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New York Administrative Procedure for the Dismissal of Teaching Personnel

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NEW YORK ADMINISTRATIVE PROCEDURE FOR THE DISMISSAL OF TEACHING PERSONNEL

In New York the procedure for the dismissal of teaching personnel is controlled by the general administrative case law and by the specific provisions of the State Education Law. This study is designed to provide a guide to the basic procedural framework that must be followed by boards of education in dismissing teaching personnel. There will be no attempt to analyze the particular problems involved in any specific cause for dismissal except where the nature of the cause directly affects the desirability of the proposed procedure. Teacher dismissal under Education Law section 3021 (removal of superintendents, teachers and employees for treasonable or seditious acts or utterances) or under Education Law section 3022 (elimination of subversive persons from the public school system) will not be dealt with due to the peculiar constitutional problems involved in these provisions.[1]

In General: Tenure and the Statutory Scheme

There is no general provision of the Education Law which controls the dismissal of teaching personnel in all school districts. The statutory provisions divide the school districts according to size or the number of teachers employed and there are specific provisions governing tenure and probation in each of these types of districts. The following is a list of sections of the Education Law and the type of district to which they are applicable:

A. Section 2573 applies to city school districts with 125,000 or more inhabitants. Specifically, it applies to New York, Buffalo, Rochester, Syracuse, Yonkers and Albany.[2] Within this section there are subsections which control procedure in cities with a population of 400,000 or more inhabitants[3] and cities with a population of one million or more inhabitants.[4]

B. Section 2509 applies to city school districts in cities with a population of less than 125,000 inhabitants.[5]

C. Section 3012 applies to Union Free school districts having a population of more than 4,500 inhabitants and employing a superintendent of schools.[6]

D. Section 3013 applies to school districts employing eight or more teachers other than city school districts and school districts having a population of 4,500 or more inhabitants and employing a superintendent of schools.[7]

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1. For a discussion of these provisions of the N.Y. Educ. Law, see Comment, *An Appraisal of Security Legislation in Education in Light of Keyishian: A Proposed Solution*, *supra* p. 781.
2. See N.Y. Educ. Law § 2550.
3. N.Y. Educ. Law § 2573(6).
4. N.Y. Educ. Law § 2573(7).
5. See N.Y. Educ. Law § 2501.
6. N.Y. Educ. Law § 3012(1).
7. N.Y. Educ. Law § 3013(1).

E. Section 3014 applies to boards of co-operative educational services.[8]

F. Section 3020 is a short provision of general application providing that teachers shall not be dismissed except for cause found sufficient by the Commissioner of Education.

Thus the provisions governing probation and the dismissal of a teacher with tenure cover all school districts employing eight or more teachers and also cover the boards of co-operative educational services. In addition to this, there is a provision which prohibits the dismissal of any teacher[9] without sufficient cause.

Teacher Dismissal During the Probationary Period

It is appropriate first to examine the procedure for the dismissal of a teacher during the probationary period since this area may be dealt with summarily. The actual period of probation may be from one to five years, the variance due to statutory provisions for various types of school districts and the discretion vested in the school boards by statute.[10] The services of a teacher may be discontinued at any time during the probationary period on the recommendation of the superintendent of schools or district superintendent. The recommendation must be approved by a majority vote of the board of education.[11] At the end of the probationary period the superintendent, based on competent, efficient and satisfactory performance, may recommend the appointment of the teacher in a written report to the board.[12] If, at the end of the probationary period tenure is not granted, school boards are required to give sixty days notice of this refusal to the applicant.[13] The dismissal of a teacher during the probationary period is at the discretion of the school board,[14] although the board may act only on the recommendation of the superintendent.[15] There is no statutory requirement that grounds for dismissal be specified[16] or that a hearing be held by the school board.[17]

Dismissal of a Teacher with Tenure

Once a teacher has been given tenure, he holds his position as long as he meets the standard of good behavior and competent and efficient service, and

8. N.Y. Educ. Law § 3014(1).

9. N.Y. Educ. Law § 3020. Thus this general provision covers districts employing less than eight teachers.

10. N.Y. Educ. Law §§ 2509(1), 2573(1) provide for a probation period of not less than one year and not more than three years to be fixed by the school board.

N.Y. Educ. Law § 3012(1) provides for a probationary period of three years.

N.Y. Educ. Law §§ 3013(1) and 3014(1) provide for a probationary period not to exceed five years, which is established by the school board.

