

# Procedures for Dismissal under the Teacher Tenure Act

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by Robert P. Joyce

THE BASIC THRUST of the Teacher Tenure Act<sup>1</sup> is that public school employees under its protection 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.

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. 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. The local board is the employer and exercises hiring and firing authority over employees generally, including teachers. 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

or the teacher fails for a second time the state-required general knowledge test.

This article describes the procedures by which local school boards may dismiss teachers and by which the board's decisions may be reviewed under the due process provisions of the Teacher Tenure Act. The article begins with a brief discussion of the significant differences between dismissal and nonrenewal. This is followed by an extensive, step by step discussion of the entire dismissal process, beginning with the superintendent's recommendation and ending with the appeal process. The article concludes with a discussion of the few exceptions whereby a dismissal decision is reached not by the local board but by the State Board of Education.

## 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. 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).

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.

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

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.). 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,"<sup>2</sup> it does not create a property interest. Therefore nonrenewal need not be done in compliance with due process. It only need 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.

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.

## Dismissal Step One: Superintendent's Decision and Notice to 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."<sup>3</sup> The one exception is dismissal by the State Board of Education under the School-Based Management and Accountability Program, discussed beginning on page 17.

## Requirement of Superintendent's Recommendation

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." 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 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 not to renew a teacher even in the absence of a recommendation of nonrenewal by the superintendent.

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 following sections, 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.<sup>4</sup>

## Notice to 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

2. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

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

4. *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).

notice of that decision to the teacher. The statute sets out seven specific requirements regarding that notice.<sup>5</sup>

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. [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). 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 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 copy 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.”<sup>6</sup> 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).”<sup>7</sup>

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.<sup>8</sup> 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.

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.<sup>9</sup> 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.

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

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

7. “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).

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

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

## Dismissal Step Two: Teacher's Response to 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.

### Teacher Option One: 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 accept the recommendation (or modify it) and dismiss, demote, or suspend the teacher, or it may reject the superintendent's recommendation. 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.<sup>10</sup>

### Teacher Option Two: Request Hearing before Case Manager

If the teacher requests a hearing before a case manager, then begins the review procedure described throughout the remainder of this article. 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.

### Teacher Option Three: Request Hearing before 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 educa-

tion, in which case the teacher's only hearing will be a limited-evidence hearing, as discussed below, and the teacher will have forfeited the right to a full-evidence hearing.

## Dismissal Step Three: Optional Case Manager Hearing

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

### Teacher Request for Hearing, 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.<sup>11</sup>

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 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

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).

11. The case manager procedure for teacher dismissal cases was added by the General Assembly in 1997, when the legislature eliminated a

10. 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,

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 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 preparation and submission of a report—within fifteen days of being appointed.<sup>12</sup> 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)<sup>13</sup> or whether the entire procedure will have to move within the fifteen days.

### *Conduct the Hearing*

The most visible duty of the case manager is the conduct of the hearing and prehearing procedures. That duty is discussed in the following section, “Case Manager’s Conduct of the Hearing.”

### *Make Findings of Fact*

Perhaps the most significant duty of the case manager is “to make all necessary findings of fact”<sup>14</sup> 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” standard, which is the ordinary standard used in civil cases. It is also known as the greater weight of the evidence standard; the terms are synonymous.<sup>15</sup> 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.”<sup>16</sup>

*Board of education bound by case manager’s fact findings.* The significance of the case manager’s 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.

*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.<sup>17</sup> 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.”<sup>18</sup> It is not clear just what the scope of this directive is, and there are no court decisions interpreting it. It appears, however, to give the case manager some leeway in making findings of fact that are not strictly limited to the grounds for dismissal, such as perhaps findings related to dissimilar treatment of other teachers not dismissed in similar circumstances.

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similar procedure by which cases were heard before panels of the Professional Review Committee.

12. 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).

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

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

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15. 1 BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 41, at 140 (4th ed. 1993).

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

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

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

### ***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.”<sup>19</sup> The recommendation is, of course, not binding on the superintendent.

### ***Make 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 the discussion beginning on page 14.

### ***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.<sup>20</sup> 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.<sup>21</sup> 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.

### ***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 whether the facts, as the case manager finds them, substantiate the superintendent’s grounds for dismissal. They are designed, in addition, to meet the requirements of due process.

### ***Nature of 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,”<sup>22</sup> 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

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

20. G.S. 115C-325(i)(4).

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

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

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 below as Dismissal Step Four.

### *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.”<sup>23</sup> In fact, the only such rules adopted by the State Board are found in the North Carolina Administrative Code and simply direct the local superintendent to provide the facility in which the hearing is to be conducted and employ a certified court reporter to record and if requested to transcribe the proceedings.<sup>24</sup>

The North Carolina Court of Appeals (in a decision entered at a time when 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.”<sup>25</sup> 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.”<sup>26</sup> 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.<sup>27</sup> 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.”<sup>28</sup> 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 Board was inquiring.”<sup>29</sup> In cases arising in the Pender County system,<sup>30</sup> the Edenton-Chowan system,<sup>31</sup> and the Wake County system,<sup>32</sup> 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 provision<sup>33</sup> 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.<sup>34</sup> Given that limitation, may the case manager hear evidence of teacher conduct or actions more than three years old? In a 1979

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

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

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

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

30. *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).

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

32. *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).

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

34. 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 ma-

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

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

25. *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).

decision the state 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.<sup>35</sup> 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.”<sup>36</sup> 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.

### *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 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.<sup>37</sup> He or she also may cross-examine witnesses.<sup>38</sup> 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. 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.<sup>39</sup> He or she also may cross-examine witnesses.<sup>40</sup> 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.

### *Gathering, 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.<sup>41</sup> Each is entitled to have subpoenas issued by the case manager to compel witnesses to attend and testify and to produce documents.

*Exchanging evidence.*<sup>42</sup> At least five days before the hearing, the superintendent must provide to the teacher

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terial 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.

35. *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). See also *Gregory v. Durham County Bd. of Educ.*, 591 F. Supp. 145, 155 (M.D.N.C. 1984).

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

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

38. 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.

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

40. See note 38.

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

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



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.<sup>43</sup> 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,<sup>44</sup> 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.

