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Alaska State Legislature

Al Adams
District L

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Official Business

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Senator Al Adams AA

DATE: January 19, 1990

Re: Senate Bill 194, "An Act relating to judicial review of school boards' nonretention or dismissal of teachers."

Thank you for scheduling the aforementioned legislation.

My reasons for introducing Senate Bill 194 are to eliminate an expensive duplication that occurs when teachers are reviewed for nonretention.

At present, school boards can dismiss either tenured or non-tenured teachers for one of three reasons- incompetency, immorality or substantial non-compliance with the school laws of the state, the regulations or bylaws of the department, the bylaws of the district or the written rules of the superintendent. Tenured teachers can be nonretained for these same reasons or because of a necessary reduction of staff caused by a decrease in school attendance.

Under existing law, a teacher who is dismissed or nonretained can request a formal hearing before his or her local school board. This hearing can occur in either an open or closed session at the teachers discretion. The teacher has the right to cross-examine witnesses, subpoena person or persons who have made allegations against the teacher and the right to representation by counsel. The proceedings at the hearing must be recorded and a transcript provided to the teacher at cost. The final decision must be written and contain specific finding of fact and conclusions of law. In addition the final decision must be provided within 10 days of the date of the hearing.

Following this hearing and subsequent decision, a tenured teacher is entitled to a de novo (new) trial in superior court. This proceeding would

duplicate the prior hearing in every respect and at considerable cost in time and expense to the school district.

Under Senate Bill 194, the teacher would retain the right to appeal to the Superior Court, but only on the record of the school board hearing. The Superior court could not reverse a factual decision of the school board if the decision was based on substantial evidence on the record.

It is my opinion that the under the provisions of Senate Bill 194, teachers would continue with adequate civil and constitutional protections but that wasteful duplication of effort would cease.

Thank you again for your consideration.

BILL VERSION: SB 194
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Judicial Review of School Boards' Nonretention or Dismissal of Teachers
Sponsor: Adams
Requestor: Senate HESS

Agency Affected: Education
BRU: K-12 Support
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Mary Hakala
Division: Commissioner's Office
Phone: 465-2800
Date: 3/3/89

Approved by Commissioner: William G. Demmert
Agency: Education
Date: 3/3/89

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

ASSOCIATION OF ALASKA SCHOOL BOARDS
316 W. 11th St. • Juneau, Alaska 99801-1510 • (907) 586-1083

Position Paper

Senate Bill 194

The Association of Alaska School Boards encourages the support of SB 194 "an act relating to judicial review of School Boards' non-retention or dismissal of teachers."

The proposed legislation is seeking to define the School Board as an administrative agency under AS 22.10.021. As such, "the hearing on appeal from a final order or judgement of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or part."

The hearing process regarding non-retention or dismissal of teachers is necessary for fair protection of teacher rights. However, the process is time consuming and very costly to school districts. A trial de novo allows a teacher to appeal to the superior court for a new trial regardless of the finding of the hearing process. A school district must then repeat the process before the court and incur the financial cost once again thereby delaying the process.

The Association of Alaska School Boards respectfully requests that the Senate Hess Committee pass SB 194 and recognize School Boards as an administrative agency under 22.10.021.

ALASKA ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS
ALASKA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS
ALASKA ASSOCIATION OF SCHOOL ADMINISTRATORS

• ALASKA COUNCIL OF SCHOOL ADMINISTRATORS •
326 Fourth St., Suite 408 Juneau, Alaska 99801 586-9702

POSITION PAPER SB 194 "An Act relating to judicial review of school boards' nonretention or dismissal of teachers."

Sec. 14.20.180 "Procedures and hearing upon notice of dismissal or nonretention" clearly lays out the due process with the final decision based on specific findings of fact and conclusion of law.

It seems after a school district has gone to the expense and time to show just cause, they should not have to continue repeating the whole process again under the "trial de novo" appeal process. It would seem appropriate school districts be defined an administrative agency under AS 22.10.021 and consequently all findings of fact be reviewed and considered by the superior court before granting a trial de novo, in part or whole.

The Alaska Council of School Administrators respectfully requests the Senate committee pass SB 194 and recognize school boards as an administrative agency under 22.10.021.

NEA-ALASKA

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

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March 6, 1989

To: Senator Paul Fischer, Chair
Members, Senate HESS Committee

Re: Senate Bill No. 194; "An Act relating to judicial review of school board's nonretention or dismissal of teachers."

NEA-Alaska strongly opposes SB 194.

By placing constraint upon the latitude of the court in what it may consider and the remedy it may grant cuts the very heart out of the fundamental principle of due process and fair treatment under law.

AS 14.20.205 in its present form in providing access to a de novo trial in superior court not only assures due process but discourages arbitrary and capricious treatment of employees.

In far too many instances the school board or some of its members have already been party to discussion and even decisions to dismiss or nonretain employees even before the process reaches the hearing at the school board level.

To suggest that the process is impartial in all instances even under current law is to clearly stretch the imagination beyond reality. The presence of the potential for judicial review of a school board decision through a de novo trial is the one component in law that brings credibility to the school board hearing process.

Facts, as stated by a school board, should be able to withstand the scrutiny of the courts, especially when the employee disagrees with and contests the validity of the facts and any subsequent action by the school board which may lead to termination of employment and the person's source of income.

Section 2 of the proposed legislation has the effect of setting up a dual system of due process for employees in similar circumstances and may very well not stand he test of equal protection under the Alaska Constitution.

The answer to the alleged problem which brings this legislation forward is more thorough and conscientious pre-hire consideration of prospective employees by school district administrators and closer scrutiny of their recommendations for employment by the school boards.

Additionally, a better job in evaluation of employee performance consistent with the regulations of the Department of Education will further serve the best interests of school boards, employees and students.

NEA-Alaska strongly believes that the disruptive and adverse effect that this legislation would have on employees and their expectation of fair and equitable treatment under law is not in the public interest.

Thank you for your consideration of our position.

Respectfully submitted,

Bob Manners
Executive Secretary

cc: Senator Al Adams

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Sec. 22.10.020. Jurisdiction of the superior court. (a) The superior court is the trial court of general jurisdiction, with original jurisdiction in all civil and criminal matters, including probate and guardianship of minors and incompetents. Except for a petition for injunctive relief under AS 25.35.010 or 25.35.020, an action that falls within the concurrent jurisdiction of the superior court and the district court may not be filed in the superior court, except as provided by rules of the supreme court.

(b) The jurisdiction of the superior court extends over the whole of the state.

(c) The superior court and its judges may issue injunctions, writs of review, mandamus, prohibition, habeas corpus, and all other writs necessary or proper to the complete exercise of its jurisdiction. A writ of habeas corpus may be made returnable before any judge of the superior court.

(d) The superior court has jurisdiction in all matters appealed to it from a subordinate court, or administrative agency when appeal is provided by law. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part.

(e) An appeal to the superior court is a matter of right, but an appeal from a subordinate court may not be taken by the defendant in a criminal case after a plea of guilty, except on the ground that the sentence was excessive. The state has no right to appeal in criminal cases, except to test the sufficiency of an indictment or information or to appeal a sentence on the ground it is too lenient.

(f) An appeal to the superior court may be taken on the ground that a sentence of imprisonment of 90 days or more was excessive and the superior court in the exercise of this jurisdiction has the power to reduce the sentence. When a sentence is appealed by the state on the ground it is too lenient, the court may not increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.

(g) In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

(h) The superior court, in an action for divorce, separation, or child support, affecting inalienable stock in a corporation organized under 43 U.S.C. 1601 — 1628 (Alaska Native Claims Settlement Act), may

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order the stock transferred to the spouse, a child, or a guardian or custodian for a child, but may not order it sold on the open market or transferred to other persons.

(i) The superior court is the court of original jurisdiction over all causes of action arising under the provisions of AS 18.80. A person who is injured or aggrieved by an act, practice, or policy which is prohibited under AS 18.80 may apply to the superior court for relief. The person aggrieved or injured may maintain an action on behalf of that person or on behalf of a class consisting of all persons who are aggrieved or injured by the act, practice, or policy giving rise to the action. In an action brought under this subsection, the court may grant relief as to any act, practice, or policy of the defendant which is prohibited by AS 18.80, regardless of whether each act, practice, or policy, with respect to which relief is granted, directly affects the plaintiff, so long as a class or members of a class of which the plaintiff is a member are or may be aggrieved or injured by the act, practice, or policy. The court may enjoin any act, practice, or policy which is illegal under AS 18.80 and may order any other relief, including the payment of money, that is appropriate. (§ 17(1) (2) ch 50 SLA 1959; am § 2 ch 117 SLA 1969; am § 1 ch 240 SLA 1970; am § 3 ch 70 SLA 1972; am § 8 ch 12 SLA 1980; am § 78 ch 6 SLA 1984; am § 2 ch 17 SLA 1985)

Revisor's notes. — Chapter 50 SLA 1959 implemented the constitution by providing for the establishment of the supreme and superior court system under the constitution. It was designed to accomplish the transfer of judicial functions within the three-year transition period contemplated by the Statehood Act, P.L. 85-508 of July 7, 1958, with provision being made for a more rapid transfer if the President sooner ended the jurisdiction of the territorial courts by executive order.