11. N.Y. Educ. Law §§ 2509(1), 2573(1), 3012(1), 3013(1), 3014(1).

12. N.Y. Educ. Law §§ 2509(2), 2573(5), 3012(2), 3013(2), 3014(2).

13. N.Y. Educ. Law §§ 2509(1), 2573(1), 3012(2), 3013(2), 3014(2).

14. Pinto v. Wynstra, 22 A.D.2d 914, 915, 255 N.Y.S.2d 536, 538 (2d Dep't 1964); Matter of Marie Ursula Lehn, 1 N.Y. Dep't of Educ. Rep. 286 (1959).

15. Application of Board of Educ. of Cent. School Dist. No. 1, 283 App. Div. 376, 128 N.Y.S.2d 155 (3d Dep't 1954).

16. Matter of Ruth Ross, 1 N.Y. Dep't of Educ. Rep. 47, 48 (1958).

17. Bomar v. Cole, 177 Misc. 740, 742, 32 N.Y.S.2d 825, 827 (Sup. Ct. 1941).

may not be dismissed unless the school board follows the prescribed statutory procedures[18] as to notice, hearing and cause. The board must also conform these specific statutory provisions to the requirement of "due process of law" found in the federal and state constitutions.[19] Additionally, the board is bound by the rules and practices found in New York State administrative case law. The emphasis of these administrative decisions is on the fairness and objectivity of the administrative procedure. The Court of Appeals has declared that "the hearing held by an administrative tribunal acting in a judicial or quasi-judicial capacity may be more or less informal. Technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential element of a fair trial can be dispensed with unless waived."[20] The basic aim of these general administrative case law requirements for a fair hearing is to protect citizens from arbitrary government action.[21] With reference to this general mandate for "fairness," the particular procedural steps in the dismissal of a teacher will be examined.

INVESTIGATION

The first step taken by the school board in dismissing a teacher is the investigation of a complaint against a particular individual. All complaints are filed with the board of education,[22] either by the superintendent as provided by statute,[23] by the board itself[24] or by private individuals.[25] The time in which these charges must be brought is governed by statutory provisions which vary according to the type of school district.[26] Those complaints or charges, whether written or oral, originating outside of the school system and made to a single board member, should be communicated to the entire board and a reply should be drafted which is non-commital but assures the complainant of an investigation by the board.[27] If the complaint arises out of school activities, an investigation

18. N.Y. Educ. Law §§ 2573(5), 2509(2), 3012(2), 3013(2), 3014(2).

19. U.S. Const. amend. XIV, N.Y. Const. art. 1, § 6. See Bender v. Board of Regents 262 App. Div. 627, 30 N.Y.S.2d 779 (3d Dep't 1941), where "due process" was characterized as "due notice and a full opportunity to be heard before an impartial tribunal . . . [which results in] clear and convincing proof of his guilt." *Id.* at 632, 30 N.Y.S.2d at 785.

20. Hecht. v. Monaghan, 307 N.Y. 461, 470, 121 N.E.2d 421, 426 (1954).

21. See Stuart v. Palmer, 74 N.Y. 183 (1878); see also Note, 30 St. John's L. Rev. 251 (1956).

22. N.Y. Educ. Law §§ 3012(3), 3013(3), 3014(3) require written charges to be filed with the board; sections 2509 and 2573 do not have such a specific requirement.

23. N.Y. Educ. Law §§ 3012(3), 3013(3), 3014(3).

24. Cooke v. Dodge, 164 Misc. 78, 81, 299 N.Y. Supp. 257, 262 (Sup. Ct. 1937).

25. Matter of Broderick, 68 N.Y. Dep't of State Rep. 28 (1947). (Charges were filed by the Parent Teachers Association.); see also Matter of Joseph D. Errico, 3 N.Y. Dep't of Educ. Rep. 72, 73 (1963). A survey of the school district members of the Erie County Association of School Boards indicates that supervisors, parents and pupils are the most frequent source of complaints although there was one reported instance of a complaint brought by the local police department.

26. N.Y. Educ. Law §§ 2509(3-a), 3012(4), 3013(2-a) provide that charges must be brought within five years unless such conduct *constituted* a crime when committed. N.Y. Educ. Law § 2573(8-a) requires charges to be brought in three years unless such conduct *resulted in a conviction* for a crime. N.Y. Educ. Law § 3014 has no specific requirement.