In a third case,<sup>45</sup> 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,"<sup>46</sup> the court of appeals rejected the teacher's appeal.

43. *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).

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

45. *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).

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

## Hearing Must Be Private

Concerning a dismissal hearing before a case manager or a board of education, the statute<sup>47</sup> 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 counterpart 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."<sup>48</sup> 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."<sup>49</sup>

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."<sup>50</sup>

## Recording the Hearing, Preparing Transcript

It is the responsibility of the superintendent to employ a certified court reporter to record and, if requested, to transcribe the proceedings.<sup>51</sup> 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.

## End of Case Manager's Role

As was previously mentioned, after the hearing has ended, the case manager has the responsibility of mak-

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

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

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

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

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

ing 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 one of two things happens. 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 "if the case manager determines that the report failed to address a critical factual issue."<sup>52</sup> That is, the statute authorizes the case manager to do so, but it does not direct him or her to 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."<sup>53</sup> 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.

### **Superintendent's Options in Response to 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.

### **Teacher's Options in Response to 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. 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.)<sup>54</sup> 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.

### **Dismissal Step Four: Hearing before 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.

52. G.S. 115C-325(i)(4) and (j)(1)(2).

53. G.S. 115C-325(j)(7).

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

### 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. 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 in which of these three ways the matter comes before the board, the hearing before the board is a limited-evidence hearing. As has been discussed, 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 procedures are in place to subpoena witnesses and documents. But, also as discussed, the hearing before the board of education in a teacher dismissal proceeding is a limited-evidence hearing, and that is true whether or not a case manager hearing has been held and irrespective of the case manager's recommendation. As will be discussed in following sections, however, depending on whether or not a case manager hearing has been held, there are some differences in the evidence that can be placed before the board of education in the limited-evidence hearing.

### 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 if a Case Manager Hearing Has Been Held*

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 after receiving the case manager's report the superintendent persists in the intention to recommend dismissal, the teacher may then request a hearing before the board. 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 are the following:

- the entire record from the case manager hearing, including the transcript, exhibits, and documents submitted to the case manager;
- 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 which 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).

#### *Matters to Be Considered if a Case Manager Hearing Has Not Been Held*

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 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 are the following:

- 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;
- 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;

- 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).

### *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 at 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**

As with case manager hearings, the statute governing board hearings says bluntly, "The hearing shall be private."<sup>55</sup> As with case manager hearings (see discussion above), that requirement appears to leave little room for opening such meetings to the public.

### ***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 decisionmaker.<sup>56</sup> 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.<sup>57</sup> 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 supreme court has said,<sup>58</sup> 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 is shown by the evidence at the hearing. Bias does not result, the supreme court has taken great care to say, merely from board members having acquired knowledge about the teacher's case prior to the hearing. As the court has said:<sup>59</sup>

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.

### **Role of 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. That is a natural arrangement. The superintendent and the board attorney likely have worked together over time and have an established relationship. More important, it is likely that the board attorney will have assisted the superintendent in the superintendent's consideration of whether to recommend the dismissal of the teacher.

Yet the actual client of the school board attorney is the board of education itself, not the superintendent. It is reasonable, based on the standard relationship of attorney and client, that the board would turn to the

55. G.S. 115C-325(j)(2)(1).

56. *Crump v. Board of Educ.*, 326 N.C. 603, 392 S.E.2d 579 (1990).

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

58. *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.

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

board attorney for assistance in dealing with any legal issues that arose in the course of the hearing. In such an instance, the board attorney would be called upon to assist two different actors at once—the superintendent and the board—as the two execute functions that are not exactly the same: the superintendent as a party to the hearing, the board as the jury.

There is a common solution for this dilemma. For the purposes of the dismissal hearing, the board attorney 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. Obviously extra expense is involved, but the expense is frequently viewed as reasonable considering the gains in efficiency and fairness.

On three occasions 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,<sup>60</sup> Pender County,<sup>61</sup> and Charlotte-Mecklenburg<sup>62</sup> 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.”<sup>63</sup> Even so, the best practice is to engage an independent attorney to advise the board.

## Recording the Hearing, Preparing 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.<sup>64</sup> The teacher may have the hearing before the board transcribed by a court reporter at the teacher's own expense. As has been discussed, the statutory provision for recording a hearing before a case manager is quite different.

## Dismissal Step Five: The Board's Decision

At the conclusion of its hearing, the board must “make a determination”<sup>65</sup> whereby it may reject the superintendent's recommendation, accept the recommendation and dismiss, demote, or suspend the teacher, or modify the recommendation and dismiss, demote, or suspend the teacher. If the board rejects the superintendent's 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.<sup>66</sup> On closed provisions for the discussion of personnel matters, however, the open meetings act 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.”<sup>67</sup> It is not clear how this provision affects the board vote after the board hearing. Interpreted literally, it applies to votes to discharge or remove but not to suspend or demote. It also 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.”<sup>68</sup> Does the breadth of that provision include

60. *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).

61. *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).

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

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

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

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

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

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

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

the board vote, or does the open-vote provision of the open meetings act apply? There is no case law directly on this point. The best practice would be to assume that the open-vote provision of the open meetings act applies and move from closed session to open session for the vote at the end of the deliberations.

## Board's Report

Within two days of the conclusion of the hearing, the board must send a written copy of its "findings and determination"<sup>69</sup> 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 permit her to adequately prepare an appeal.<sup>70</sup> 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.

## Dismissal Step Six: Appeal by Teacher and Review by 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.<sup>71</sup>

## Applying 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."<sup>72</sup> 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 first had to determine how the appeal was to proceed.<sup>73</sup> The court's decision was to apply the state's Administrative Procedure Act (APA)<sup>74</sup> procedures and standards for review. That decision, which continues to be followed,<sup>75</sup> has two particular consequences. A brief discussion of each follows.

### *First Consequence: No New Trial*

In that 1976 Wake County case the court of appeals recognized that applying the APA standards meant that there would be no new trial in superior court. "Clearly, [the teacher] was not entitled to a trial *de novo* on the question of the truth or validity of the charges against him," the court said.<sup>76</sup> Rather, the court would be limited to a review of "the entire record as submitted."<sup>77</sup> Thus the action of the board will stand unless the superior court finds that an error of law occurred at the board level.