In November, 1959, eight superior court judges were appointed. On February 20, 1960, the President signed Executive Order No. 10,867, which ended the jurisdiction of the District Court for the Territory of Alaska and proclaimed that the United States District Court for the District of Alaska was prepared to assume the functions imposed upon it. Section 31(1) ch 50 SLA 1959 provided that causes might be commenced, filed, and determined in the state courts in each judicial district from the appointment of one or more judges for the district. Although by the terms of § 31(2) the jurisdiction of the state courts was to be nonexclusive until January 3, 1962, the effect of the executive order was to give them the exclusive jurisdiction which they would in any event receive on that date.

Cross references. — For intervention by the State Commission for Human Rights in an action brought under AS 22.10.020(c), see AS 18.80.145. For appeal of sentence of imprisonment to court of appeals, see AS 22.07.020(b). For appeal from district court to superior court in criminal actions, see AS 22.15.240(b).

Effect of amendments. — The 1984 amendment rewrote this section.

The 1985 amendment added the last sentence of subsection (a).

Editor's notes. — Section 37, ch. 12, SLA 1980 provides: "Sections 8, 15 and 31 of this Act have the effect of changing Rule 21, Rules of Appellate Procedure and Rule 7, District Court Criminal Rules by amending AS 22.10.020(a), AS 22.15.240, and AS 12.55 to provide that a sentence of 90 days or more imposed by the district court may be appealed."

Section 12, ch. 17, SLA 1985 provides that the 1985 amendment to (a) of this section applies only to cases filed on or after July 1, 1985.

AS 14.20.145 is expressly made subject to this section. Redman v. Department of Educ., Sup. Ct. Op. No. 1009 (File Nos. 1802, 1822), 519 P.2d 760 (1974).

Sec. 14.20.160. Loss of tenure rights. Tenure rights are lost when the teacher's employment in the district is interrupted or terminated. (§ 1 ch 92 SLA 1960; am § 1 ch 104 SLA 1965; am § 20 ch 98 SLA 1966; am § 22 ch 37 SLA 1986)

Effect of amendments. — The 1986 amendment deleted "or when the teacher reaches the age of 65" at the end of the section.

Sec. 14.20.165. Restoration of tenure rights. A teacher who held tenure rights and who was retired due to disability under AS 14.25.130, but whose disability (1) has been removed, and the removal of that disability is certified by a competent physician following a physical or mental examination, or (2) has been compensated for by rehabilitation or other appropriate restorative education or training, and that rehabilitation or restoration to health has been certified by the division of vocational rehabilitation of the department, shall be restored to full tenure rights in the district from which the teacher was retired, at such time as an opening for which the teacher is qualified becomes available. (§ 1 ch 71 SLA 1975)

Sec. 14.20.170. Dismissal. (a) A teacher, including a teacher who has acquired tenure rights, may be dismissed at any time only for the following causes:

(1) incompetency, which is defined as the inability or the unintentional or intentional failure to perform the teacher's customary teaching duties in a satisfactory manner;

(2) immorality, which is defined as the commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude; or

(3) substantial noncompliance with the school laws of the state, the regulations or bylaws of the department, the bylaws of the district, or the written rules of the superintendent.

(b) A teacher may be suspended temporarily with regular compensation during a period of investigation to determine whether or not cause exists for the issuance of a notification of dismissal according to AS 14.20.180. (§ 2 ch 92 SLA 1960; am § 21 ch 98 SLA 1966; am §§ 1, 2 ch 104 SLA 1966)

Legislative history reports. — For report on ch. 104, SLA 1966, see 1966 House Journal, p. 988.

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NOTES TO DECISIONS

In general. — See annotations under AS 14.20.095, Notes to Decisions.

Subsection (b) of this section is in a permissive form and allows temporary suspension during the investigation. Nichols v. Eckert, Sup. Ct. Op. No. 860 (File No. 1572), 504 P.2d 1359 (1973).

A right of nontenured teachers to a hearing prior to dismissal for cause is not to be found in this section. Nichols v. Eckert, Sup. Ct. Op. No. 860 (File No. 1572), 504 P.2d 1359 (1973).

The express language of subsection (b) of this section clearly lacks any indication that the legislature intended to provide a hearing prior to dismissal for cause of a nontenured teacher. Nichols v. Eckert, Sup. Ct. Op. No. 860 (File No. 1572), 504 P.2d 1359 (1973).

Despite the reference to AS 14.20.180. — The reference to AS 14.20.180 in this section cannot reasonably be interpreted to extend the hearing rights given to tenured teachers under that section to nontenured teachers. Nichols v. Eckert, Sup. Ct. Op. No. 860 (File No. 1572), 504 P.2d 1359 (1973).

The distinction in treatment between tenured and nontenured teachers is quite clear from the express terms of AS 14.20.180. Nichols v. Eckert, Sup. Ct. Op. No. 860 (File No. 1572), 504 P.2d 1359 (1973).

Validity of dismissal proceedings. — When a discharged teacher had not demonstrated any way in which his dismissal was tainted by his temporary suspension with pay under subsection (b), nor any other way in which he was prejudiced by the suspension, his contention that the dismissal proceedings were void as a matter of law was found to be without merit. Renfroe v. Green, Sup. Ct. Op. No. 2233 (File Nos. 4394, 4481), 626 P.2d 1068 (1980).

Dismissal for immorality. — In subsection (a)(2), the act must constitute a crime involving moral turpitude; a criminal conviction is not necessary. Kenai Peninsula Borough Bd. of Educ. v. Brown, Sup. Ct. Op. No. 2886 (File No. 7763), 691 P.2d 1034 (1984).

Although the Board of Education could not dismiss a teacher on an assumption that a violation of AS 42.20.030(7) (wilfully diverting electricity) always constitutes a theft, the board had sufficient evidence to conclude that the teacher had committed theft, and the dismissal for immorality was therefore valid even if the teacher was not convicted under a theft statute. Kenai Peninsula Borough Bd. of Educ. v. Brown, Sup. Ct. Op. No. 2886 (File No. 7763), 691 P.2d 1034 (1984).

Instructions. — There was no error in the court's inclusion of an instruction on provisions of the Professional Teaching Practices Commission Code of Ethics although there had been no determination that a dismissed teacher had violated the code by the commission when fair minded jurors, in the exercise of reasonable judgment, could differ on whether certain actions by the dismissed teacher were unethical or otherwise constituted substantial non-compliance under subsection (a) of this section. Renfroe v. Green, Sup. Ct. Op. No. 2233 (File Nos. 4394, 4481), 626 P.2d 1068 (1980).

Directed verdict. — When there was evidence that a dismissed teacher had verbally and physically abused another member of the teaching profession in front of students; and fair minded jurors, in the exercise of reasonable judgment, could differ on whether those actions violated provisions of the code of ethics of the Professional Teaching Practices Commission or otherwise constituted incompetency or substantial noncompliance under subsection (a) of this section, the superior court did not err in failing to direct a verdict in the dismissed teacher's favor. Renfroe v. Green, Sup. Ct. Op. No. 2233 (File Nos. 4394, 4481), 626 P.2d 1068 (1980).

Cited in Skagway City School Bd. v. Davis, Sup. Ct. Op. No. 1216 (File No. 2265), 543 P.2d 218 (1975).

Collateral references. — Temporary inability of teacher without fault of school authorities to perform duty as justifying termination of contract or removal. 72 ALR 283.

Marriage of teacher as ground of removal or discharge. 81 ALR 1033; 118 ALR 1092.

Candidacy for or incumbency of public office or other political activity by teacher or other school employee as ground for dismissal or compulsory leave of absence. 136 ALR 1154.

Assertion of immunity as ground for discharge of teacher. 44 ALR2d 799.

Notice of intention to discharge teacher, or not to renew contract, sufficiency under statutes requiring such notice. 92 ALR2d 751.

Right to dismiss public school teacher on ground that services are no longer needed. 100 ALR2d 1141.

What constitutes "incompetency" or "inefficiency" as a ground for dismissal or demotion of public school teacher. 4 ALR3d 1090.

Elements and measure of damages in action by schoolteacher for wrongful discharge. 22 ALR3d 1047.

Use of illegal drugs as ground for dismissal of teacher, or denial or cancelation of teacher's certificate. 47 ALR3d 754.

Dismissal of, or disciplinary action against, public school teachers for violation of regulation as to dress or personal appearances of teachers. 58 ALR3d 1227.

Sexual conduct as ground for dismissal of teacher or denial or revocation of teaching certificate. 78 ALR3d 19.

What constitutes "insubordination" as ground for dismissal of public school teacher. 78 ALR3d 83.

Dismissal of public school teacher because of unauthorized absence or tardiness. 78 ALR3d 117.