27. Rezny, *Legal Problems of School Boards*, §§ 4.6, 4.7, in 5 Legal Problems of Education Series (1966).

may be made with comparative ease by the superintendent or other appropriate school official.[28] When the complaint involves charges arising from outside activities, however, the difficulty is greatly increased. The teacher may be questioned, the complainant must be interviewed and the facts alleged by the parties must be verified. Normally these investigatory functions are performed by the teacher's immediate supervisor, for example the building principal, or (as is more often the case) by the superintendent of schools for the district.[29] Although individual members of the school board, with or without the authorization of the board, may conduct an informal investigation of any charges (which investigation would not disqualify them from sitting or voting on a later hearing of these charges),[30] it would be advisable to act in a more formal manner to give reassurance of fairness and impartiality in these quasi-judicial proceedings.[31] While "ex parte" exidence will be discussed later in this study,[32] it is pertinent to point out that if an individual member of the board investigates such charges and does not communicate to the board *and* the parties involved in the adjudication, his action will undermine the validity of any decision reached by the board.[33] The results of the investigation must be given to the board and to the parties in order to avoid the possibility that the board's decision may be reversed on appeal.[34] Also, in the interest of impartiality and to insure the absence of the appearance of bias and prejudice, it is good practice for the board member who usually conducts the hearing to avoid any participation in the investigation.[35]

The Requirement of Notice

If charges have been filed with the school board, or an investigation has led the board to file charges itself, the accused teacher must be adequately notified of the hearing at which the validity of those charges will be determined. Although the specific statutory provision may make no mention of the requirement of

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28. *E.g.*, school records may be examined in the case of a complaint of continued, unexcused absence, or there may be interviews conducted with students, supervisors or subordinates involved in a complaint of incompetency.

29. A survey of the thirty-three members districts of the Erie County Association of School Boards indicated that the superintendents normally were responsible for the investigations of complaints against personnel. (Investigation procedures included interviewing teachers, parents, pupils and other school board employees.)

30. Kaney v. State Civil Serv. Comm'n, 190 Misc. 944, 77 N.Y.S.2d 8 (Sup. Ct.), *aff'd*, 273 App. Div. 1054, 81 N.Y.S.2d 168, *aff'd*, 298 N.Y. 707, 83 N.E. 2d 11 (1948) (Preliminary investigation does not necessarily preclude a fair hearing or impartial consideration by the administrative agency.).

31. Bender v. Board of Regents, 262 App. Div. 627, 30 N.Y.S.2d 779, (1941): "In the administration of justice it is not only requisite that a tribunal invested with judicial powers should be honest, unbiased, impartial and disinterested in fact, but equally essential that all doubt or suspicion to the contrary should be jealously guarded against and eliminated." *Id.* at 631, 30 N.Y.S.2d at 784.

32. *Infra* p. 823.

33. Annot., 18 A.L.R.2d 553, § 2 (1951).

34. *Ibid.*

35. See, 1 Benjamin, Administrative Adjudication in the State of New York [hereinafter cited Benjamin] 77 (1942).

notice or of the content of such notice,[36] it has been held that the accused teacher must, at least, be notified of the nature of the complaint and the time and place at which he will be given the opportunity to answer the charges.[37] The requirement of notice will be met if the allegations are sufficiently specific, and are set out in a manner which will allow the person charged to *prepare* to meet these allegations at a hearing by the school board.[38]

CAUSE FOR DISMISSAL

Some statutory provisions specifically enumerate the "causes" or conduct of teaching personnel which justify dismissal by the school board,[39] while other provisions leave the possible "causes" for dismissal unspecified.[40] The conduct involved may or may not be related to school activities.[41] However, the "cause," to be sufficient, must be reasonably related to some action or conduct of the teacher which renders his services undesirable; it must be a neglect of duty or evidence of conduct affecting his character or fitness for the position.[42]

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36. N.Y. Educ. Law §§ 2509, 2573 have no special requirement of notice. N.Y. Educ. Law §§ 3013(3), 3014(3) do not specify the content of such notice but rather require that a copy of the charges filed with the school board be served on the person so charged at least ten days before the date set for the hearing. N.Y. Educ. Law § 3012(3) has the most detailed statement of the requirement of notice, it provides in part: "No teacher on tenure shall be dismissed, however, unless furnished with a written statement, specifying in detail the charge or charges against said teacher, signed by the proper officer of the board of education and naming a date and place at which the teacher may appear before the board of education and answer said charge or charges." This same subsection provides that the hearing is to be held not less than 20 days nor more than 30 days after notice has been served and that such notice may be by registered mail to that party's last known address.