### *Second Consequence: Use of 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 superior court may overturn the action of an administrative agency if the action taken by that agency was "[u]nsupported by substantial evidence . . . in view of the entire record as submitted."<sup>78</sup> The application of the whole record test is discussed later in this section, beginning on page 15.

### *Applying the APA Even Though School Boards 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

73. *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).

74. G.S. Ch. 150B.

75. See *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977); *Overton v. Goldsboro Bd. of Educ.*, 304 N.C. 312, 283 S.E.2d 495 (1981); *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).

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

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

78. 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.

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

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

71. 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).

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

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.<sup>79</sup> Just which administrative agencies were subject to those Chapter 143 provisions was never clear.<sup>80</sup> 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.<sup>81</sup> 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 judicial review provisions still apply. The court noted that the APA expressly excepts 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."<sup>82</sup>

### *Applying Only Judicial Review Portion of 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, 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."<sup>83</sup>

### *Wording of Judicial Review Portion of APA*

The portion of the statute that applies to review of school board dismissal decisions currently is codified 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 in 1991 the court of appeals specifically held that all six subparts apply.<sup>84</sup> A court might rule, for instance, that the board of education made its decision to dismiss a teacher by following an unlawful procedure (perhaps by not exchanging witness information at the proper time or by not giving timely notice of a decision)<sup>85</sup> and therefore 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."<sup>86</sup> 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

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

80. "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).

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

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

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

84. *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).

85. 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).

86. *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).

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*.”<sup>87</sup> 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.”<sup>88</sup>

Second, the court must take into account all the evidence supporting the board’s decision and all that detracts from it.<sup>89</sup> “Under the whole record test, therefore, the reviewing judge must consider the complete testimony of all the witnesses.”<sup>90</sup> Specifically, the court must consider the case manager report, if there was one.<sup>91</sup>

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,<sup>92</sup> adding, “Substantial evidence is more than a scintilla or a permissible inference.”<sup>93</sup>

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.

## Hearings in a Reduction in Force

The hearing before a case manager in a teacher dismissal proceeding is a full-evidence hearing, and the hearing before the board of education is a limited-evidence hearing. An exception to the limited-evidence hearing before the board exists 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 development of procedures for implementing a RIF and selecting the particular employees to be dismissed as part of it is largely up to the discretion of the school board. A particular employee who is subject to the Teacher Tenure Act and is selected for a RIF has the right to a full-evidence hearing before the board under G.S. 115C-325(j3).

### Nature of 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 and 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.”<sup>94</sup> The board itself may 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.

### Exchange of Information

The rules for exchange of information before the hearing are a little different from those followed at 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.

87. *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).

88. *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).

89. *Thompson*, 292 N.C. at 410, 233 S.E.2d at 541.

90. *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).

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

92. *Id.*

93. *Id.*

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



## 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.”<sup>95</sup> 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.”<sup>96</sup>

## 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 article have described the procedures by which local boards may dismiss a teacher and the procedures by which a dismissal decision may be reviewed. But there are two special circumstances in which teachers may be dismissed instead by the State Board of Education.<sup>97</sup> These circumstances arise when a school has been identified as low-performing under the School-Based Management and Accountability Program and, one, the performance evaluations by the assistance team assigned to the school under that program have been negative with respect to a particular teacher or, two, a teacher in such a school has repeatedly failed a standard knowledge test after efforts at remediation. Again, it bears repeating that only in two limited circumstances under the School-Based Management and Accountability Program is the decision to dismiss a

teacher made by the State Board of Education and not the local school board. In such cases 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 to “[e]valuate at least semiannually the personnel assigned to the school and make findings and recommendations concerning their performance.”<sup>98</sup> 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.”<sup>99</sup>

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 makes the recommendation to dismiss the teacher. In such an instance the State Board “may dismiss” the teacher.

## Dismissal Triggered by Failing General Knowledge Test

Teachers in low-performing schools may be required to take and pass a general knowledge test.<sup>100</sup> 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.

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

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

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

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

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

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

## Hearing before 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.”<sup>101</sup> 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<sup>102</sup> 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.”<sup>103</sup>

The State Board has responded to that directive with provisions found in the North Carolina Administrative Code.<sup>104</sup> 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 legal counsel 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.

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

102. 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).

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

104. 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.”<sup>105</sup> 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.<sup>106</sup> 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,”<sup>107</sup> 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 above. ■

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

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

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

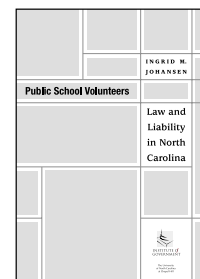
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# The School Board Chair: “Meeting” Expectations

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by Susan Leigh Flinspach and Jason Bradley Kay

*“[I harbor] some uncertainty about how much power the board chair should have.”*

—1999 survey respondent

THE CHAIRPERSONS of North Carolina school boards have an excellent resource for improving their leadership roles: the members of their own boards. Each school board member holds his or her expectations of the chair, and the board chairperson who is aware of these expectations is better prepared to lead the board. Some chairpersons learn about these expectations while at a retreat or a board work session; others learn less formally by listening and asking questions. Either way, as chairpersons reflect on board processes and problems, they benefit from knowing what members expect of them.

The purpose of this article is to help North Carolina school board chairpersons improve their leadership roles by examining board members’ expectations of the chair position. The data used throughout the article derive from a 1999 survey of school board members in North Carolina and have been evaluated in light of the notion of *facilitative leadership*, that is, leadership directed toward meeting the interests of everyone involved. The article concludes with a checklist of chair roles, based empirically on board members’ expectations, that is designed to give chairpersons a structured way to reflect on their own leadership.

The article comprises three main sections. The first section presents a statistical picture of school board

chairpersons in North Carolina from the 1999 survey data. The second sets out a framework for studying leadership roles that is based on school board members’ expectations of the role of chairperson. Survey data on these expectations give shape to a checklist of chair roles, which is presented in the third and final section and which offers current board chairpersons an indicator of how well they are doing in the position.