Sec. 14.20.175. Nonretention. (a) A teacher who has not acquired tenure rights is subject to nonretention for the school year following the expiration of the teacher's contract for any cause which the employer determines to be adequate. However, at the teacher's request, the teacher is entitled to a written statement of the cause for nonretention. The boards of city and borough school districts and regional educational attendance areas shall provide by regulation or bylaw a procedure under which a nonretained teacher may request and receive an informal hearing by the board.

(b) A teacher who has acquired tenure rights is subject to nonretention for the following school year only for the following causes:

(1) incompetency, which is defined as the inability or the unintentional or intentional failure to perform the teacher's customary teaching duties in a satisfactory manner;

(2) immorality, which is defined as the commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude;

(3) substantial noncompliance with the school laws of the state, the regulations or bylaws of the department, the bylaws of the district, or the written rules of the superintendent; or

(4) a necessary reduction of staff occasioned by a decrease in school attendance. (§ 22 ch 98 SLA 1966; am § 1 ch 11 SLA 1968; am § 13 ch 46 SLA 1970; am § 15 ch 124 SLA 1975)

NOTES TO DECISIONS

Section exceeds federal constitutional requirements. — This section in requiring a statement of cause and an opportunity to be heard, exceeds federal constitutional requirements. Shatting v. Dillingham City School Dist., Sup. Ct. Op. No. 2177 (File No. 4240), 617 P.2d 9 (1980).

Discretion of school boards. — 4 AAC 19.010, which provides that formal evaluations shall serve as a method for gathering data relevant to subsequent employment status decisions pertaining to the person evaluated, cannot operate to limit the broad discretion that was intentionally given to local school boards by the

legislature, and a school board's decision not to renew the contract of a nontenured teacher may be "for any cause which the employer determines to be adequate." Shatting v. Dillingham City School Dist., Sup. Ct. Op. No. 2177 (File No. 4240), 617 P.2d 9 (1980).

Despite the broad language of subsection (a), the board's discretion is subject to certain limitations; for example, a school board may not deny continued employment to a teacher because of the teacher's exercise of first amendment rights, nor may a school board deny continued employment to a teacher if to do so would deprive the teacher of other rights that are guaranteed by constitution or statute. Shatting v. Dillingham City School Dist., Sup. Ct. Op. No. 2177 (File No. 4240), 617 P.2d 9 (1980).

Rights of nonretained, nontenured teachers are limited. — The rights of a nontenured teacher who is simply not retained at the end of his period of employment are relatively limited. A nonretained, nontenured teacher has no constitutionally protected interest in public employment. Gorder v. Matanuska-Susitna Borough School Dist., Sup. Ct. Op. No. 929 (File No. 1754), 513 P.2d 1094 (1973); Shatting v. Dillingham City School Dist., Sup. Ct. Op. No. 2177 (File No. 4240), 617 P.2d 9 (1980).

Probationary employees who are otherwise lawfully discharged cannot obtain permanent status through grievance procedures which do not purport to modify the statutory provisions concerning tenure and termination of employees. Gorder v. Matanuska-Susitna Borough School Dist., Sup. Ct. Op. No. 929 (File No. 1754), 513 P.2d 1094 (1973).

The grievance procedure may be of value to a nontenured teacher in attempting to persuade the hiring authority that he should be retained. The process might on occasion bring forth evidence and argument by which the termination of the nontenured teacher might be reconsidered. Gorder v. Matanuska-Susitna Borough School Dist., Sup. Ct. Op. No. 929 (File No. 1754), 513 P.2d 1094 (1973).

But any such results and action would be a matter within the discretion of the hiring authority, and thereby a matter of grace rather than legal right. Gorder v. Matanuska-Susitna Borough School Dist., Sup. Ct. Op. No. 929 (File No. 1754), 513 P.2d 1094 (1973).

Nonretention of tenured teacher for substantial noncompliance with district regulations affirmed. — See Fisher v. Fairbanks N. Star Borough School Dist., Sup. Ct. Op. No. 2960 (File No. 7446), 704 P.2d 213 (1985).

Submission of alleged breach of collective bargaining agreement to arbitration. — Where procedures concerning the nonretention of teachers are negotiated by a school district and a teachers' union and are included within a collective bargaining agreement, a nontenured teacher who is not retained by the school district can submit an alleged breach of the collective bargaining agreement to arbitration, though the arbitrator's latitude in fashioning an appropriate remedy is restricted by the language of subsection (a). Jones v. Wrangell School Dist., Sup. Ct. Op. No. 2917 (File Nos. S-223/S-224), 696 P.2d 677 (1985).

Quoted in Matanuska-Susitna Borough v. Lum, Sup. Ct. Op. No. 1179 (File Nos. 2241, 2250), 538 P.2d 994 (1975); Jerrel v. Kenai Peninsula Borough School Dist., Sup. Ct. Op. No. 1458 (File No. 2901), 567 P.2d 760 (1977).

Collateral references. — Right to dismiss public school teacher on ground that services are no longer needed. 100 ALR2d 1141.

Sec. 14.20.180. Procedure and hearing upon notice of dismissal or nonretention. (a) An employer shall include in a notification of dismissal of a teacher who has not acquired tenure rights, or of nonretention or dismissal of a tenured teacher, a statement of cause and a complete bill of particulars.

(b) The tenured teacher may, within 15 days immediately following receipt of the notification, notify the employer in writing that a hearing before the school board is requested. The tenured teacher may

require in the notification that the hearing be either public or private and that the hearing be under oath or affirmation. The notification may also require that the right of cross-examination be provided and that the tenured teacher be represented by counsel and have the right to subpoena a person who has made allegations which are used as a basis for the decision of the employer.

(c) Upon receipt of the notification requesting a hearing, the employer shall immediately arrange for a hearing, and shall notify the tenured teacher or administrator in writing of the date, time, and place of the hearing. A written transcript, tape, or similar recording of the proceedings shall be kept. Transcribed copies shall be furnished to the tenured teacher for cost upon request of the tenured teacher. A final decision of the school board requires a majority vote of the membership. The vote shall be by roll call. The final decision shall be written and contain specific findings of fact and conclusions of law. A written notification of the decision shall be furnished to the tenured teacher within 10 days of the date of the decision. (§ 3a ch 92 SLA 1960; am § 23 ch 98 SLA 1966; am §§ 2, 3 ch 11 SLA 1968; am § 14 ch 46 SLA 1970; am §§ 16, 17 ch 124 SLA 1975)

NOTES TO DECISIONS

Section describes procedure. — This section describes the administrative procedure, which includes a hearing, when a tenured teacher has been given a notice of dismissal or nonretention. Corso v. Commissioner of Educ., Sup. Ct. Op. No. 1412 (File No. 2870), 563 P.2d 246 (1977).

Reference to section in AS 14.20.170 does not extend hearing rights to nontenured teachers. — The reference to this section in AS 14.20.170 cannot reasonably be interpreted to extend the hearing rights given to tenured teachers under this section to nontenured teachers. Nichols v. Eckert, Sup. Ct. Op. No. 860 (File No. 1572), 504 P.2d 1359 (1973).

But constitutional due process requirements overcome any statutory rule. — Even though a hearing is not accorded to nontenured teachers by statute, the constitutional requirements of due process overcome any statutory rule. Nichols v. Eckert, Sup. Ct. Op. No. 860 (File No. 1572), 504 P.2d 1359 (1973).

And nontenured teachers are entitled to hearing upon dismissal. — Where a mid-year dismissal is at issue, clearly the teachers have been deprived of an interest in property, namely, their present teaching post. This is an interest protected by the 14th amendment to the United States Constitution and by the first article of the Alaska Constitution, and thus they are entitled to a hearing. Nichols v. Eckert, Sup. Ct. Op. No. 860 (File No. 1572), 504 P.2d 1359 (1973).

When dismissal effective. — The "notification of dismissal" is a notice that the board has voted in favor of dismissal, but the dismissal cannot be effective until the teacher has had an opportunity to request a hearing if one is desired. Kenai Peninsula Borough Bd. of Educ. v. Brown, Sup. Ct. Op. No. 2886 (File No. 7763), 691 P.2d 1034 (1984).

Since this section gives the teacher 15 days in which to request a hearing, the termination is not effective until at least 15 days following the notification of dismissal. Kenai Peninsula Borough Bd. of Educ. v. Brown, Sup. Ct. Op. No. 2886 (File No. 7763), 691 P.2d 1034 (1984).

If the teacher does not request a hearing, the dismissal becomes effective immediately following the expiration of the 15 day period; if the teacher does request a hearing, the dismissal can only be effective after a final majority vote following the hearing. Kenai Peninsula Borough Bd. of Educ. v. Brown, Sup. Ct. Op. No. 2886 (File No. 7763), 691 P.2d 1034 (1984).

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cess rights where the teacher was notified that the Board of Education had approved a recommendation for his immediate dismissal and that his pay was terminated effective the day of the meeting, and he was told that he could request a hearing, but the dismissal was nonetheless effective prior to the hearing. Kenai Peninsula Borough Bd of Educ. v. Brown, Sup. Ct. Op. No. 2886 (File No. 7763), 691 P.2d 1034 (1984).