37. Matter of Healey, 34 N.Y. Dep't of State Rep. 449, 451 (1926).

38. Benjamin 77-78: "The essence of quasi-judicial procedure is that each party be given an adequate opportunity to present his case and to meet the case against him. It is by this criterion that the adequacy of particular methods of specifying the issues in particular proceedings should be judged . . . ." See also 1 Davis, Administrative Law Treatise [hereinafter cited Davis] §§ 8.04, 8.05 (1958); Model State Administrative Procedure Act § 8 (example of other items which it might be appropriate to specify in the notice).

39. N.Y. Educ. Law §§ 3012(2), 3013(2), 3014(2) list two classes of "cause":

"(a) insubordination, immoral character or conduct unbecoming a teacher." Generally this class deals with conduct not necessarily related to school performance.

"(b) inefficiency, incompetency, physical or mental disability or neglect of duty." Generally this class deals with conduct directly related to school duties and educational performance.

These causes, when specified, are the exclusive reason for dismissal and must be shown to justify such dismissal. Kobylski v. Agone, 37 Misc. 2d 255, 263, 234 N.Y.S.2d 907, 915 (Sup. Ct.) *aff'd*, 19 A.D.2d 761, 242 N.Y.S.2d 630 (1962).

40. N.Y. Educ. Law §§ 2509(2), 2573(5) leave the possible "causes" for dismissal by the school board unspecified.

41. There is no precise way to delineate those activities which are related to school activities and those which are not, though individual cases may fall clearly in one or the other category. See, *e.g.*, Matter of Fotheringham, 15 N.Y. Dep't of State Rep. 561 (1930) (affirming the dismissal of a teacher who was absent without consent); Matter of Bronson, 15 N.Y. Dep't of State Rep. 561 (1930) (affirming the dismissal of a teacher who had a child born out of wedlock).

42. Cooke v. Dodge, 164 Misc. 78, 82, 299 N.Y. Supp. 257, 262 (Sup. Ct. 1937). Typically courts are vague in their definition of "sufficient cause"; however it can be said that the conduct involved must be in some way detrimental to the school system. See also Matter of Mufson, 18 N.Y. Dep't of State Rep. 393, 399 (1918).

REQUIREMENT OF A HEARING

After making the initial determination that there are grounds for a formal presentation of charges[43] the school board, or a committee of its members[44] must hold a formal hearing. This hearing must not be a mere formality held to announce a previously decided decision.[45] The statutory provisions contemplate a formal presentation of the evidence with the accused individual having an opportunity to fully reply to these charges.[46] The various provisions of the N.Y. Education Law differ in their specific requirements for the hearing with respect to such matters as testimony under oath, subpoena power, the right to counsel, and the compilation of an adequate record.[47] Regarding the subpoena power, it must be noted that both the agency and the person appearing before it have the right to subpoena witnesses and records. It must also be remembered that it is not the duty or privilege of the agency to determine the necessity of the testimony to be given by any witness of the respondent.[48] A subpoena or subpoena duces tecum, for the production of papers, should be issued any time it will further the inquiry, and such a subpoena may be issued whenever the requested material bears any reasonable relation to the subject matter of the investigation.[49] The teacher charged always has the right to be represented by counsel,[50] regardless of whether the statute involved specifically refers to this right. The inherent right of a citizen to be represented by counsel has received the strongest affirmation by the New York courts.[51]

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43. N.Y. Educ. Law § 2509(3) requires that the board have "probable cause," *i.e.*, such substance to the allegations that would lead reasonable men to hold a hearing to determine their validity, before a formal presentation of charges is made and a hearing held. If charges do not constitute a "prima facie" case—not likely to be true—no hearing by the school board is required. Matter of Parents Ass'n of Pub. School 131, 75 N.Y. Dep't of State Rep. 152, 153 (1954). N.Y. Educ. Law §§ 2573, 3012, 3013, 3014 do not specifically require a determination of "probable cause."

44. N.Y. Educ. Law §§ 2509(3), 2573(8), 3013(3), 3014(3) provide for a hearing by the board or a committee of its members. However, N.Y. Educ. Law § 3012(3) makes no allowance for a hearing by a committee of the school board and N.Y. Educ. Law § 2573(7), applicable to cities with a population of 1,000,000 or more, contains a provision for the discretionary appointment of a trial examiner by the board. In each of these provisions it is specified that the board is not bound by the decision of the committee or examiner and, after having read the testimony and evidence, may accept, modify or reject their findings.