## School Board Chairpersons in North Carolina

*“The chairman is the key to the success or failure of a school system.”*

—1999 survey respondent

In 1999, the Institute of Government and the North Carolina School Boards Association co-sponsored the School Board Training Survey. Questionnaires were mailed to all 787 members on the 100 county, 17 city, and 3 federal school boards in the state. The questionnaires were sent in May. A follow-up questionnaire was mailed to non-respondents in August. The response rate was 54 percent, meaning that 428 board members had returned their questionnaires by November 1, when the study ended. Only one school board—a county board—did not respond. With that exception, the board-level response rates varied from one returned questionnaire to nine. The average number of returned questionnaires was 3.6 per school board.

A total of 139 survey respondents reported that they currently serve as the board chairperson or that they had served as chairperson in the past. Most of these 139 respondents have been on public school boards for

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more than one term (see Table 1), and 45 percent of them have been school board members nine years or longer. In North Carolina, apparently only rarely is the board chairperson a newcomer to the school board.

Even experienced board members, however, are unlikely to assume the chair position fully prepared for the office. The incoming chairperson is usually called on to learn new skills and handle new responsibilities, such as managing meetings, helping the school board work with the superintendent, and representing the board to others. Because of the learning curve associated with becoming the chair, the National Center for Nonprofit Boards<sup>1</sup> and a national study of “well-governed” versus “troubled” school boards<sup>2</sup> agree that boards benefit when the chairperson remains in office for at least two years. The national study of school boards makes the following recommendation:

The board should select its most able member as chair or president, based on his or her leadership qualities. The practice of rotating the chair among members should be eliminated, and each chair should serve for at least two years.<sup>3</sup>

Table 2 shows the years in office reported by the current and former board chairpersons in the 1999 survey. Of these respondents, 43 percent report that they have served as chairperson for less than two years, the minimum length of time recommended in the two national reports; 80 percent, for four years or less. Given the demands on the board chair, these figures are not surprising. Yet shorter terms mean that school board chairpersons have less time to master the skills, responsibilities, and expectations of the office.

## Expectations of the School Board Chair

*“The board chair sets the tempo—what he does affects the whole board.”*  
—1999 survey respondent

The concept of facilitative leadership—that is, leadership based on facilitating and empowering oth-

1. E. C. Dorsey, *The Role of the Board Chairperson*, NCNB Governance Series Booklet 11 (Washington, D.C.: National Center for Nonprofit Boards, 1992), p. 13.

2. R. H. Goodman et al., *Getting There from Here. School Board–Superintendent Collaboration: Creating a School Governance Team Capable of Raising Student Achievement* (Arlington, Va.: New England School Development Council and Educational Research Service, 1997), p. 43.

3. *Id.* at 42.

**Table 1**  
**Current and Former School Board Chairpersons:**  
**Years of Service on the Board**

Years of Service	Number of Chairpersons	Percent (%)
< 2 years	1	0.7
2 to 4 years	20	14.4
5 to 8 years	54	38.8
9 to 12 years	30	21.6
13+ years	33	23.7
No response	1	0.7
Total	139	99.9

**Table 2**  
**Years of Service as the Chair by Current and Former School Board Chairpersons**

Years of Service	Number of Chairpersons	Percent (%)
< 2 years	60	43.2
2 to 4 years	52	37.4
5 to 8 years	19	13.7
9+ years	8	5.8
Total	139	100.1

ers—provides the framework for the remainder of this article. A facilitative leader helps others to

... focus on the interests of all stakeholders and craft solutions that address all the interests. This does not mean that facilitative leaders give up their own interests. Rather, they think of their interests as one of many sets of interests to be considered when crafting solutions.<sup>4</sup>

Of particular interest in the use and study of this concept is the checklist of facilitative leadership roles developed by James Svava for city council chairs and mayors.<sup>5</sup> Svava’s checklist consists of ten roles organized into three categories:

4. R. M. Schwarz, *The Skilled Facilitator: Practical Wisdom for Developing Effective Groups* (San Francisco: Jossey-Bass Publishers, 1994), p. 254.

5. Svava’s research focuses on mayors and chairpersons in the council-manager form of city government. He first elaborated his model and developed the roles checklist in J. H. Svava & Associates, *Facilitative Leadership in Local Government: Lessons from Successful Mayors and Chairpersons* (San Francisco: Jossey-Bass Publishers, 1994). The checklist is also part of the re-

- traditional or automatic roles
- policy and organizing roles
- active coordination and communication roles.<sup>6</sup>

*Traditional or automatic roles* are “built into the office”;<sup>7</sup> they include doing ceremonial tasks, presiding over meetings, acting as a representative or promoter to other governments and agencies, and serving as a link between the board and the public. The second category, *policy and organizing roles*, calls for the chair to be a goal setter, a delegator and organizer, and a policy initiator for the board. The last category, *roles focusing on active coordination and communication*, is dependent upon the facilitative skills of the mayor or chairperson. These encompass articulating the issues facing the board and mobilizing resources, building a partnership with the executive officer, and helping the board network and function as a team. Obviously there is overlap among the roles, and as Svava notes, “success in one enhances success in others.”<sup>8</sup>

Svava’s checklist for mayors and city council chairpersons provides a basis for developing a checklist of roles for the facilitative school board chair. Figure 1 presents a preliminary adaptation of such a checklist that is suitable for analyzing the 1999 survey responses about the board chair position.<sup>9</sup> The 1999 School Board Training Survey touched on only seven of the ten roles outlined in Svava’s checklist but did include items in each of the three categories of roles: automatic, policy, and coordination and communication. The survey asked board members to indicate, from a list of fourteen items, what they considered to be the responsibilities of the school board chair and also allowed them to write in other comments.

### Automatic or Traditional Roles

The survey asked North Carolina school board members about some of the “traditional” or “automatic” roles on the board chairperson checklist (see

### Figure 1 Preliminary Checklist of the Roles of the School Board Chair

#### Traditional or Automatic Roles

Presiding Officer  
Representative to Other Governments and Agencies  
Link to the Public

#### Policy and Organizing Role

Goal Setter

#### Active Coordination and Communication Roles

Educator  
Liaison and Partner with Superintendent  
Team and Network Builder

Adapted directly from “Checklist of Roles for Council-Manager Mayors,” Exhibit 2, Chapter 12, in J. H. Svava & Associates, *Facilitative Leadership in Local Government: Mayors and Board Chairpersons in the Council-Manager Form* (San Francisco: Jossey-Bass, Publishers, forthcoming).