A hearing is the procedure most likely to lead to a fair determination regarding the dismissal of a nontenured teacher. The stigma which attaches to a discharge for incompetence is sufficiently injurious to call for this type of safeguard. Nichols v. Eckert, Sup. Ct. Op. No. 860 (File No. 1572), 504 P.2d 1359 (1973).

A full judicial hearing is not necessary, but a hearing that allows the administrative authority to examine both sides of the controversy will protect the interests and rights of all who are involved. Nichols v. Eckert, Sup. Ct. Op. No. 860 (File No. 1572), 504 P.2d 1359 (1973).

But nontenured teachers must be given opportunity to present defense by testimony. Nichols v. Eckert, Sup. Ct. Op. No. 860 (File No. 1572), 504 P.2d 1359 (1973).

Hearing complied with section and teacher's due process rights. — See Kenai Peninsula Borough Bd. of Educ. v. Brown, Sup. Ct. Op. No. 2886 (File No. 7763), 691 P.2d 1034 (1984).

When time for appeal begins to run. — In light of the provision in subsection (c) of this section that the final decision of the school board must be "written and contain specific findings of fact and conclusions of law," the time for appeal from the board's determination did not begin to run until the written decision was mailed or delivered to the teacher. Jerrel v. Kenai Peninsula Borough School Dist., Sup. Ct. Op. No. 1458 (File No. 2901), 567 P.2d 760 (1977).

Applied in Renfroe v. Green, Sup. Ct. Op. No. 2233 (File Nos. 4394, 4481), 626 P.2d 1068 (1980).

Collateral references. — Request for hearing, sufficiency under statute requiring hearing on request before discharge. 89 ALR2d 1018.

Sufficiency of notice of intention to discharge teacher or not to renew contract under statutes requiring such notice. 92 ALR2d 751.

Elements and measure of damages in action by schoolteacher for wrongful discharge. 22 ALR3d 1047.

Secs. 14.20.185 — 14.20.200. Procedure and hearing; appeals. [Repealed, § 59 ch 98 SLA 1966.]

Sec. 14.20.205. Judicial review. If a school board reaches a decision unfavorable to a teacher, the teacher is entitled to a de novo trial in the superior court. However, a teacher who has not attained tenure rights is not entitled to judicial review according to this section. (§ 24 ch 98 SLA 1966; am § 1 ch 148 SLA 1966; am § 4 ch 11 SLA 1968; am § 18 ch 124 SLA 1975)

NOTES TO DECISIONS

This section, granting a trial de novo to teachers, does not violate the separation of powers. Matanuska-Susitna Borough v. Lum, Sup. Ct. Op. No. 1179 (File Nos. 2241, 2250), 538 P.2d 994 (1975).

On its face, this section bears no relation to the general provisions governing judicial appeals, which is covered by Title 22. Matanuska-Susitna Borough v. Lum, Sup. Ct. Op. No. 1179 (File Nos. 2241, 2250), 538 P.2d 994 (1975).

AS 22.10.020 does not supersede this section. — AS 22.10.020, which provided in § 17(1), ch. 50, SLA 1959, that "All hearings on appeal from any final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, shall grant a trial de novo, in whole or in

part," does not supersede this section, which expressly mandates de novo reviews for tenured teachers. Matanuska-Susitna Borough v. Lum, Sup. Ct. Op. No. 1179 (File Nos. 2241, 2250), 538 P.2d 994 (1975).

In reenacting AS 22.10.020 in 1970 the legislature has not unequivocally expressed any intent to deny tenured teachers de novo review nor was the reenactment part of a comprehensive revision. Matanuska-Susitna Borough v. Lum, Sup. Ct. Op. No. 1179 (File Nos. 2241, 2250), 538 P.2d 994 (1975).

Since this section and AS 22.10.020 are not irreconcilably conflicting, but can be intelligently read as conterminous expressions of a general rule and an exception to it, nothing in the edicts of statutory construction requires us to find that this section has been rendered inoperative by the reenactment of AS 22.10.020. Matanuska-Susitna Borough v. Lum, Sup. Ct. Op. No. 1179 (File Nos. 2241, 2250), 538 P.2d 994 (1975).

A policy factor militating in favor of a full application of this section is that a tenured teacher against whose favor a decision has been reached is faced with the loss of a very important right: his source of income. In this connection, it is not necessary to indulge in such classificatory labels as "vested right" or "property right," for it is enough that the right be recognized as important for it to act as a guide to decision in the interpretation of this section. Matanuska-Susitna Borough v. Lum, Sup. Ct. Op. No. 1179 (File Nos. 2241, 2250), 538 P.2d 994 (1975).

Rights of nonretained, nontenured teachers are limited. — The rights of a nontenured teacher who is simply not retained at the end of his period of employment are relatively limited because such a teacher has no constitutionally protected interest in public employment. Gorder v. Matanuska-Susitna Borough School Dist., Sup. Ct. Op. No. 929 (File No. 1754), 513 P.2d 1094 (1973).

Probationary employees who are otherwise lawfully discharged cannot obtain permanent status through grievance procedures which do not purport to modify the statutory provisions concerning tenure and termination of employees. Gorder v. Matanuska-Susitna Borough School Dist., Sup. Ct. Op. No. 929 (File No. 1754), 513 P.2d 1094 (1973).

The grievance procedure may be of value to a nontenured teacher in attempting to persuade the hiring authority that he should be retained. The process might on occasion bring forth evidence and argument by which the termination of the nontenured teacher might be reconsidered. Gorder v. Matanuska-Susitna Borough School Dist., Sup. Ct. Op. No. 929 (File No. 1754), 513 P.2d 1094 (1973).

But any such results and action would be a matter within the discretion of the hiring authority, and thereby a matter of grace rather than legal right. Gorder v. Matanuska-Susitna Borough School Dist., Sup. Ct. Op. No. 929 (File No. 1754), 513 P.2d 1094 (1973).

Right of nontenured teacher to judicial review. — While this section does not extend the tenured teacher's right to a trial de novo to a nontenured teacher, neither does it preclude a more limited form of judicial review of the school board decision; therefore a nontenured teacher has a right to judicial review, on the record, of a school board's nonretention, and although a review on the record is all that is required, in its discretion the superior court may grant a trial de novo. Shatting v. Dillingham City School Dist., Sup. Ct. Op. No. 2177 (File No. 4240), 617 P.2d 9 (1980).

Courts granted fact-finding role. — While courts normally feel constrained to defer to the fact-finding role which the legislature has given to a particular agency, no such constraint logically should exist where the legislature itself has granted the courts a fact-finding role in their review of administrative action. This section seemingly does just that, for it expressly grants a tenured teacher a "trial de novo" following an unfavorable school board decision. Matanuska-Susitna Borough v. Lum, Sup. Ct. Op. No. 1179 (File Nos. 2241, 2250), 538 P.2d 994 (1975).

When time for appeal begins to run. — In light of the provision in AS 14.20.180(c) that the final decision of the school board must be "written and contain specific findings of fact and conclusions of law," the time for appeal from the board's determination did not begin to run until the written decision was mailed or delivered to the teacher. Jerrel v. Kenai Peninsula Borough School Dist., Sup. Ct. Op. No. 1458 (File No. 2901), 567 P.2d 760 (1977).

Applied in Renfroe v. Green, Sup. Ct. Op. No 2233 (File Nos. 4394, 4481), 626 P.2d 1068 (1980); Jones v. Wrangell

School Dist., Sup. Ct. Op. No. 2917 (File Nos. S-223/S-224), 696 P.2d 677 (1985).

Quoted in Sjong v. State, Dep't of Revenue, Sup. Ct. Op. No. 2269 (File No. 4255), 622 P.2d 967 (1981); Fedpac Int'l, Inc. v. State, Sup. Ct. Op. No. 2520 (File No. 6034), 646 P.2d 240 (1982); Fisher v. Fairbanks N. Star Borough School Dist., Sup. Ct. Op. No. 2960 (File No. 7446), 704 P.2d 213 (1985).

Sec. 14.20.207. [Renumbered as AS 14.20.215.]

Sec. 14.20.210. Authority of school board or department to adopt bylaws. A school board or the department may adopt teacher tenure bylaws not in conflict with the regulations of the department or state law. (§ 4 ch 92 SLA 1960; am § 26 ch 98 SLA 1966)

Sec. 14.20.215. Definitions. In AS 14.20.010 — 14.20.215

(1) "continuous employment" means employment which is without interruption except for temporary absences approved by the employer or its designee, or except for the interval between consecutive school terms if the teacher is employed only for the months of the school term;

(2) "dismissal" means termination by the employer of the contract services of the teacher during the time a teacher's contract is in force, and termination of the right to the balance of the compensation due the teacher under the contract;

(3) "employer" means the school board or superintendent which appoints the teacher;

(4) "nonretention" means the election by an employer not to re-employ a teacher for the school year or school term immediately following the expiration of the teacher's current contract;

(5) "school year" includes "school term" if the teacher is employed only for the period of the school term; and

(6) "teacher" means a person serving in a teaching, counseling, or administrative capacity and required to be certificated in order to hold the position. (§ 25 ch 98 SLA 1966; am § 15 ch 46 SLA 1970; am § 19, ch 124 SLA 1975)

Revisor's notes. — Formerly AS 14.20.207. Renumbered and reorganized to alphabetize the defined terms in 1987.