45. Cooke v. Dodge, 164 Misc. 78, 81, 299 N.Y. Supp. 257, 262 (Sup. Ct. 1937).

46. Matter of Kenney, 64 N.Y. Dep't of State Rep. 209, 210 (1942).

47. See Appendix for the variations in the statutes.

48. Coney Island Dairy Prod. Corp. v. Baldwin, 243 App. Div. 178, 276 N.Y. Supp. 682 (3d Dep't 1935): "The privilege of a litigant to enforce the attendance of witnesses is an ancient right and should not be denied by prejudging the materiality of the testimony which may be given . . . . The issuance of a subpoena is a matter of right and not a matter where the discretion of a judge or clerk may be exercised." *Id.* at 180, 276 N.Y. Supp. at 684.

49. New York State Elec. & Gas Corp. v. N.Y. Pub. Serv. Comm'n, 169 Misc. 144, 7 N.Y.S.2d 225 (Sup. Ct. 1938).

50. Fusco v. Moses, 304 N.Y. 424, 107 N.E.2d 581 (1952); see also Greenbaum v. Bingham, 201 N.Y. 343, 94 N.E. 853 (1911). Of course, this does not mean that the proceedings are invalid if the person charged does not avail himself of this privilege.

51. 1 Cooper, State Administrative Law 329 (1965).

Resignation Before or During the Hearing

The resignation of a teacher with tenure, facing an administrative proceeding on charges filed with the school board, is an accepted avenue of teacher discipline.[52] The Commissioner of Education has ruled[53] that the board of education has the power to accept or reject a resignation,[54] and that once the resignation has been accepted by the board, the teacher may not withdraw it without the board's consent. In the same ruling the Commissioner declared that a resignation *requested* by the board, in order to discontinue disciplinary proceedings, was not made under duress.[55] In another instance, a teacher, faced with various charges, submitted an irrevocable resignation and the proceedings were dropped "without prejudice." On appeal, a lower court order that the resignation be vacated and that the petitioner be given a hearing, was reversed by the Appellate Division. The court upheld the resignation and declared that the proper interpretation of the term "without prejudice" was that the charges would be dropped without imputation of wrongful behavior.[56] However, it must be remembered that though a resignation may be inferred from behavior, it must be an intentional, deliberate and voluntary act; mere absence, without more, may not be sufficient evidence of an intent to resign.[57]

Conduct of the Hearing

Prior to the formal hearing, the school board may suspend the accused teacher.[58] The suspension may be for a limited time only. Should the teacher be reinstated after the hearing, he must be paid in full for the period of suspension.[59] The time and place of the hearing should be convenient for all the parties involved,[60] and should normally be a closed meeting, unless the teacher being charged wishes otherwise, in order to avoid damaging the reputation of that

52. A survey of the member school districts of the Erie County Association of School Boards indicated that those districts replying considered the resignation of teaching personnel facing charges was the most desirable avenue of teacher discipline. Only two districts reported complaints which reached the formal hearing stage. One of these districts reported two persons were requested to resign for "moral reasons" and then went on to say: "These problems have never reached the formal hearing and I surely hope that they never do." Questionnaire on file at the office of the Buffalo Law Review.

53. Matter of Palmer, 49 N.Y. Dep't of State Rep. 75 (1934).

54. This power is subject to an appeal to the Commissioner of Education; see N.Y. Educ. Law § 310.

55. Matter of Palmer, 49 N.Y. Dep't of State Rep. 75, 79 (1934).

56. McFerron v. Board of Educ. of Colonie Cent. Schools, 21 A.D.2d 944, 251 N.Y.S.2d 48 (3d Dep't), *aff'd*, 15 N.Y.2d 630, 255 N.Y.S.2d 674, 203 N.E.2d 924 (1964).

57. Matter of Lelia Johnson, 3 N.Y. Dep't of Educ. Rep. 186, 187 (1964).

58. The Education Law, specifically or impliedly, authorizes the suspension of a teacher after the charges have been brought until a determination of the matter has been made. N.Y. Educ. Law §§ 2509(3), 2573(8) authorize such suspension by calling for payment of back wages if the teacher is re-instated or acquitted. N.Y. Educ. Law § 2573(7) calls for a period of suspension at the discretion of the board of not more than ninety days. N.Y. Educ. Law §§ 3012(3), 3013(3), 3014(3) authorize a suspension of the teacher of not more than thirty days.