Figure 1). These roles are functioning as the *presiding officer* at school board meetings, acting as a *representative to other governments* and agencies, and serving as a *link to the public*.

### Presiding Officer

In a joint publication, the National School Boards Association and the American Association of School Administrators state that conducting the meeting and “other activities related to serving as the presiding officer of the board” are the responsibilities of the board chair.<sup>10</sup> In a survey published in 1996, U.S. school superintendents rated “presiding over board meetings” as the single activity that is crucial to the school board chair’s role.<sup>11</sup> And, a 1991 national sample of school board members included “presides over board meetings” as one of the few crucial roles of the chair.<sup>12</sup>

Managing school board meetings is the central component of the role of the presiding officer. Indeed,

in the council-manager form of government can be compared to the roles of the school board chair. To adapt this checklist to school board chairs requires the following changes: “Chair” or “chairperson” substitutes for “mayor”; “board,” for “council”; “superintendent,” for “manager.” The aptness of this preliminary adaptation will be assessed in light of the school board survey results.

10. Joint American Association of School Administrators–National School Boards Association Committee, *Roles and Relationships: School Boards and Superintendents*, revised ed. (Arlington, Va.: American Association of School Administrators, 1994), p. 10.

11. D. M. Seaton, “What Superintendents Say about Board Leadership,” *American School Board Journal* 183, No. 2 (1996): 18–19.

12. D. M. Seaton et al., “The Burden School Board Presidents Bear,” *American School Board Journal* 179, No. 1 (1992): 34.

visited volume *Facilitative Leadership in Local Government: Mayors and Board Chairpersons in the Council-Manager Form* (San Francisco: Jossey-Bass Publishers, forthcoming).

6. Exhibit 2, Chapter 12, in *Facilitative Leadership in Local Government: Mayors and Board Chairpersons in the Council-Manager Form*, *supra* note 5.

7. *Id.*, Chapter 12.

8. *Id.*

9. Svava distinguishes the mayor-council form of government (the elected mayor has formal powers over other officials) from the council-manager form (the mayor or chairperson lacks formal control over others). In structure, the council-manager form resembles school board–superintendent governance, and so the argument here is that the roles of the mayor

in the view of one survey respondent, the chairperson is “responsible for the quality and effectiveness of the board meeting.” In addition to conducting the meeting, meeting management encompasses preparing for the meeting and providing follow-up.<sup>13</sup> The 1999 survey contained three items about the chairperson’s responsibility for meeting management: establishing rules, keeping meetings focused, providing follow-up.

Fewer than half (47.7 percent) of the respondents in the 1999 survey said that establishing meeting rules is the responsibility of the school board chair. Interestingly, in the national survey of school board members taken in 1991, 84.8 percent of the respondents ranked “establishes meeting rules” as crucial to the chair’s role, and 60.2 percent reported that their chairpersons had done so.<sup>14</sup> Clearly North Carolina school board members in 1999 were much less willing to allow the chair-

person to decide on the meeting rules than were their counterparts across the country in 1991.

The second meeting-management item in the 1999 North Carolina survey is keeping board meetings focused. Almost all of the respondents, 98.4 percent, considered that to be the responsibility of the chair. Nonetheless the responses of chairpersons and other board members were slightly different. Every current and former board chairperson surveyed expected the chair to keep meetings focused, an expectation that was held by significantly fewer school board members.<sup>15</sup> On this item, the 1999 sample of North Carolinians and the national sample taken in 1991 were in complete agreement; 98.3 percent of the 1991 respondents ranked keeping meetings focused as a crucial role of the chair.<sup>16</sup>

With regard to following up on matters after the meeting, just over 60 percent of the surveyed board members said they expect the chairperson to follow up with individuals who agree to gather information or to carry out other tasks for the next board meeting. As

13. J. J. Herman, “All the Right Moves,” *American School Board Journal* 177, No. 4 (1990): 44–46, emphasizes the chairperson’s participation before, during, and after the meeting. J. Carver, *The Chairperson’s Role as Servant-Leader to the Board* (San Francisco: Jossey-Bass Publishers, 1997); Dorsey, *supra* note 1; and E. C. Hirzy, *The Chair’s Role in Leading the Nonprofit Board* (Washington, D.C.: National Center for Nonprofit Boards, 1998), focus on the chairperson’s actions before and during the meeting.

14. Seaton et al., *supra* note 12, at 34.

15. The chi square is 4.28, with one degree of freedom. The *p* value is .039.

16. Seaton et al., *supra* note 12, at 34.

## Bibliographic Resources for School Board Chairs

Many written sources are available to school board chairs, and in this accumulated literature it is common to find lists of roles or responsibilities, sometimes with descriptions or explanations. The following sources, for example, all contain lists of chair roles or responsibilities:

- Amundson, K. J. et al. *Becoming a Better Board Member*. Alexandria, Va.: National School Boards Association, 1996.
- Dorsey, E. C. *The Role of the Board Chairperson*. NCNB Governance Series Booklet 11. Washington, D.C.: National Center for Nonprofit Boards, 1992.
- Goodman, R. H. et al. *Getting There from Here. School Board–Superintendent Collaboration: Creating a School Governance Team Capable of Raising Student Achievement*. Arlington, Va.: New England School Development Council and Educational Research Service, 1997.
- Hirzy, E. C. *The Chair’s Role in Leading the Nonprofit Board*. Washington, D.C.: National Center for Nonprofit Boards, 1998.

Also common are articles that include pointers about meeting-management tasks. One such example is

- Jones, G. L. “Lessons for Leaders.” *American School Board Journal* 183, No. 2 (1996): 17–19.

Board member expectations, however, have generally been overlooked in the literature. A notable exception is Daniel Seaton’s survey work with school board members:

- Seaton, D. M. et al. “The Burden School Board Presidents Bear.” *American School Board Journal* 179, No. 1 (1992): 32–37.

with the second item, responses to this third meeting-management item differed by chair service. Current and former chairpersons were significantly less likely to expect the chairperson to handle this task than were the other respondents.<sup>17</sup> This difference in expectation signals the potential for misunderstandings to develop on North Carolina school boards, as most board members do in fact hold the chair responsible for following up with others after the meeting.