NOTES TO DECISIONS

Applied in Griffin v. Galena City School Dist., Sup. Ct. Op. No. 2469 (File No. 5388), 640 P.2d 829 (1982).

Quoted in Begich v. Jefferson, Sup. Ct. Op. No. 481 (File No. 894), 441 P.2d 27 (1968); State v. Redman, Sup. Ct. Op. No. 755 (File No. 1431), 491 P.2d 157 (1971); Shatting v. Dillingham City School Dist., Sup. Ct. Op. No. 2177 (File No. 4240), 617 P.2d 9 (1980).

Cited in Alaska State-Operated School Sys. v. Mueller, Sup. Ct. Op. No. 1157 (File No. 2138), 536 P.2d 99 (1975); Skagway City School Bd. v. Davis, Sup. Ct. Op. No. 1216 (File No. 2265), 543 P.2d 218 (1975); Northwest Arctic Regional

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 5-DAY NOTICE 3/2/89
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER JUD

**FISCAL NOTE(S) MUST BE ATTACHED
IN ACCORDANCE WITH AS 24.08.035
2/27/89

DATE TURNED INTO OFFICE 3/9/89

Mr. President:

HESS Committee considered SB 194

judicial review of school boards' nonretention or dismissal of teachers

and recommended:

[ ] replace with CS _____ [] same title
[] new title

[ ] attached amendment(s) and

[ ] _____ letter of intent adopted

[ ] do pass

[ ] do not pass

[ ] no recommendation

(X) individual recommendations

[ ] further referral to _____

FISCAL NOTE(S) attached (X) zero [ ] fiscal impact
[ ] appropriation no FN attached [ ] Gov. FN introduced w/ bill

MEMBERS SIGNING DO PASS

Al Adams

OTHER RECOMMENDATIONS

Hoy Hess (No Rec)
Tim Kelly (No Rec)
Jim Duncan (No Rec)

Dan Fraser
Chairman signature and recommendation

[ ] Committee backup attached

Thus, I am of the view that this court should apply Alaska law here in determining the rights of the riparian owners, the Pankratzes.

Looking to Alaska law, I find no evidence that in Alaska an owner of riparian land may acquire title to accreted land *below* the ordinary high water mark.[7] Therefore, I am in agreement with the majority, and the parties, that the State has title to the bed of the Chena River up to the ordinary high water mark as modified by accretion. Since Alaska law on this point is the same as federal law, in the absence of Alaska precedent regarding determination of the ordinary high water mark, federal case law is highly persuasive.

MATANUSKA-SUSITNA BOROUGH et al., Appellants,

v.

W. Burton LUM and Helen Lum, Appellees.

W. Burton LUM and Helen Lum, Cross-Appellants,

v.

MATANUSKA-SUSITNA BOROUGH et al., Cross-Appellees.

Nos. 2241, 2250.

Supreme Court of Alaska.

Aug. 8, 1975.

Tenured teachers received notices of nonretention and, after a hearing, the school board sustained the nonretention. The teachers brought action in the Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., seeking a trial de novo. The trial de novo was denied and a hearing was held on the record only. The dismissal of the wife teacher was reversed and her case remanded. The husband teacher's case was also remanded, for further consideration. The school board appealed, and the teachers cross-appealed. The Supreme Court, Connor, J., held that where no express provision covered the time for filing an appeal from dismissal of a teacher, an appeal brought 29 days after final administrative decision was made was timely. A general statute providing that all hearings on appeal from any final order or judgment of subordinate court or administrative agency shall be on the record unless the superior court in its discretion shall grant trial de novo in whole or in part did not supersede the education statute expressly mandating de novo reviews for tenured teachers. Where the school board had not denied the wife teacher procedural due process rights and where she had not been fired for exercising certain substantive constitutional rights and there was no statute providing for reinstatement with back pay, she demonstrated no right to automatic imposition of damages in the form of back pay.

Remanded.

Erwin, J., filed a concurring opinion.

1. Schools and School Districts ⇐141(5)

Appeal to superior court filed eight days after board's action in dismissing tenured teacher was timely. Dist.Ct.Rules, Civ. rules 21, 21(a, e); AS 14.20.205, 44.-

erty rights in riparian land. By invoking federal law, the Court was able to exercise jurisdiction by granting certiorari; if state law were held controlling, the state supreme court decisions would not have been reviewable because they would have rested on independent, adequate state law grounds. *See Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935). Thus, the Court may have introduced federal law into these cases in order to correct "erroneous" state court decisions. *See Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 337, 94 S.Ct. 517, 531, 38 L.Ed.2d 526, 545 (1973) (Stewart, J., dissenting). The application of federal law in *Bonelli Cattle Co.* is criticized in Note, 50 Wash.L.Rev. 777 (1975).

7. *See Schafer v. Schnabel*, 494 P.2d 802 (Alaska 1972) (holding that accretion benefits the riparian owner of coastal land so long as the accreted land is above mean high tide, the boundary of seabed land conveyed to Alaska under the Submerged Lands Act of 1953).

62.330, 44.62.560(a); Rules of Appellate Procedure, rule 45(a)(2), (i).

2. Schools and School Districts ⇐141(5)

Under statute providing trial de novo for any tenured teacher dismissed by school board or appeal panel, plain, speedy and adequate remedy at law existed for dismissed teacher, and rule concerning time for filing petition for review with superior court was inapplicable. Dist.Ct.Rules, Civ. rules 21, 21(a, e); AS 14.20.205, 44.62.330, 44.62.560(a); Rules of Appellate Procedure, rule 45(a)(2), (i).

3. Administrative Law and Procedure ⇐722

Rule setting 30-day deadline for appealing from administrative rulings did not become effective until March of 1973, and it did not control litigation commenced in September, 1972. AS 44.62.330; Rules of Appellate Procedure, rule 45 (a)(2), (i).

4. Schools and School Districts ⇐141(5)

Where no express provision covered time for filing appeal from dismissal of teacher, appeal brought 29 days after final administrative decision was made was timely. AS 14.20.205, 44.62.330; Rules of Appellate Procedure, rule 45(a)(2), (i).

5. Constitutional Law ⇐74
Schools and School Districts ⇐10

Statute granting a trial de novo to teachers does not violate separation of powers. AS 14.20.205.

6. Schools and School Districts ⇐10

General statute providing that all hearings on appeal from any final order or judgment of subordinate court or administrative agency shall be on the record unless superior court, in its discretion shall grant trial de novo in whole or in part did not supersede education statute expressly mandating de novo reviews for tenured teachers. AS 14.12.080, 14.20.205, 22.10.020, 22.10.020(a).

7. Schools and School Districts ⇐141(6)

Where school board had not denied nonretained, tenured teacher procedural due process rights and where teacher had not been fired for exercising certain substantive constitutional rights and there was no statute providing for reinstatement with back pay, she demonstrated no right to automatic imposition of damages in form of back pay. AS 14.20.175, 14.20.205.

W. C. Arnold, Anchorage, John D. Shaw, Palmer, for appellants and cross-appellees.

John R. Strachan, Anchorage, for appellees and cross-appellants.

OPINION

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, JJ.

CONNOR, Justice.

This case brings up for review several questions about the procedures employed, and the rights of tenured teachers, in nonretention proceedings. W. Burton Lum and Helen Lum were both tenured teachers with the Matanuska-Susitna School District. In March of 1972, they both received notices of nonretention advising them that they would not be retained as teachers for the 1972-73 school year. The notices stated causes and detailed particulars. The Lums were both charged with incompetency and substantial noncompliance with rules and directives.[1] The school board

1. AS 14.20.175 provides in part:

"(b) A teacher who has acquired tenure rights is subject to nonretention for the following school year only for the following causes:

(1) incompetency, which is defined as the inability or the unintentional or intentional failure to perform the teacher's customary teaching duties in a satisfactory manner;

(2) immorality, which is defined as the commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude;

(3) substantial noncompliance with the school laws of the state, the regulations or bylaws of the department, the bylaws of the district, or the written rules of the superintendent; or

(4) a necessary reduction of staff occasioned by a decrease in school attendance."

provided the Lums with a public hearing, at which the Lums were represented by counsel. In August of 1972 the school board issued a decision sustaining the non-retention of the Lums.

On September 1, 1972, the Lums commenced an action in the superior court, seeking a trial de novo pursuant to AS 14.20.205, which provides:

> "If a school board or appeal panel reaches a decision unfavorable to a teacher, the teacher is entitled to a de novo trial in the superior court. However, a teacher who has not attained tenure rights is not entitled to judicial review according to this section."

On January 9, 1973, the superior court denied a trial de novo, and ruled that the Lums were limited to a judicial review on the record made before the school board. The Lums then petitioned this court for review of that ruling, but the petition was denied.

