶⁸ The open meetings act on closed provisions for discussion of personnel matters, however, provides that “[f]inal action making an appointment or discharge or removal by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting.”⁶⁹ It is not clear how this provision affects the board vote after the board hearing. By its literal words, for example, it applies to votes to discharge or remove but not to votes to suspend or demote, as the board has the authority to do. Also, it is not clear how the general provisions of the open meetings act interact with the direct provision in the Teacher Tenure Act that “[t]he hearing shall be private.”⁷⁰ Does that provision include the board vote, or does the open meetings act open-vote provision apply? There is no case law directly on this point. The best practice would be to assume that the open meetings act open-vote provision applies and move from closed session to open session for the vote at the end of the hearing and deliberations.

Board's Report of Its Decision

Within two days after the hearing, the board must send a written copy of its “findings and determination”⁷¹ to the teacher and to the superintendent. In a case arising from the former Greensboro city school system, a dismissed teacher, challenging her dismissal on several grounds, argued that the report of the board’s “findings” sent to her was insufficiently complete and precise to

67. G.S. 115C-325(j1)(5).

68. G.S. 143-318.9 through .18.

69. G.S. 143-318.11(a)(6).

70. G.S. 115C-325(j2)(1).

71. G.S. 115C-325(l)(5).

permit her to adequately prepare an appeal.⁷² The court, in an unpublished opinion, rejected the teacher's argument that evidence supporting the findings must be set out as additional findings, holding that only "ultimate" facts need be set out, not "evidentiary" facts.

Section 2006 Dismissal Step Six: Appeal by the Teacher and Review by the Courts

Within thirty days of notification of the board's decision to dismiss the teacher from employment, the teacher may appeal the decision to the superior court. A teacher who does not request a hearing before the board of education is not entitled to have his or her dismissal reviewed in court.⁷³

Applying the Standards of the Administrative Procedure Act

The Teacher Tenure Act provides only that a teacher who has been dismissed "shall have the right to appeal from the decision of the board to the superior court."⁷⁴ The statute contains no guidance to the superior court on procedures to be used in such an appeal and no guidance on the standard to be applied in judging the actions of the board. Thus when the first teacher dismissal case under the Teacher Tenure Act—a case arising in the Wake County school system—reached the court of appeals in 1976, the court faced the necessity of determining how the appeal was to proceed.⁷⁵ The court made the determination to apply the state's Administrative Procedure Act (APA)⁷⁶ procedures and standards for review, a decision that is still followed today.⁷⁷

First consequence of applying the APA: no new trial. In that Wake County case the court of appeals recognized that applying the APA standards meant that there would be no new trial in the superior court. "Clearly, [the teacher]

72. *Luther v. Greensboro City Bd. of Educ.*, 110 N.C. App. 661, 432 S.E.2d 446 (1993) (memorandum opinion; full opinion unpublished).

73. G.S. 115C-325(n). *Church v. Madison County Bd. of Educ.*, 31 N.C. App. 641, 230 S.E.2d 769 (1976), *disc. review denied*, 292 N.C. 264, 233 S.E.2d 391 (1977).

74. G.S. 115C-325(n).

75. *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).

76. G.S. Ch. 150B.

77. See *Thompson*, 292 N.C. at 406, 233 S.E.2d at 538; *Overton v. Goldsboro Bd. of Educ.*, 304 N.C. 312, 283 S.E.2d 495 (1981); *Evers*, 104 N.C. App. at 1, 407 S.E.2d at 879, *aff'd*, 331 N.C. 380, 416 S.E.2d 3.

was not entitled to a trial *de novo* on the question of the truth or validity of the charges against him," the court said.⁷⁸ Rather, the court will review "the entire record as submitted."⁷⁹ The action of the board will stand unless the superior court finds that an error of law occurred at the board level.

Second consequence of applying the APA: use of the whole record test.

The court of appeals recognized that the second consequence of applying the APA standards was the employment of what is known as the "whole record test." The APA provides that the court may overturn the action of an administrative agency if the action of the agency is "[u]nsupported by substantial evidence . . . in view of the entire record as submitted."⁸⁰ The application of the whole record test is discussed later in this section.

Applying the APA even though school boards are specifically exempted.

The 1976 decision in the Wake County case to apply the APA standards to judicial reviews of teacher dismissal decisions and the 1981 decision of the North Carolina Supreme Court in a case arising from the former Goldsboro city school system reaffirming that decision have the odd effect of applying the APA standards to these school board decisions even though the APA itself expressly states that it does not apply to school boards.