Serving as the presiding officer at board meetings would seem to be an automatic role of the school board chair, yet as has been described, school board members have different expectations of the duties of the presiding officer. Slightly less than half of the board members surveyed expect the chair to be responsible for establishing meeting rules, and slightly more than half do not. Virtually all of the respondents reported that they expect the chair to keep the meetings focused, but that expectation is stronger among current and former chairpersons than among other board members. Significantly more board members than current and former chairpersons say that chairs are responsible for following up with others after the meeting. The role of presiding officer may be automatic, but its obligations are not.

### *Representative to Other Governments and Agencies*

Much of the literature on school board chairpersons ignores their role as the school board's representative to other governments and agencies. Most of the 1999 survey respondents, however, acknowledged that board chairpersons do indeed have that role. In North Carolina, local boards of education and the boards of county commissioners interact to develop the school system's annual budget, and 59.2 percent of the survey respondents reported that they expect the chairperson to be the school board's liaison to the board of county commissioners. A few respondents wrote that the chairperson could or should select the school board's representative to the board of county commissioners rather than do the job him- or herself. These comments indicate that the chair has the right to choose a liaison to outside agencies but that his or her decision to become that liaison should not be automatic. Most of the board members who responded to the survey reported that they expect their chairperson to represent their school board to other governments and external agencies, but a

few said they expect their chairs to select the representative from among the other members of the board.

### *Link to the Public*

As shown in Figure 1, acting as a link to the public is considered to be another automatic or traditional role of the school board chair. Being board spokesperson is one of the duties of this role. The National School Boards Association describes the spokesperson for the school board as follows: "It is often helpful to have one individual who presents the board's official position to the public. Typically, the board president fulfills this role."<sup>18</sup> In the national survey of school board members taken in 1991, 86.4 percent of the respondents considered "board spokesman" to be crucial to the role of the board chair.<sup>19</sup>

Among the 1999 North Carolina survey respondents, 83.6 percent indicated that they expect the board chairperson to be the board spokesperson. One board member openly challenged this expectation, however: "There is no reason that the chair's views should be the dominant view espoused—either to the public or to staff." A few respondents expressed discomfort with the automatic character of the responsibility. For example, one respondent suggested that the board chair should "serve as board spokesperson sometimes," whereas another said the chair should not serve as spokesperson "unless directed by the board." Of the fifty-seven respondents who wrote additional comments about the chair's responsibilities, seven (12.3 percent) singled out the spokesperson role. These comments tended to be characterized by emotional language, and several were critical of the way in which a given respondent's board chairperson had carried out the duties of spokesperson. Nonetheless, most board members agreed that being spokesperson is part of the board chair's role.

Another component of the link to the public role is dealing directly with citizens and the community. North Carolina school board members are sharply divided on the issue of whether or not that should be a responsibility of the chair. Only 48.4 percent indicated that they expect the chairperson to serve as the board liaison to the community. Four respondents wrote that the chair could or should delegate the community liaison role to others, but seven indicated that the entire board shares

17. The chi square is 4.67, with one degree of freedom. The *p* value is .031.

18. K. J. Amundson et al., *Becoming a Better Board Member* (Alexandria, Va.: National School Boards Association, 1996), p. 74.

19. Seaton et al., *supra* note 12, at 34.

this responsibility. One respondent said it is “important for all board members” to serve as liaisons to the wider community, “especially in large school systems.” A plausible cause of the disagreement over this item can be discerned in the words of a former school board chairperson from Virginia:

The growing complexity of internal board relations is mirrored in the board’s external relationships. The same sociological and ideological divides that show up among board members on many issues also complicate a school board’s relationships with its community. Neither “the board” nor “the community” is a single entity with a predictable agenda and predictable expectations.<sup>20</sup>

In sum, just under half of the 1999 survey respondents indicated that the school board chairperson should be the board’s liaison to the community, but most agreed that the chair should act as the spokesperson for the board.

### Analysis

The 1999 North Carolina School Board Training Survey data are inconclusive as to whether or not all three of the automatic or traditional roles—presiding officer, representative to other governments and agencies, and link to the public—are appropriate for the school board chair. That the board chair should always assume the role of presiding officer has been officially recognized by the National School Boards Association<sup>21</sup> and has gained widespread acceptance, as gauged by a national sample of school board members<sup>22</sup> and of superintendents.<sup>23</sup> The other two roles, however, lack these clear indicators of agreement. The 1999 North Carolina survey results offer support for all three roles but are more equivocal about the link to the public role. Whereas a majority of the school board members agreed it is the responsibility of the board chair to serve as board spokesperson, a minority of respondents voiced concerns with the status quo. More importantly, less than half of the board members reported that they consider it the chairperson’s job to be the board liaison to the community, and several wrote strong objections to the chair assuming that responsibility. The evidence

thus suggests that narrowing “link to the public” down to “board spokesperson” would more accurately reflect board members’ expectations of the role.

A second question arises about the categorization of these roles as automatic or traditional. Both labels, especially automatic, imply that school board members should expect such roles to be built into the chair position. The school board respondents, however, took this posture toward only one task, keeping the meeting focused, and for just one role, that of presiding officer. A few board members suggested that the chair could or should select other board members to be the board spokesperson and the representative to the county commissioners. Additional research could help to separate member expectations of the *role* from their expectations of the *tasks* encompassed by it. Given the current evidence, though, the two problematic roles—serving as a representative to other governments and agencies and as board spokesperson—could more accurately be labeled *probable* roles of the school board chair.

Figure 2 takes this analysis into account and breaks out the probable roles from the automatic or traditional ones. Whereas acting as the presiding officer remains in the automatic category, serving as board spokesperson and functioning as a representative to other governments and agencies are now labeled as probable roles of the school board chair in order to reflect more accurately board members’ expectations of the position.