Subsequently, the superior court held a hearing on the record only. On April 22, 1974, the court reversed Helen Lum's dismissal and remanded her case to the school board for action not inconsistent with the court's decision. At the same time the superior court remanded W. Burton Lum's case to the school board for further consideration. From this ruling the school board appeals and the Lums cross-appeal.

The school board presents two main arguments on appeal:

(1) The school board claims that the Lums failed to appeal or seek review from the school board's initial decision in a timely manner;

(2) The school board urges that neither the superior court nor this court can reverse the school board's decision unless the record shows a lack of substantial evidence to support the school boar findings; it is contended that there w substantial evidence to support t board's decision and the reversal there by the superior court was error.

By cross-appeal Mr. Lum contends th AS 14.20.205 guarantees him a trial novo, and that the superior court shou not have remanded his case to the scho board. By cross-appeal Mrs. Lum co tends that the superior court should nc merely have reversed her dismissal, with remand to the school board, but that i should have ordered her reinstated witl full back pay.

Timeliness of Appeal to Superior Court

The school board asserts that the 29-day delay between the school board's decision on August 3, 1972, and the filing of the superior court action on September 1, 1972, renders the Lums' appeal untimely. This is said to contravene the 10-day provision of District Court Civil Rule 21(e).[2]

[1] Initially it should be noted that while a board decision on Mr. Lum was issued on August 3, 1972, the decision concerning Mrs. Lum appears to have been rendered on August 24, 1972. Since the complaint alleges that Mrs. Lum was dismissed on August 24, and since appellants' answer failed to contravene that allegation, it must be taken as true that, for the purposes of this litigation, Mrs. Lum's dismissal date was August 24, 1972. Under these conditions, Mrs. Lum's appeal to the superior court was certainly timely, even under District Court Civil Rule 21(e), since it was filed eight days after the board's action.

[2] However, the reliance on Rule 21(e) seems to be misplaced. District

2. District Court Civil Rule 21(e) concerns the time for filing a petition for review with the superior court. The rule states:

> "The time within which a petition for review may be filed shall be 10 days from the date of the order or decisions sought to be reviewed, except that upon a showing of excusable neglect based on a failure of a party to learn of the order or decision the superior court may extend the time for filing the petition not exceeding 10 days from the expiration of the original time herein prescribed."

Court Rule 21 is concerned with "petitions for review." Rule 21(a) provides:

"An aggrieved party may petition the superior court for review of any order or decision of a magistrate court or an administrative agency *where there is no appeal or other plain, speedy or adequate remedy*, and where the magistrate or administrative agency appears to have exercised his or its functions erroneously or to have exceeded his or its jurisdiction, to the injury of some substantial right of such party.

Relief heretofore available by writs of review, certiorari, mandamus, prohibition, and other writs may be obtained by petition for review under the practice prescribed in these rules." (emphasis added)

Since the legislature had provided for a trial de novo for any tenured teacher who was dismissed by a school board or appeal panel,[3] a plain, speedy and adequate remedy at law existed within the meaning of Rule 21(a). This means that Rule 21(e) was inapplicable.

At the time that appellees sought a trial de novo in the superior court, it was unclear what law controlled the time for filing. If school board decisions such as the present one could be construed to fall within the Administrative Procedure Act, then AS 44.62.560(a) of that Act would have controlled. AS 44.62.560(a) establishes a 30-day time period for appealing from administrative rulings. However, the Administrative Procedure Act by its express terms did not apply to local school boards.[4]

[3] The trial judge apparently felt that Appellate Rule 45(a)(2) controlled, as he so indicated in a letter dated July 27, 1973. While Appellate Rule 45(a)(2) sets a 30-day deadline for appealing from administrative rulings, that rule did not become effective until March of 1973.[5] Thus it would not have controlled litigation commenced in September, 1972.

[4] Apparently no express provision covered the time for filing in this case. Under these circumstances our ruling in *McCarrey v. Commissioner of Natural Resources*, 526 P.2d 1353 (Alaska 1974), is useful. In *McCarrey* the appellant had waited over five months before seeking judicial review of an administrative determination. It was somewhat uncertain as to whether the 30-day provision in the Administrative Procedure Act was to govern. We stated that in May of 1971 when the superior court action was commenced,

". . . [A] great deal of confusion existed concerning the method and procedures by which appeals from an administrative decision might be taken to the superior court. The matter has now been resolved by adoption of Appellate Rule 45. . . . *Moreover, failure to file an appeal within strict time limitations does not create a jurisdictional defect.* Courts in Alaska have authority to relax the strict requirements of the rules in order to avoid surprise or a serious miscarriage of justice, or otherwise in aid of their appellate jurisdiction." 526 P.2d, at 1355. (footnotes omitted, emphasis added)

Since the Administrative Procedure Act sets a 30-day time period and since Appellate Rule 45(a)(2) now sets a 30-day period for all administrative appeals, we conclude that an appeal brought 29 days after the final administrative decision was made was timely.

3. AS 14.20.205 provides:
"If a school board or appeal panel reaches a decision unfavorable to a teacher, the teacher is entitled to a de novo trial in the superior court. However, a teacher who has not attained tenure rights is not entitled to judicial review according to this section."

4. *See* AS 44.62.330.

5. Appellate Rule 45(i) says that these rules superceded all other procedural methods in Alaska for appealing from administrative rulings to the state's courts.

The Trial De Novo Question

Mr. Lum, as cross-appellant, argues that the express language of AS 14.20.205 guarantees him the right to a trial de novo. The statute provides:

"If a school board or appeal panel reaches a decision unfavorable to a teacher, the teacher is entitled to a de novo trial in the superior court. However, a teacher who has not attained tenure rights is not entitled to judicial review according to this section."

Lum claims that the legislative intent is clear from this language and that the purpose of the act is to protect tenured teachers from potentially biased school boards. He asserts that the record in this case in fact shows just such a bias. The board, in its cross-reply brief, refers us to the arguments on the same point which the board made in response to the Lums' petition for review.

Pared to its essence, the board's earlier brief argues that *Keiner v. City of Anchorage*, 378 P.2d 406 (Alaska 1963), disposes of this issue in regard to all administrative reviews, and that even if *Keiner* is not dispositive of the issue, the doctrine of separation of powers requires that AS 14.20.205 be declared unconstitutional or be restricted severely in its meaning. The brief also argues that a chronological review of the statutes in question shows a clear legislative intent to repeal the special de novo rights granted by AS 14.20.205. We find none of these arguments totally persuasive.

In *Keiner v. City of Anchorage, supra*, the city brought proceedings to have Keiner's building declared a fire and health hazard, to declare it a public nuisance, and to order it removed. After an initial determination by the city manager, Keiner filed objections, and the city council, acting as a board of adjustment, found the building hazardous and ordered its removal. On appeal to the superior court and to this court Keiner claimed the right to a de novo judicial determination of whether his building constituted a fire and health hazard. In rejecting that claim, this court held that a territorial statute, § 16-1-35, Twenty-fourth, A.C.L.A.1949, providing for an appeal from such municipal actions and for de novo hearing and trial in the territorial district court, was superseded by the Administrative Procedure Act which became law in 1959, after statehood.

The school board itself acknowledges that *Keiner* does not mandate review on the record. As the board notes, "this court has treated all appeals to the superior court from administrative agencies as being on the record unless otherwise ordered in the discretion of the superior court." Thus *Keiner* does not foreclose the possibility of requiring a trial de novo for tenured teachers.

[5] The "separation of powers" argument asserts that to require a full trial de novo by the superior court encroaches on the executive powers of an administrative agency such as the school board. It is urged that this is unconstitutional. This overlooks, however, the scope of administrative power delegated by the legislature to the school board. At the same time that it has empowered these boards to terminate teachers, it has also guaranteed tenure rights to teachers. The statute granting a trial de novo to teachers can hardly be said to violate the separation of powers. We shall not consider the point further.[6]

[6] We shall now turn to a chronological review of certain pertinent statutes.

In 1949 a territorial statute provided that determinations of municipal boards of adjustment "shall be heard and tried de novo in the District Court."[7]

6. For a case in which we rejected a similar argument, in the context of real property tax assessments, see Wingerdner v. Greater Anchorage Area Borough, 534 P.2d 541 (Alaska 1975).

7. § 16-1-35, Twenty-fourth, A.C.L.A.1949.

In 1959 the state adopted title 22, the statutory scheme governing the judiciary. AS 22.10.020(a) provides in part:

"All hearings on appeal from any final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, shall grant a trial de novo, in whole or in part."[8]

In 1963 Mr. Keiner appealed from the denial of his demand for a trial de novo from a municipal board's condemnation of his property. As noted above, in *Keiner v. City of Anchorage, supra*, this court held that the 1949 statute had been superseded by the 1959 act, and thus de novo trials were discretionary.