The timing of the appeal in the Wake County case made it subject to an old version of the APA, which was found in G.S. Chapter 143.⁸¹ Just which administrative agencies were subject to those Chapter 143 provisions was never clear.⁸² But in 1972, in a case arising from the Wayne County school system, the state court of appeals held that the Chapter 143 provisions did apply to the judicial review of a board of education's decision to dismiss a superintendent.⁸³ So it was reasonable that four years later the court in the Wake County teacher dismissal case would apply the Chapter 143 provisions to the judicial review of the dismissal.

The complicating matter is that in 1975 the first version of the modern APA, replacing the Chapter 143 provisions, became effective, explicitly providing that the actions of boards of education are not subject to the APA. Nonetheless, in 1981 the state supreme court in the Goldsboro case held that the APA judi-

78. *Thompson*, 31 N.C. App. at 415, 230 S.E.2d at 172.

79. G.S. 150B-51(b)(5).

80. This is the current statutory wording of the whole record test, found at G.S. 150B-51(b)(5). At the time of the court of appeals decision in the Wake County case, the wording was slightly different.

81. G.S. 143-306 through -316.

82. "We concede that precisely which administrative decisions are subject to review under the article is somewhat vague." *James v. Wayne County Bd. of Educ.*, 15 N.C. App. 531, 532, 190 S.E.2d 224, 225 (1972).

83. *James*, 15 N.C. App. 531, 190 S.E.2d 224.

cial review provisions still apply. The court noted that the APA expressly excludes school boards from its coverage but said it would continue to apply the APA in teacher dismissal hearings “[s]ince no other statute provides guidance for judicial review of school board decisions and in the interest of uniformity in reviewing administrative board decisions.”⁸⁴

Applying only the judicial review portion of the APA. The supreme court in the Goldsboro case, aware that its decision to apply the APA to the review of teacher dismissals was directly contrary to the APA’s own wording, stressed that it meant to apply *only* the judicial review portion of the APA to boards of education, and no other portions. “We wish to make it clear,” the court said, “that only [G.S. 150B-51(b)] is applicable to appeals from decisions of city or county boards of education. Neither this case nor [the Wake County decision] is to be interpreted as holding that any other provision contained in the APA applies to actions of city or county boards of education or appeals therefrom.”⁸⁵

The wording of the judicial review portion of the APA. The portion of the statute that applies to review of school board dismissal decisions is codified today at G.S. 150B-51(b)(5). It reads as follows:

[T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency’s decision if the substantial rights of the petitioners may have been prejudiced because the agency’s findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

Most cases turn on the application of subpart (5). That is the whole record test discussed below. But the court of appeals in 1991 specifically held that all six subparts apply.⁸⁶ A court might rule, for instance, that the board of education

84. *Overton v. Goldsboro Bd. of Educ.*, 304 N.C. 312, 316, 283 S.E.2d 495, 498 (1981).

85. *Overton*, 304 N.C. at 317, 283 S.E.2d at 498.

86. *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).

made its decision to dismiss a teacher by following an unlawful procedure (as perhaps by not exchanging witness information at the proper time or not giving timely notice of a decision)⁸⁷ and reverse the decision of the board.

Applying the Whole Record Test

Commonly, the issue before the superior court on an appeal from a dismissal decision by a board of education is whether the decision was “unsupported by substantial evidence in view of the whole record.”⁸⁸ In deciding this issue, the courts must apply the following three principles.

First, the court does not replace the school board’s judgment with its own. Repeatedly, North Carolina’s appellate courts have stressed that in applying the whole record test, they are not substituting their judgment about whether a teacher should have been dismissed for the judgment of the board of education. As the supreme court put it in its 1977 decision in the original whole record case, a case arising in the Wake County school system: “The whole record test does not allow the reviewing court to replace the Board’s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.”⁸⁹ In a 1984 decision in a case arising in the New Bern–Craven County school system, the supreme court said, “The ‘whole record’ test is not a tool of judicial intrusion; instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.”⁹⁰

Second, the court must take into account all the evidence supporting the board’s decision and all that detracts from it.⁹¹ “Under the whole record test, therefore, the reviewing judge must consider the complete testimony of all the witnesses.”⁹² Specifically, the court must consider the case manager report, if there was one.⁹³

87. For arguments like this, see *Davis v. Public Sch. of Robeson County*, 115 N.C. App. 98, 443 S.E.2d 781, *disc. review denied*, 337 N.C. 690, 448 S.E.2d 519 (1994).

88. *Overton*, 304 N.C. at 317, 283 S.E.2d at 498. See also *Crump v. Board of Educ., Hickory Sch. Admin. Unit*, 79 N.C. App. 372, 373, 339 S.E.2d 483, 484, *disc. review denied*, 317 N.C. 333, 346 S.E.2d 137 (1986); *Evers*, 104 N.C. App. at 20, 407 S.E.2d at 889–90 (1991), *aff’d*, 331 N.C. 380, 416 S.E.2d 3 (1992).

89. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (internal quotation marks omitted). See also *Hope v. Charlotte–Mecklenburg Bd. of Educ.*, 110 N.C. App. 599, 605, 430 S.E.2d 472, 475 (1993).

90. *Faulkner v. New Bern–Craven County Bd. of Educ.*, 311 N.C. 42, 56, 316 S.E.2d 281, 290 (1984), *citing In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979).

91. *Thompson*, 292 N.C. at 410, 233 S.E.2d at 541 (1977).

92. *Faulkner*, 311 N.C. at 50, 316 S.E.2d at 286 (1984) *citing In re Appeal from Envtl. Management Comm’n*, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

93. *Thompson*, 292 N.C. at 414, 233 S.E.2d at 543 (1977).

And, third, “substantial evidence” is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. So the supreme court said in 1977,⁹⁴ adding, “Substantial evidence is more than a scintilla or a permissible inference.”⁹⁵

Putting these three principles to work, the job for the superior court judge is to determine whether, in view of the entire record, the decision of the school board is supported by substantial evidence. If the answer is yes, the decision of the board stands.

Section 2007 Hearings in a Reduction in Force

As described in section 2003, the hearing before a case manager in a teacher dismissal proceeding is a full-evidence hearing and, as described in section 2004, the hearing before the board of education is a limited-evidence hearing. An exception exists for dismissal under G.S. 115C-325(e)(1), which permits the dismissal of a teacher due to “[a] justifiable decrease in the number of positions due to district reorganization, decreased enrollment, or decreased funding.” This circumstance is commonly referred to as a reduction in force, or RIF. The procedures for implementing a RIF and selecting the particular employees to be dismissed as part of it are discussed in detail in section 1206. Once a particular employee subject to the Teacher Tenure Act is selected for a RIF, that person has the right to a full-evidence hearing before the board under G.S. 115C-325(j3).

Nature of a Board Full-Evidence Hearing

The full-evidence hearing before the board is very similar to the full-evidence hearing conducted before a case manager in other teacher dismissal proceedings. The hearing is to be private, it is to be conducted according to rules adopted by the State Board of Education, the rules of evidence are not to apply but the board (like a case manager) is to “give probative effect to evidence that is of a kind commonly relied on by reasonably prudent persons in the conduct of serious affairs.”⁹⁶ The board may itself subpoena and swear witnesses and compel them to give testimony and produce documents and records. The board decides all procedure issues necessary for a fair and efficient hearing.

94. *Thompson*, 292 N.C. at 414, 233 S.E.2d at 543.

95. *Thompson*, 292 N.C. at 414, 233 S.E.2d at 543.

96. G.S. 115C-325(j3)(4).

Exchange of Information

The rules for exchange of information before the hearing are a little different than with a case manager hearing. At least eight days before the hearing, the superintendent is to provide to the teacher a list of witnesses the superintendent intends to present, together with a brief statement of the nature of the testimony of each witness and a copy of all documentary evidence the superintendent intends to present. At least six days before the hearing, the teacher must make the corresponding material available to the superintendent.

Evidence to Be Considered

At the hearing, both the superintendent and the teacher have the right to be present and to be heard, to be represented by counsel, and to present through witnesses any competent testimony relevant to the issue of “whether the grounds for a dismissal or demotion due to a reduction in force is [sic] justified.”⁹⁷ No evidence that is not on the exchange list between the superintendent and the teacher may be introduced at the hearing unless the board finds that the new evidence is critical to the matter at issue and the party making the request could not, with reasonable diligence, have discovered and produced the evidence in a timely way.

Board Decision

Oddly, the statute contains no provision directing the board to make a decision, but it seems obvious that, following the hearing, the board must make a determination. The statute does say that the board is to hear evidence on whether the grounds for the dismissal due to the RIF are “justified.” For a discussion of that concept in the context of a RIF see section 1206 and its analysis of a case arising from the Durham school system.⁹⁸

Section 2008 Dismissal by the State Board of Education

In almost all circumstances, the dismissal of a teacher is the responsibility of the local board of education. After all, the local board is the teacher’s employer. The preceding sections of this chapter have described the procedure by which local boards may dismiss a teacher and the procedure by which that decision

97. G.S. 115C-325(j3)(3).

98. *Taborn v. Hammonds*, 324 N.C. 546, 380 S.E.2d 513 (1989).

may be reviewed. But, as discussed in section 1900, there are three special circumstances in which teachers may be dismissed by the State Board of Education.⁹⁹ These circumstances arise when a school has been identified as low performing under the School-Based Management and Accountability Program (see section 402) and the performance evaluations by the assistance team assigned under that program to the school have been negative with respect to a particular teacher or a teacher in such a school has repeatedly failed a standard knowledge test after efforts at remediation.