### Policy and Organizing Roles

The policy and organizing category on the Svara checklist for mayors and chairpersons includes three roles: goal setter, delegator and organizer, and policy initiator. The National Center for Nonprofit Boards suggests that the board chairperson should “set goals and expectations for the board.”<sup>24</sup> The National School Boards Association’s guide to boardsmanship recognizes the board chair’s role as a delegator,<sup>25</sup> but the literature on school board chairs has little to say about that person’s role in policy making. The 1999 North Carolina School Board Training Survey included one question about policy leadership—related to the role of goal setter—but no questions related to delegating, organizing, or policy initiation. For that reason, the checklist for school board chairs (Figure 1) contains only the goal setter role. Clearly more research is needed

20. G. L. Jones, “Lessons for Leaders,” *American School Board Journal* 183, No. 2 (1996): 19.

21. Joint American Association of School Administrators–National School Boards Association Committee, *supra* note 10, at 10.

22. Seaton et al., *supra* note 12, at 34.

23. Seaton, *supra* note 11.

24. Hirzy, *supra* note 13, at 6.

25. Amundson et al., *supra* note 18, at 74.



**Figure 2**  
**Realignment of the School Board Chairperson's**  
**Automatic or Traditional Roles Based on the 1999**  
**Survey Data**

**Automatic or Traditional Role**

- Presiding Officer
- Keeps meetings focused (98.4% agreement)
  - Follows up on individuals who agree to gather information or carry out tasks for the next board meeting (60.8% agreement)
  - Does *not* establish meeting rules

**Probable Roles**

- Representative to Other Governments and Agencies
- Serves as board liaison to the county commissioners (59.2% agreement)
- Board Spokesperson
- Serves as board spokesperson (83.6% agreement)

to help school board members understand the policy and organizing roles of the board chair.

Surveyed school board members were asked if taking the lead in setting board goals or priorities is a responsibility of the school board chair. Board members were divided over this question, with about 54 percent responding that they do expect the chairperson to take the lead in setting goals or priorities. Figure 3 incorporates this information into the partial checklist of roles for school board chairpersons.

**Active Coordination and**  
**Communication Roles**

*"I continue to see the chairman's most effective role as that of a facilitator/coordinator."*

—1999 survey respondent

The last category of roles derived from the Svara checklist focuses on active coordination and communication. The three roles constituting this category are: educating the board, the school superintendent, and the public; serving as board liaison to, and partner with, the superintendent; and team and network building.

**Educator**

The educator role has received some attention in the literature on school board chairs. The school board members who responded to the 1991 national survey tended to criticize their board chairpersons for not helping to educate other board members. They gave

**Figure 3**  
**Partial Checklist of School Board Chairperson's Roles**  
**Based on the 1999 Survey Data**

**Automatic or Traditional Role**

- Presiding Officer
- Keeps meetings focused (98.4% agreement)
  - Follows up on individuals who agree to gather information or carry out tasks for the next board meeting (60.8% agreement)
  - Does *not* establish meeting rules

**Probable Roles**

- Representative to Other Governments and Agencies
- Serves as board liaison to the county commissioners (59.2% agreement)
- Board Spokesperson
- Serves as board spokesperson (83.6% agreement)

**Policy and Organizing Role**

- Goal Setter
- Takes lead in setting board goals or priorities (54.7% agreement)

their chairpersons low ratings on planning board in-service training, providing orientation for new board members, and instructing the board on superintendent relations.<sup>26</sup> Superintendents in the 1996 survey rated the board chairperson's educational tasks as "important,"<sup>27</sup> and the National School Boards Association's boardsmanship guide urges chairpersons to take part in planning one particular educational task for board members—the orientation process for new members.<sup>28</sup>

The 1999 North Carolina School Board Training Survey included one question about the chair's educator role, to which 70 percent of the board members surveyed reported the expectation that their chairperson should help new school board members learn the ropes. Even more than other 1999 respondents, current and former school board chairpersons acknowledged the importance of this task. They have significantly higher expectations of the chair's responsibility to assist new board members than do other board members.<sup>29</sup> Some board chairpersons take part both in the planning of local orientations for new members and in the instruction. About a quarter of the survey respondents who had gone through a local orientation to the school

26. Seaton et al., *supra* note 12, at 34.

27. Seaton, *supra* note 11.

28. Amundson et al., *supra* note 18, at 73.

29. Chi square is 6.15, with one degree of freedom. The *p* value is .013.

board reported that their board chairpersons had helped with their orientation. Twenty-five board members said that the chairperson was the sole instructor in their local orientation. Thus all school board members, and especially board chairpersons, expect the board chair to carry out this aspect of the educator role.

### *Liaison and Partner with Superintendent*

In its guide for board members, the National School Boards Association notes: "The board president must serve as a liaison between the board and the superintendent."<sup>30</sup> This role is central to maintaining open lines of communication between the superintendent and the school board. The chairperson and the superintendent have the opportunity to work together regularly to develop the meeting agenda. According to a national study published in 1997, board chairpersons and superintendents in high-achieving districts meet or confer by telephone or e-mail at least once each week.<sup>31</sup> Following those exchanges, the chairperson then contacts the other board members to keep them informed. In the national survey of school board members conducted in 1991, 86.2 percent of the respondents indicated that "keeping superintendent communications open" is a crucial responsibility of the board chair.<sup>32</sup>

The 1999 North Carolina survey asked board members if they thought that the board chair is responsible for keeping communication open between the board and the superintendent. A total of 85.2 percent said that they do expect the chair to fulfill this role. Board chairpersons and other board members are largely in agreement on this task, but members' responses varied according to their length of service on the school board. The longer a member had been on the board, the more likely she or he was to expect the chair to keep board-superintendent communication open.<sup>33</sup> This result indicates that with greater experience on the board comes a greater willingness to accept the board chair's role as liaison between the board and the superintendent.

### *Team and Network Builder*

Using case studies of mayors and city council chairpersons, Svava has shown that the chairperson's ability to help the council work as a team and build net-

works with outside groups is central to successful facilitative leadership. The chairperson acts as a facilitative leader by forging collaborative relations, by helping others accomplish their goals, and by using cooperation and consensus to further the board's mission or vision.<sup>34</sup> Four items on the 1999 survey of North Carolina school board members dealt with these aspects of facilitative leadership and helped to clarify board members' expectations of the chair's role as team builder and network builder.

The first item asked board members whether or not they consider "building consensus at meetings" to be a responsibility of the board chair; 70 percent of the respondents said they do. A significantly greater number of current and former chairpersons hold this expectation than do other board members,<sup>35</sup> and it may be that leadership experience underscores the importance of consensus building.