In 1966 the legislature enacted an entirely revised education code. *Alaska Statutes*, title 14. AS 14.20.205 provided tenured teachers with a right to a trial de novo in the superior court following an unfavorable ruling by a school board.[9]

In 1970 the legislature amended AS 22.10.020, in a manner irrelevant to this case. However, it reenacted the de novo provision, stating:

"All hearings on appeal from any final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, shall grant a trial de novo, in whole or in part."[10]

The board argues in effect that the last statute in time repeals pre-existing statutes, and that since the 1970 judiciary statute essentially states that *all* appeals from administrative agencies are merely discretionarily de novo, this supersedes the 1966 Education statute which expressly mandates de novo reviews for tenured teachers. We find this argument unpersuasive.

In support of its "chronology" argument, the board relies on Professor Sutherland's work on statutory construction,[11] and the cases cited therein. Paraphrased, the cited portions of Sutherland hold that where a statute has been modified by an intermediate act, and where the initial act is then reenacted, the *general rule* is that the intermediate act remains in force. A well-recognized caveat to the *general rule* holds that the intermediate act is impliedly repealed if its terms and the reenactment's terms are "wholly inconsistent." The board argues that in 1959 the legislature made all administrative appeals *discretionarily* de novo; in 1966 it carved out an intermediate act which made tenured teachers' appeals mandatorily de novo; in 1970 it reenacted the original law making *all* administrative appeals discretionarily de novo. Since *all* appeals can't be discretionarily de novo if tenured teachers' appeals are mandatorily de novo, the board finds the two provisions "wholly inconsistent" and hence the 1970 act impliedly repeals the 1966 act.

This argument might be sound if the intermediate act of 1966 had been an *amendment* to the general rule of 1959 or had been a modification of the statutory rules governing the judiciary.[12] However, the 1966 act is more properly characterized as a "special" statute dealing with education. On its face, this title 14 statute concerning tenured teachers bears no relation to the general provisions governing judicial appeals, which is covered by title 22.[13]

8. The Michie Company, in its bound volume, has changed the session law phraseology from "All hearings . . . ." to "The hearings . . . . ." However, the language used in the session laws is controlling in this case.

9. AS 14.20.205 was amended in 1968 but the amendment merely deleted surplus language.

10. *See* footnote 8 *supra*.

11. J. G. Sutherland, Statutory Construction (4th ed. 1972).

12. All of the cases cited by the school board appear to fit this type of description. *See, e. g., United States Smelting Refining & Mining Co. v. Locw*, 74 F.Supp. 917, 11 Alaska 429 (1947).

13. Several cases have found the titles of various legislation helpful in determining similar issues of judicial construction. *See Allison v. Hatton*, 46 Or. 370, 80 P. 101 (1905); *Eddy v. Kincaid*, 28 Or. 537, 41 P. 156 (1895).

The role of special statutes was treated by the Montana Supreme Court in *Teamsters Local 45 v. Montana Liquor Control Bd.*, 155 Mont. 300, 471 P.2d 541, 543 (1970). There the court said:

"Where one statute deals with a subject in general and comprehensive terms and another deals with a part of the same subject in a more minute and definite way, *to the extent of any necessary repugnancy between them* the special will prevail over the general." (emphasis in the original)

In addition, facially conflicting special statutes may simply establish *exceptions* to a general rule. Thus the Oregon Supreme Court has stated that where a "later special or local statute is not irreconcilable with the general statute to the degree that both statutes cannot have coterminous operation, the general statute will not be repealed, but the special or local statute will exist as an exception to its terms." *Andersen v. Heltzel*, 197 Or. 23, 251 P.2d 482, 483–84 (1952).[14]

Certainly in reenacting AS 22.10.020 the legislature has not unequivocally expressed any intent to deny tenured teachers de novo review. Nor was the reenactment part of a comprehensive revision. Since the two statutes are not irreconcilably conflicting, but can be intelligently read as conterminous expressions of a general rule and an exception to it, nothing in the edicts of statutory construction requires us to find that AS 14.20.205 has been rendered inoperative by the reenactment of AS 22.10.020.

Additionally, there are strong policy reasons for holding that tenured teachers have a mandatory right to a trial de novo.[15]

The primary reason for granting a trial de novo is that the legislature apparently intended to create such a right in enacting AS 14.20.205. In *Alaska Foods, Inc. v. American Manufacturer's Mutual Insurance Co.*, 482 P.2d 842, 846 (Alaska 1971), we stated, in dictum, why a trial de novo is normally denied in cases involving administrative agencies. The denial results from the

". . . recognition of the respective functions of administrative agencies and the superior court, and [from] the deference the courts feel constrained to show to findings made by such an agency charged by law with the making of factual determinations in a particular area within the scope of executive power." (footnote omitted)

While courts normally feel constrained to defer to the fact-finding role which the

14. Sutherland himself states that subsequent enactment of a general statute will only rarely operate to impliedly repeal a special statute. Thus he writes:

"The enactment of a general law broad enough in its scope and application to cover the field of operation of a special or local statute will generally not repeal a statute which limits its operation to a particular phase of the subject covered by the general law, or to a particular locality within the jurisdictional scope of the general statute. An implied repeal of prior statutes will be restricted to statutes of the same general nature, since the legislature is presumed to have known of the existence of prior special or particular legislation, and to have contemplated only a general treatment of the subject matter by the general enactment. Therefore, where the later general statute does not present an irreconcilable conflict the prior special statute will be construed as remaining in effect as a qualification or exception to the general law.

However, since there is no rule of law to prevent the repeal of a special by a later general statute, prior special or local statutes may be repealed by implication from the enactment of a later general statute where the legislative intent to effectuate a repeal is unequivocally expressed. A repeal will also result by implication when a comprehensive revision of a particular subject is promulgated, or upon the predication of a statewide system of administration to replace previous regulation by localities." Sutherland, *supra*, § 23.15, at 245–46. (footnotes omitted)

15. A thorough recapitulation of many of the factors affecting de novo reviews of administrative hearings can be found in Forkosch: *Judicial De Novo Review of Administrative Quasi-Judicial Fact Determination*, 25 Hast. L.J. 963 (1974).

legislature has given to a particular agency, no such constraint logically should exist where the legislature itself has granted the courts a fact-finding role in their review of administrative action. AS 14.20.205 seemingly does just that, for it expressly grants a tenured teacher a "trial de novo" following an unfavorable school board decision. Under these circumstances, our statement in *Aleutian Homes v. Fischer*, 418 P.2d 769, 773 (Alaska 1966), should be borne in mind:

> "As a general statement of law, we are in agreement with [the] contention that where the legislature has established a specific procedure for review of administrative decisions, or orders, such procedure is controlling." (footnote omitted)

In the state of Washington a similar remedy was created by the legislature to insure that tenured teachers would receive an appeal de novo.[16] The Washington Supreme Court expressed no reservations whatever, in upholding the procedures established by the legislature. In *Hattrick v. North Kitsap School Dist.*, 81 Wash.2d 668, 504 P.2d 302, 303 (1972), the court construed the statute to require no less than a determination by the trial court which was "independent of any conclusion of the school board, and . . . based solely upon the evidence and testimony which the trial court receives." *See also Denton v. South Kitsap School Dist.*, 10 Wash.App. 69, 516 P.2d 1080 (1973).

A second reason for upholding Mr. Lum's claim for a trial de novo is that school boards, unlike many administrative agencies, have no unique fact-finding expertise.

In *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L. Ed. 456 (1951), the United States Supreme Court stated why courts are normally allowed only a very narrow scope of review in cases involving appeals from administrative agencies. The restraint exists because the agencies are "presumably equipped or informed by experience to deal with a specialized field of knowledge . . . ." Thus agency "findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."

Professor Louis L. Jaffee, one of the foremost authorities on administrative law, acknowledges that, generally speaking, agency expertise is a legitimate rationale for restricting the scope of judicial review.[17] But Jaffee goes on to state, "it is notorious that [this rationale] can easily become an absurd and mesmerizing shibboleth." Jaffee concludes by noting, "The usual court . . . demands, and properly so, that the agency convince the court that its 'putative' expertness is in fact relevant to the finding in question; and even then it takes this expertness as but one factor in the agency decision which must run the gauntlet of its common sense."[18]

It is well known that the composition of many school boards is not such as to endow them with fact-finding expertise in matters of teacher nonretention.

The state legislature has provided that to qualify as a school board member, one merely needs to be eligible to vote in the municipal elections. AS 14.12.080. Under these circumstances we are not convinced that the school board possesses such expertise that we should defer to the findings in question. From this standpoint there is no policy reason for restricting the superior court's scope of review.

The final policy factor militating in favor of a full application of AS 14.20.205 is that Mr. Lum is faced with the loss of a very important right: his source of income. In this connection we do not feel that it is necessary to indulge in such classificatory labels as "vested right" or "property right," for it is enough that the right

16. Rev.Code of Wash. 28A.58.480

17. L. Jaffee, Judicial Control of Administrative Action, 613–16 (Student Ed. 1965).

18. *Id.* at 614–15.

be recognized as important for it to act as a guide to decision in the interpretation of the statute.[19]

From this review of the arguments concerning the construction of the statute and the public policy arguments which bear upon the outcome, we hold that Mr. Lum is entitled to a judicial review de novo on the question of his nonretention. It follows that his case should not be remanded to the school board.