Requirement that Dismissal Be by the State Board

For emphasis, it bears repeating that in these limited circumstances under the School-Based Management and Accountability Program, the decision to dismiss a teacher is made by the State Board of Education, not the local school board. The local board takes no action at all.

Dismissal Triggered by Recommendation of Assistance Team

Once the State Board of Education has identified a school as low performing, it may assign an assistance team to try to help improve student performance at the school. Among the duties of the assistance team is the duty to “[e]valuate at least semiannually the personnel assigned to the school and make findings and recommendations concerning their performance.”¹⁰⁰ The findings and recommendations of the assistance team trigger the procedure for dismissal of a teacher by the State Board of Education in one of two ways.

First, the report of the assistance team can require the State Board of Education to dismiss the teacher. Amendments to the Teacher Tenure Act passed in 1996 in the same bill with the adoption of the School-Based Management and Accountability Program provide that the state board “shall dismiss” a teacher “when the State Board receives two consecutive evaluations that include written findings and recommendations regarding [the teacher’s] inadequate performance from the assistance team.”¹⁰¹

Second, the report of the assistance team can create a situation in which the state board may dismiss the teacher but is not required to by the statute. That is the case if the state board finds that the school has failed to make satisfactory improvement despite the efforts of the assistance team *and* the assistance team

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

100. G.S. 115C-105.31(b)(2).

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

makes the recommendation to dismiss the teacher. In such an instance the state board “may dismiss” the teacher.

Dismissal Triggered by General Knowledge Test Failure

As discussed in section 1900, teachers in low-performing schools may be required to take and pass a general knowledge test.¹⁰² Upon failing the test, a teacher is given a chance at remediation and another opportunity to pass the test. If the teacher fails the second time, the statute requires the state board to begin dismissal proceedings.

Hearing before a State Board Panel

The teacher dismissed by the state board in any of these three ways “may request a hearing before a panel of three members of the State Board within 30 days of any dismissal.”¹⁰³ The amendments thus seem to say that the hearing comes after the state board has taken the dismissal action. The statute does not further describe the hearing procedure that is to be followed,¹⁰⁴ but instead provides that “[t]he State Board shall adopt procedures to ensure that due process rights are afforded to persons recommended for dismissal under this subdivision.”¹⁰⁵

The State Board has responded to that directive with provisions found in the North Carolina Administrative Code.¹⁰⁶ By those provisions, the three-member panel is to “sit as an impartial tribunal to receive evidence and to decide on the basis of that evidence whether [the teacher] shall be dismissed.” The case against the teacher is presented by the assistance team assigned to the school.

Both the assistance team and the teacher have the right to be represented by lawyers at the hearing, to subpoena witnesses and documents, to examine and cross-examine witnesses under oath, and to present relevant evidence using witnesses and documents. It is the responsibility of the panel to give written notice to the parties of the time and place of the hearing, to make a complete record of the evidence received at the hearing, and to issue the subpoenas on behalf of the parties.

The burden of proof is on the assistance team.

102. G.S. 115C-105.38A.

103. G.S. 115C-325(q)(2) and (2a).

104. Except to say that the state board “shall have the right to subpoena witnesses and documents on behalf of any party to the proceedings under this subsection.” G.S. 115C-325(q)(5).

105. G.S. 115C-325(q)(2) and (2a).

106. N.C. ADMIN. CODE tit. 16, ch. 6G § .0308.

Appeal to the State Board

The statute then provides that “[d]ecisions of the panel may be appealed on the record to the State Board.”¹⁰⁷ There are no further statutory provisions regarding the appeal to the full state board, but the state board has adopted rules codified in the Administrative Code.¹⁰⁸ Those rules provide that either the assistance team or the teacher may within ten days of notification of the panel’s decision give notice of appeal to the full state board. The appeal is to be “on the record with no arguments by counsel except in the form of written briefs of no more than 25 pages.” That is, the state board will not hear witnesses or otherwise take evidence. The state board is to render a decision within thirty days, unless it finds good cause for extending the time or the parties agree to an extension. The panel members are not excluded from the full state board hearing.

Review under the Administrative Procedure Act

The statute then provides that there is “further right of judicial review under Chapter 150B of the General Statutes.”¹⁰⁹ That is the Administrative Procedure Act. It appears that at this point judicial review of a dismissal action by the State Board of Education will take the same form as judicial review of a dismissal action by a local board of education, described in section 2006.

107. G.S. 115C-325(q)(2) and (2a).

108. N.C. ADMIN. CODE tit. 16, ch. 6G § .0308(e).

109. G.S. 115C-325(q)(2) and (2a).