59. N.Y. Educ. Law §§ 2509(3), 2573(7), (8), 3012(3), 3013(3), 3014(3).

60. Benjamin 124.

person.[61] The actual physical setting of the hearing room should reflect an attempt to preserve the formality of the proceeding;[62] of course this latter requirement is limited by the availability of facilities.[63]

One of the indispensable requisites of a fair hearing is the right of the respondent to cross examine witnesses and produce witnesses and evidence to refute the charges against him.[64] This right of cross examination is limited, at least to the extent that the stringent requirements of a criminal proceeding need not be met, and special circumstances such as the need for the testimony of children of tender years would justify the school board in controlling and limiting the examination.[65] However, it should be remembered that the lack of opportunity to cross examine a witness weakens the probative value of such testimony when it is being considered by a reviewing court.[66]

Technical rules of evidence need not apply to an administrative hearing;[67] for example, hearsay testimony is admitted in a number of circumstances.[68] The trend at both the state and federal levels is to make technical evidentiary rules inapplicable to administrative tribunals.[69] The Model State Administrative Procedure Act section nine provides: "Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs." In New York it has been said that the spirit rather than the letter of judicial rules of evidence applies to proceedings before administrative tribunals.[70]

Conclusion of the Hearing

It is difficult to say what amount of evidence is sufficient to sustain the charges made by the school board, thereby justifying the dismissal of a teacher, since there is a paucity of decisions under the Education Law regarding what is "sufficient evidence." The burden of proof, of course, is on those attempting to dismiss the teacher or alleging the misconduct.[71] The courts speak of a "fair preponderance of the evidence" in order to justify the dismissal of a teacher by

61. Benjamin 126.
62. Benjamin 125.
63. See Davis § 8.13 on hearing procedure and methods.
64. 1 Cooper, *op. cit. supra* note 51, at 361.
65. Shields v. Hults, 21 A.D.2d 745, 250 N.Y.S.2d 143 (4th Dep't 1964): In the absence of a "compelling reason to the contrary" petitioner has a right to be confronted by the witnesses who presented proof against him. *Id.* at 746, 250 N.Y.S.2d at 144. For an interesting discussion of the problems of children's testimony, see Stafford, *The Child As a Witness*, 37 Wash. L. Rev. 303 (1962).
66. Benjamin 199.
67. Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954).
68. Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916). However, in view of the nature of the action, hearsay and other incompetent testimony should be severely restricted. Benjamin 178. No definite guidelines can be given as to when such testimony should be rejected, the provision as to the judgment of "reasonable" men as found in the Model State Administrative Procedure Act § 9 is the best available guideline.
69. 2 Davis § 14.06.
70. Roge v. Valentine, 280 N.Y. 268, 20 N.E.2d 751 (1939).
71. Matter of Cawston, 71 N.Y. Dep't of State Rep. 48, 49 (1951). See also Matter of Sharp, 40 N.Y. Dep't of State Rep. 33, 34 (1930).

the board.[72] It should be noted that although the technical rules of evidence do not apply to administrative proceedings, and although hearsay and other "incompetent" evidence may be admitted, there must be some other competent evidence which establishes the facts alleged and from which reasonable inferences may be drawn.[73] Briefly, the courts will insist that the school board make a conscientous, painstaking and open-minded analysis of the evidence and draw a reasonable conclusion therefrom.[74] Thus, no finding of an administrative agency can be sustained if it is based solely on suspicion, speculation, surmise and guesswork.[75] There must be substantial evidence to support the findings, *i.e.*, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[76]

The school board's decision to dismiss a teacher can only be based on evidence introduced in a hearing at which the respondent had an opportunity to rebut that evidence.[77] The principle that an administrative tribunal cannot base its decision on material not in the hearing record has a long history in New York.[78] The courts enforce this rule by precluding administrative reliance on such evidence as affidavits or testimony taken in the absence of the interested parties, or the school record of the individual or facts gathered from the agency's own investigation which are not in the transcript or record.[79]

The various statutory provisions of the New York Education Law call for a majority vote by the school board before a penalty is imposed and some of these provisions also list the possible penalties.[80] Though the method of discipline normally is chosen by the board, occasionally the courts have overruled the board if the penalty was found to be too harsh or not to fit the offense.[81]

Appeal and Review

After reaching a decision the school board must state the cause for dismissal and the specific evidence in the record on which it relied to support its findings. Intelligent appellate review of the board's determination is impossible unless

72. Matter of Morton, 30 N.Y. Dep't of State Rep. 9, 11 (1939); Matter of Anne Healy, 20 N.Y. Dep't of State Rep. 193, 195 (1919). See also Matter of Brown, 57 N.Y. Dep't of State Rep. 332 (1937) (held testimony of numerous superiors sufficient).

