



Hands Off My Tenure!

Unions challenge constitutionality of reforms

by JOSHUA DUNN

In recent years, some states have shown an increased interest in reforming tenure practices to make it easier to fire bad teachers in public schools. North Carolina and Colorado illustrate two different approaches to such reform. In both states, unions have sued, claiming that tenure, once granted, is

constitutionally protected. The outcomes of these cases are likely to shape reform efforts across the country.

In 2013, North Carolina decided to completely revoke teacher tenure. The state's new standards stipulated that, instead of tenure, probationary teachers would be eligible for multi-year contracts. For those who already had tenure, such protection would be eliminated in July 2018 and replaced with the same system of multi-year contracts. In response, the North Carolina Association of Educators (NCAE) sued in *NCAE v. State*, claiming that the new law violated both the North Carolina Constitution's prohibition on taking property without just compensation and the U.S. Constitution's prohibition on state laws "impairing the Obligation of Contracts." In 2014, a trial court agreed that the law violated the property and contractual rights of already tenured teachers but not the rights of those yet to receive tenure. An appellate court upheld the decision, setting up a 2016 showdown before the state supreme court.

The court unanimously sided with the tenured teachers. However, it grounded its decision solely on the U.S. Constitution's contract clause and did not address the unions' property-rights claims. The court held that teachers' right to tenure "vested" once they signed a contract with their local school district at the end of their probationary period. Once that occurred, teachers had "reliance interests" that implicated the contract clause. Dismissing ineffective tenured teachers, the court held, was a legitimate state interest that could overcome tenured teachers' contractual rights; however, the state had not proven that the existing employment policies were inadequate for carrying out such dismissals. Content with eliminating tenure for future teachers, North Carolina declined to appeal in federal court.

The Colorado Supreme Court will hear a similar case involving a small subset of teachers. In 2010, the state legislature passed the Great Teachers and Leaders Act, which, unlike North Carolina's measure, had bipartisan support. Its lead author was Democratic state senator Michael Johnston, and it was signed by Governor Bill Ritter, also a Democrat. One part of the law was designed to eliminate the so-called Dance of the Lemons. Previously, tenured teachers who lost their positions because of school changes, such as declining enrollment

or program elimination, were guaranteed another position at another school in their district. This "forced placement" of teachers led to bad teachers being passed from school to school, and the ones on the receiving end—most often, schools serving underprivileged students—had no choice but to accept these "lemons." The new law replaced this practice with a "mutual consent" system under which a receiving school's administration and teacher representatives had to approve any new placements. Displaced teachers who could not find a school willing to accept them were put on paid leave for 12 months, after which time they were placed on unpaid leave.

With the support of the Colorado Education Association, the Denver Classroom Teachers Association, along with five teachers, sued the Denver Public Schools, claiming that the mutual-consent provision violated the teachers' contract clause and property rights under the Colorado Constitution. In 2014, a trial court rejected the union arguments, since displacement is not the same thing as dismissal. But in 2015 that ruling was overturned by an appellate court. The state supreme court agreed to review the ruling and will decide the case in 2017.

Colorado's law appears to have a better chance of surviving than North Carolina's. Instead of eliminating tenure for all teachers, regardless of performance, Colorado's focused on the teachers' fitness. To nullify the law, the court would have to say that the few teachers unable to find a placement should be entitled to a job even if they are not qualified for any existing positions. Colorado's law provides for a just-cause displacement of poorly performing teachers rather than a blanket removal of tenure.

For other states, the implications are clear. Wholesale elimination of tenure for those who already have it will face difficult legal challenges, while narrower reforms are more likely to survive. But for long-term insurance against litigation, states should eliminate tenure only for future teachers. Those who have never received a benefit cannot claim that they are legally entitled to it.

Joshua Dunn is professor of political science at the University of Colorado–Colorado Springs.