The survey also asked school board members about the chair's responsibility to motivate members and to help resolve conflicts among them. The respondents were divided about motivation. Just 54.2 percent reported that they expect the chair to help motivate board members. The 1999 respondents do however consider the chair to be responsible for dealing with the third item, involving internal conflicts, with 74.6 percent reporting that they expect the chair to help resolve such problems. Responses to all three items, especially the ones on consensus building and resolving internal conflicts, indicate that board members expect the school board chair to help the board work as a team.

The fourth item, which pertains to networking with outside groups, asked if it is the chairperson's responsibility to help resolve conflicts between the school board and other entities. Almost 60 percent of the respondents indicated that this is indeed a responsibility of the chair. Although school board members do not necessarily consider the chairperson to be the board's liaison to outside groups (and certainly not the board's liaison to the community in general), they do expect him or her to help with any fence-mending that is needed in order to do a better job of networking. Thus the survey results provide evidence that all of the active coordination and communication roles pertain to school board chairs.

30. Amundson et al., *supra* note 18, at 74.

31. Goodman et al., *supra* note 2, at 15.

32. Seaton et al., *supra* note 12, at 34.

33. Chi square is 12.32, with four degrees of freedom. The *p* value is .015.

34. Svava & Associates, *supra* note 5, at 216-55.

35. Chi square is 9.48, with one degree of freedom. The *p* value is .002.

**Figure 4**  
**Final Checklist of School Board Chairperson's Roles**  
**Based on the 1999 Survey Data**

#### Automatic or Traditional Role

Presiding Officer

- Keeps meetings focused (98.4% agreement)
- Follows up on individuals who agree to gather information or carry out tasks for the next board meeting (60.8% agreement)
- Does *not* establish meeting rules

#### Probable Roles

Representative to Other Governments and Agencies

- Serves as board liaison to the county commissioners (59.2% agreement)

Board Spokesperson

- Serves as board spokesperson (83.6% agreement)

#### Policy and Organizing Role

Goal Setter

- Takes lead in setting board goals or priorities (54.7% agreement)

#### Active Coordination and Communication Roles

Educator

- Helps new board members learn the ropes (70.0% agreement)

Liaison and Partner with the Superintendent

- Keeps board-superintendent communications open (85.2% agreement)

Team and Network Builder

- Builds consensus at meetings (70.0% agreement)
- Motivates board members (54.2% agreement)
- Helps resolve conflicts among board members (74.6% agreement)
- Helps resolve conflicts between the board and others (59.6% agreement)
- Does *not* serve as board liaison to the community

## The Final Roles Checklist

Figure 4 presents the final checklist of roles expected of the school board chair, according to the 1999 North Carolina School Board Training Survey. Adapted from the Svava checklist for mayors and city council chairpersons, this checklist comprises the roles that are appropriate for facilitative leadership. Facilitative leaders seek out the interests of stakeholders, help others meet their goals, and work toward building consensus based on the mission of the board.<sup>36</sup> The active coordi-

**Table 3**  
**School Board Members' Ratings**  
**of the Board-Chairperson Relationship**

Rating	Number of Responses	Percent (%)
Very Good	201	47.0
Good	114	26.6
Satisfactory	60	14.0
Poor	30	7.0
Very Poor	7	1.6
Other	16	3.7
Total	428	99.9

nation and communication roles in particular derive from the facilitative framework and reflect its priorities.

Figure 4 puts the data from the 1999 survey onto the checklist. The data present the board members' reactions to a list of possible chair responsibilities and embody some of the members' expectations concerning the chair position. Organized by role, the survey data outline the ways in which 54 percent of the board members in the state (the response rate for the survey) expect school board chairpersons in North Carolina to carry out those roles.

The survey data affected the contents of the checklist in two major ways. First, the survey had no information about three roles on the original Svava checklist, so those roles were dropped from the analysis. Second, school board members expect the chair to be the presiding officer at meetings, but they do not consider the chair's other roles to be "automatic" or built-in features of the office. Consequently, the school board chair's checklist has a new category (probable roles) containing two roles (acting as representative to other governments and agencies and acting as board spokesperson) from the automatic category on the Svava checklist. Despite the parallels of their offices, facilitative mayors and school board chairs have slightly different roles.

Relatively few school board members throughout the state are dissatisfied with the relationship between their board and its chairperson. Almost three fourths of the survey respondents characterized the quality of their board's relationship with the board chairperson as good or very good, and 47 percent rated it as very good (Table 3). In completing the survey, respondents also assessed the quality of their board's relationship with the superintendent, school staff, students, parents, county commis-

36. Svava & Associates, *supra* note 5, at 216-55.

sioners, community, and the media. The relationship between the board and the chairperson was rated high compared with these other individuals and groups. Only the board-superintendent relationship received consistently higher ratings than the board-chairperson relationship. These high ratings suggest that many school board members feel their own chairperson is meeting many of their expectations.

The final checklist (Figure 4) should give chairpersons, especially newly elected chairpersons, a starting point for reflecting on their own roles and for learning

about their own board members' expectations about those roles. For instance, a chairperson can be reasonably certain that the board will expect him or her, as the presiding officer, to keep meetings focused. Whether the chairperson should be the board's representative to other governments and agencies is less certain, though, and what the board expects that representative to do is completely undetermined. The checklist should help the board chairperson develop and raise important questions, looking to her or his own board for the answers. ■

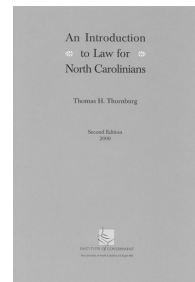
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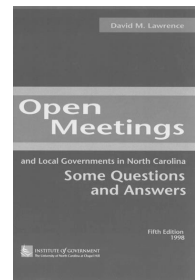
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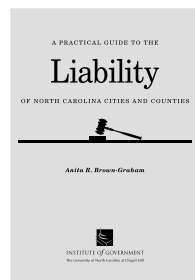
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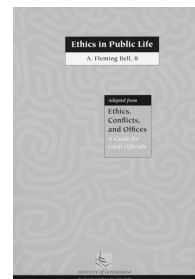
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