73. International Ry. v. Boland, 169 Misc. 926, 928, 8 N.Y.S.2d 643, 646 (Sup. Ct. 1939).

74. Leogrande v. State Liquor Authority, 25 A.D.2d 225, 268 N.Y.S.2d 433 (1st Dep't 1966).

75. Monachino v. State Liquor Authority, 12 Misc. 2d 666, 180 N.Y.S.2d 753 (Sup. Ct.), *rev'd on other grounds*, 6 A.D.2d 378, 178 N.Y.S.2d 22 (4th Dep't 1958).

76. Kilgus v. Board of Estimate of City of New York, 308 N.Y. 620, 627, 127 N.E.2d 705, 710 (1955).

77. Annot., 18 A.L.R.2d 555 (1951).

78. People *ex rel.* Kierbrick v. Roosevelt, 1 App. Div. 577, 37 N.Y. Supp. 488 (1st Dep't 1896).

79. Day v. Board of Regents, 266 App. Div. 888, 42 N.Y.S.2d 803 (3d Dep't 1943); Revere Ass'n v. Finkelstein, 274 App. Div. 440, 84 N.Y.S.2d 546 (1st Dep't 1948).

80. N.Y. Educ. Law §§ 2509(3), 3013(3), 3014(3), 2573(7) list the possible penalties as follows: a fine, a reprimand, a suspension for a fixed period without pay, or dismissal. N.Y. Educ. Law §§ 2573(8), 3012 do not list any penalties.

81. Tessier v. Board of Educ. of Union Free School Dist. No. 5, 24 A.D.2d 484, 260 N.Y.S.2d 789 (2d Dep't 1965). See also Matter of Louise Lehr, 72 N.Y. Dep't of State Rep. 129 (1952).

such written findings are made.[82] The absence of a declaration of the grounds for the determination would place an unreasonable burden on the dismissed teacher in preparing his challenge of the determination and would impede the court's review.[83] Findings must be sufficiently specific to enable a reviewing court to test the sufficiency of the evidence—to determine whether it is of such substance as will support the determination.[84]

An appeal to the Commissioner of Education or to the courts by a dismissed teacher is allowed under all of the various provisions of the Education Law.[85] An appeal to the Commissioner of Education is provided for under Education Law section 310. It has been held that his decision, once made, is final unless it can be shown he acted in a purely arbitrary manner,[86] or that he based his decision on a mistaken interpretation of the state statute or constitution.[87] The respondent teacher is not required to first appeal to the Commissioner of Education before he may appeal to the courts; rather, he has the option to appeal either to the Commissioner of Education or to the courts.[88] The procedure for an appeal to the Department of Education is left to the Commissioner under Education Law section 311.[89] If the petitioner has previously appealed the decision of the school board to the courts, the Commissioner will not entertain an appeal which would alter the court's decision.[90] An appeal may be dismissed if it is taken before there is a final decision at the lower level.[91] However, in the case of a dismissal, a petition for review must be presented in the time alloted by the Education Department rules of procedure. If it is not presented within the specified time it will be barred by laches from appeal to the Commissioner unless sufficient cause for the delay is alleged.[92] Once the decision of the Commissioner has been announced there must be a showing of new material evidence

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82. State Liquor Authority v. Patin, 23 Misc. 2d 525, 199 N.Y.S.2d 300 (Sup. Ct. 1960).
83. Carroll v. Huckle, 274 App. Div. 1024, 86 N.Y.S.2d 243 (4th Dep't 1948).
84. Di Orio v. Murphy, 20 A.D.2d 754, 247 N.Y.S.2d 417 (4th Dep't 1964).
85. N.Y. Educ. Law §§ 2509(2), 2573(5), 3012(4), 3013(4), 3014(4). The requirements of these provisions are uniform. For example, see N.Y. Educ. Law § 2509(2) which provides in part:

> Any person conceiving himself aggrieved may review the determination of said board either by an appeal to the commissioner of education, or as provided in article seven of this chapter or in accordance with article seventy-eight of the civil practice act. If such person elects to institute a proceeding under the civil practice act the determination of such board, for the purpose of such proceeding, shall be deemed final.