Helen Lum's Claim for Damages

[7] Helen Lum has cross-appealed from the order of the superior court which directed her reinstatement but made no mention of damages or back pay. The order instructs the school board to "take appropriate action not inconsistent with this decision." However, the findings of fact and conclusions of law regarding Helen Lum make no reference to back pay or damages.[20]

Helen Lum's argument can be cast into the form of a syllogism. She first states a well recognized premise which holds that if a person has been denied procedural due process during the course of job termination, then reinstatement with back pay is automatic. See *University of Alaska v. Chauvin*, 521 P.2d 1234, 1239 n. 18 (Alaska 1974). She then cites cases which hold that a hearing before a biased panel denies procedural due process. *See Simard v. Board of Education*, 473 F.2d 988, 993 (2nd Cir. 1973). Finally, she refers us to an affidavit which allegedly establishes that the board was biased against Mrs. Lum. Hence, the argument concludes, Helen Lum was denied procedural due proc and is entitled to reinstatement with ba pay.

The difficulty with that argument is t assertion of bias in fact on the part of t school board. This assertion was ch lenged by the school board both below a on appeal. The evidence is clearly co flicting, and the superior court made findings on the point. Under these circu stances Mrs. Lum's argument for orderi damages is not persuasive.

Courts traditionally have granted rei statement with back pay under only thr conditions. The first is when the admin trative agency has denied the employ certain procedural due process rights. *Se e. g., University of Alaska v. Chauvin*, 5 P.2d 1234, 1239 n. 18 (Alaska 1974); *Ha ton v. Board of Education*, 422 F.2d 4 (6th Cir. 1970); *Moses v. Washingto Parish School Board*, 304 F.Supp. 11 (D.C.La.1969); *School Dist. v. Karabe sos*, 17 Mich.App. 10, 168 N.W.2d 6 (1969); *but see, Shorba v. Amioka*, Haw. 43, 501 P.2d 807, 813 (1972). Th second circumstance is when the employe was fired for exercising certain substa tive constitutional rights. *Ramsey v. Ho kins*, 447 F.2d 128 (5th Cir. 1971), *mod fying Ramsey v. Hopkins*, 320 F.Supp 477 (D.C.Ala.1970); *Callaway v. Kirklan* 334 F.Supp. 1034 (D.C.Ga.1971); *Black School Comm. of Malden*, 310 N.E.2 330 (Mass.1974). Finally, some statute expressly provide for such treatment b the reviewing court. *See, e. g., Mass Bd. of Education*, 61 Cal.2d 612, 39 Ca

19. Where a vested right or a basic constitutional right is at stake, courts normally expand the scope of judicial review of administrative action affecting teacher tenure. *See, e. g., Adcock v. Board of Education*, 10 Cal. 3d 60, 109 Cal.Rptr. 676, 513 P.2d 900 (1973); *Bixby v. Pierno*, 4 Cal.3d 130, 93 Cal.Rptr. 234, 481 P.2d 242 (1971). And as we have noted in *Nichols v. Eckert*, 504 P.2d 1359, 1364 n. 9 (Alaska 1973), the job of even a non-tenured teacher is sufficiently important to warrant certain constitutional protections.

20. It is unclear whether the superior cour intended to have the school board determin back pay, or intended to deny to Helen Lum any claim to back pay. At one point th judge stated that no back pay would be ap propriate if the school system acted in goo faith. At another point he seems to say tha Mrs. Lum would have to pursue an indepen ent action for damages. In any event, th findings and final order make no reference t back pay.

Rptr. 739, 394 P.2d 579, 582 (1964); Rev. Code of Wash. 28A.58.480 (1970).

Since none of these conditions is present in Mrs. Lum's case, we hold that she has not demonstrated a right to the automatic imposition of damages in the form of back pay.[21]

This still leaves undetermined the question of whether Mrs. Lum is entitled to adduce proof of any damages she claims to have suffered. That question is answered for the most part by our disposition of the case in other respects.

At oral argument, counsel for Mrs. Lum stated that she would accept a trial de novo of her case together with that of Mr. Lum. In view of our disposition of this case as to Mr. Lum, we deem it appropriate that a trial de novo be had as to the nonretention of Mrs. Lum. At that trial her damage claims may also be considered by the superior court. Such a proceeding will also afford the school board a full opportunity to present its case, both as to nonretention of each of the Lums and as to damages.

In view of our holdings it is unnecessary to consider the question of whether the record of the proceeding before the school board contains substantial evidence to support the board's findings.

The case is remanded to the superior court for further proceedings consistent with this opinion.

Remanded.

ERWIN, J., concurring.

ERWIN, Justice (concurring).

I concur with the opinion, but because of possible implications which arise from that portion of the opinion concerning the power of the legislature to enact procedures governing the appeal of administrative decisions to the superior court and the Supreme Court, I find additional clarification is required.

The quotation from *Aleutian Homes v. Fischer*[1] that "where the legislature has established a specific procedure for review of administrative decisions . . . such procedure is controlling" must be interpreted in light of the fact that at the time of the *Fischer* decision there were no rules of court concerning the appeal of administrative decisions. Clearly, legislative enactment of procedural statutes would be permitted as a matter of comity[2] where the Supreme Court of Alaska had not exercised its constitutional rule-making power in the area under section 15, article IV of the Alaska Constitution.[3] However, in 1973 this Court adopted Appellate Rule 45(i) which specifically provides:

> These rules shall supersede all other procedural methods specified in Alaska statutes for appeals from administrative agencies to the courts of Alaska.

In *Winegardner v. Greater Anchorage Area Borough*,[4] the Supreme Court noted that the adoption of Appellate Rule 45 was an expression of supremacy over procedural statutes and constituted the exercise of judicial power distributed to the Supreme Court under sections 1 and 15, article IV of the Alaska Constitution.[5] *Winegardner* then determined that the grant of a jury trial on review of an assessment by the Greater Anchorage Area Borough as pro-

21. *Cf. Redman v. Department of Education*, 519 P.2d 760 (Alaska 1974).

1. 418 P.2d 769, 773 (Alaska 1966) (footnote omitted).

2. *See State v. Scott*, 387 S.W.2d 539, 543 (Mo.1965); *Perin v. Peuler*, 373 Mich. 531, 130 N.W.2d 4, 9–10 (1964) (Missouri and Michigan both have constitutional provisions similar to our section 15, article IV). *See also Leege v. Martin*, 379 P.2d 447, 449 (Alaska 1963).

3. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. . .

4. 534 P.2d 541 (Alaska 1975).

5. *Id.* at 545.

vided by statute[6] was a grant of a substantive right[7] and thus did not constitute a violation of the doctrine of separation of powers as reflected in section 15 of article IV.

Therefore, while the legislature may grant substantive rights to litigants, it may not enact procedural statutes in the area of administrative appeals contrary to our Rules without complying with the constitutional requirements of section 15, article IV of the Alaska Constitution.[8]

In the Matter of A. A., a minor, Appellant,

v.

STATE of Alaska, Appellee.

No. 2400.

Supreme Court of Alaska.

Aug. 8, 1975.

The Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., made an order of disposition in a juvenile delinquency proceeding, and an appeal was taken by the minor. The Supreme Court held that conduct of a disposition hearing in the absence of the minor's appointed counsel was erroneous. The trial court initially erred also in ordering the juvenile to be placed in a specific institution, but where the final order did not designate any specific institution but merely placed the minor in the custody of the Department of Health and Social Services and designated a specific period of time for duration of detention, any issue pertaining to the earlier order was moot.

Reversed and remanded.

6. AS 29.52.140(f).

7. 534 P.2d at 547.

1. Infants ⇐16.9

Conduct of disposition hearing in absence of minor's appointed counsel was erroneous. AS 47.10.080, 47.10.080(b)(1).

2. Infants ⇐16.11, 16.14

Trial court initially erred in ordering juvenile to be placed in specific institution but where final order did not designate any specific institution but merely placed minor in custody of Department of Health and Social Services and designated specific period of time for duration of detention any issue pertaining to earlier order was moot. AS 47.10.080, 47.10.080(b)(1).

Stephen R. Cline, Asst. Public Defender, Fairbanks, Herbert D. Soll, Public Defender, Anchorage, for appellant.

No appearance for appellee.

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER and BURKE, JJ.

OPINION

PER CURIAM.

On November 6, 1974, A. A., a minor child, admitted in superior court the allegations of three counts of a petition seeking his adjudication as a delinquent. A disposition hearing was scheduled to be held before that court on November 27, 1974 at 9:30 a. m., and the juvenile was released from custody to return to his home with his father pending the hearing.

The Division of Corrections' classification committee held a meeting on November 19, 1974 which the minor's attorney attended. The committee unanimously recommended not to detain the minor. Work and school plans were formulated as the result of consultations with the boy and his father.

At the conclusion of the November 27, 1974 disposition hearing, the superior court

8. . . . These rules may be changed by the legislature by two-thirds vote of the members elected to each house.