(References to the Civil Practice Act are now to N.Y. CPLR art. 78: see N.Y. CPLR § 7801.)
86. Birmingham v. Commissioner of Educ., 48 Misc. 2d 1052, 1053, 266 N.Y.S.2d 700, 702 (Sup. Ct. 1966).
87. Abramson v. Commissioner of Educ., 1 A.D.2d 355, 150 N.Y.S.2d 250, *motion for rehearing denied*, 2 A.D.2d 612, 152 N.Y.S.2d 426 (3d Dep't 1956).
88. Council v. Donovan, 40 Misc. 2d 744, 748, 244 N.Y.S.2d 199, 203 (Sup. Ct. 1963); see also note 84 *supra*.
89. See Abramson v. Commissioner of Educ., 1 A.D.2d 366, 150 N.Y.S.2d 270 (3d Dep't 1956), *motion for rehearing denied*, 2 A.D.2d 612, 152 N.Y.S.2d 426 (3d Dep't 1956).
90. Matter of Haskell-Gilroy, Inc., 1 N.Y. Dep't of Educ. Rep. 463, 464 (1960).
91. Matter of New Rochelle, 70 N.Y. Dep't of State Rep. 123, 125 (1949).
92. Matter of Shoonmaker, 30 N.Y. Dep't of State Rep. 219, 222 (1923).

or that the original decision was rendered under a misapprehension of the material facts, for an appeal to be reopened.[93]

CONCLUSION

The following are suggested procedural steps in the dismissal of teaching personnel.

In notifying a teacher of charges placed against him, the important element is specificity. State the time, place and nature of the incidents which have led to the inquiry. If school records are to be presented at the hearing by the board, they should be specifically identified. There is no danger that the board will be strictly held to these specifications. Administrative agencies are not held to technical procedural rules, and if some further incident or charge is brought to light at the hearing it will not violate the individual's right to be notified of the charges against him. However, it might be advisable to give that person additional time, should new charges be brought up at the hearing.

It is also advisable that the notice inform the person charged of his right to be accompanied by counsel, his right to produce evidence, and his right to bring witnesses before the board.

The time set for the hearing should not be rigidly adhered to, since it may be in the interest of a fair hearing that the teacher be allowed additional time to prepare his defense.

In order to give the appearance, as well as the actual fact, of a fair hearing, the board should separate the functions of the people who investigate, prosecute, and decide the case. It might be suggested that the superintendent of the school system or chief school officer be charged with the investigation and the presentation of the charges against the individual.

The attorney for the school district should always be present at disciplinary hearings. Informal procedural practices suggested by the school attorney will help to expedite the hearing and insure a fair and objective inquiry.

Though strict evidentiary rules are not requisites of a fair hearing, the board should remember that it is "building a record" which may be reviewed by the courts. Documents and school records referred to or used should be specifically cited so that the reference may be noted in the record of the hearing, and the accused may examine the material. It would also be advisable for the board to attempt to corroborate, as far as possible, hearsay and other "informal evidence" presented to it.

When the board reaches a decision, it is required that this decision be supported by findings. The hearing record should be examined and the reasons for the dismissal of the teacher be supported by findings as to all pertinent facts appearing in the record. If new information or material comes to the attention of the board after the hearing it should re-open the case, notify the teacher of the additional evidence and hold another hearing. This is advisable even if the

93. Matter of Katzowitz, 76 N.Y. Dep't of State Rep. 69, 70 (1955).

original record was sufficient, in the board's estimation, to substantiate the charges. Spending a little extra time will eliminate any possibility of an accusation that the board used "ex parte" evidence or that the defendant's rights were prejudiced by evidence which he had no opportunity to refute. This accusation, if sustained, would be fatal to the board's determination.

There is one other possible suggestion that generally covers all of the procedural steps taken by the school board in the discipline of teaching personnel. The school board should act in a formal manner; formality fosters a more complete and precise inquiry which should lead to a more accurate determination.

Finally, it must be noted that the principle object of the provisions of the Education Law and the object of the courts in setting minimum procedural standards for administrative tribunals is to insure the respondent teacher a fair hearing. This objective will be reached if the school board follows a procedure designed to allow the accused individual every opportunity to present his case and which allows the board every opportunity for due consideration of the merits of the case.

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APPENDIX

The following table is a compilation of the differences as to the specific requirements of a hearing in the various statutes:

Education Law	Subpoena power		Testimony Under Oath	Transcript or Record	Right to Counsel	Option for Public or Private Hearing
	Records	Individuals				
§ 2509	x	x	x	0	0	0
§ 2573	*	x	x	0	0	0
§ 3012	0	0	x	x	x	x
§ 3013	0	x	x	x	0	0
§ 3014	0	x	x	x	x	0

Specifically referred to = x
No specific reference = 0

* Education Law § 2573(8) makes no mention of the board's power to subpoena records while such provision is made in sub-section (7) applying to cities with a population of one million or more.