HOUSE EDUCATION COMMITTEE

January 28, 1983

The meeting was called to order by Chairman Daily in room 420 of the Capitol Building, at 1:10 p.m., with all members present.

Chairman Daily opened the meeting to a hearing on House Bills: 395, 396.

HOUSE BILL 396

REPRESENTATIVE JIM JENSEN, District 66, Billings, said this is not a simple little bill as it seems, and it is not a short bill, but the ideas are less complex than the bill itself. It is a bill to eliminate the distinction between tenured and non-tenured teachers. Seeking to provide that a termination decision be the final and binding arbitration. I have always been concerned about the argument that we cannot eliminate teachers who are not good teachers because of tenure. Both it's real true value and utility protect people from exercising their responsibilities to monitor and discipline teachers, and to take whatever action is necessary to terminate or not renew them. The children are not benefited, and this has worked to our detriment. A problem arises in that due process of law is not afforded one class of people in this society. That class of people is teachers. They have a right to know why an action is taken against them which terminates their employment. This section defines four specific areas or reasons for termination. Unfitness, incompetence, violation of the adopted policies of the trustees of the district, or if financial condition of the district requires a reduction in the number of teachers, and if the reason for termination is to reduce the number of teachers employed. I have never understood why the burden was put on district trustees to make decisions before levies were voted on. The bill also lays out the details of responsibility to give written specification for reaosns for termination of teachers. The question of final and binding arbitration is to save money for everybody. The cost of litigation and the burden on the courts of litigation are becoming unjustifiable. It is a corrupt appeal process. Not intentionally, and not in a criminal way corrupt, but philosophically corrupt. We have an appeal originally to the trustees, who sit in judgement. Secondly, we go to the county superintendent of schools, who is acting in a quasi-judicial role, and who is unfairly burdened with that role. The superintendent is put in an impossible position. To work with teachers and administration, and then to judge the two groups. I do not think it is a fair position for the county superintendents to be in. I do have some amendments that I would like to submit with this bill. (see exhibit 1) Rep. Jensen also submitted an article entitled "Seeking excellence: not reappointing an 'average' teacher in order to employ a better teacher", for the information of the committee. (see exhibit 1-a)

PROPONENTS

DAVID SEXTON, Montana Education Association, said the problems that House Bill 396 attempts to address are the abuses of the present tenure system. The Montana School Boards Association, over the years, has been advising termination of teachers by giving the reason "we think we can find a better teacher". These teachers never really find out why they are no longer in their chosen profession. I know of a teacher who had outstanding evaluations from supervisors, was popular, and was regarded as a promising young teacher. This teacher is presently unemployed. There was no justifiable reason for termination. Teachers are very often fired and the reasoning has little if anything to do with their competency. MEA believes that the incompetent in our profession should be expelled. We are just as concerned about excellence as we are about due process of law. There are very few teachers who fit into the category of incompetent. House Bill 396 is an attempt to address the needs of both the local school district and the needs of the teacher. This bill is an innovative answer to the problem and it incorporates a fair and sensible approach.

OPPONENTS

WAYNE BUCHANAN, Montana School Boards Association, submitted written testimony to the committee. (see exhibit 2)

JESS LONG, School Administrators of Montana, said there is extreme difficulty in dealing with tenure laws as they currently are in the statute. This would amplify problems for first year teachers. There would be no chance for the observation, or for the administrator to go through evaluations. The probationary period would evaporate. Morality has to be a factor; teachers are role models for our children.

MARK WALTON, Hellgate Elementary Principal, stood in opposition to House Bill 396, on behalf of Hellgate Elementary Superintendent, Don Waldron. Laws should be written to protect the average to above average teachers. After three years, and a fourth contract is issued, we should know the kind of teacher we are getting. As few laws as possible should be written in this regard, so that the local school boards have the local control they need to maintain quality education in their community. The more tightly the reelection laws are written by the state, the more apt we are to protect inadequate teachers. The rights of employees, including teachers, are properly protected under the laws of the State of Montana, and are written into teacher tenure laws. The idea of taking the local control for the hiring and firing of teachers from

the local school boards, takes more control than was ever intended for the laws covering public education. I see no reason for the local school boards to give up their responsibility and have an arbitrator make the decision as to whether they are right or wrong on the firing of a teacher. In Section 6, which deals with the cooperative, I think that we have so many types of different cooperatives involved, that the way this law is written, it would force this requirement upon cooperatives that really do not have an adequate legal status at this time. The present law does protect those that are hosted by the local government. The items addressed dealing with the termination of teachers because of the financial conditions of a school require that it has been negotiated into most contracts with the reduction of enforced policies. I see no reason to have this put into law.

HARRY ERICKSON, Belgrade, said if the probationary period is shortened, it will work to the detriment of the teacher. Speaking as a hiring agent of a district, I can assure you that if there were any problem at all, the teacher would not be coming back. During a three year period, the teacher could be worked with to fit into the system. House Bill 396 would require districts to look at each teaching candidate through a microscope. If there were any little thing wrong, that person would not be hired back. Our students would be the real losers if we would allow this kind of legislation to pass and allow our systems to be loaded with people who are not doing a good job. Teacher security is important, but our current law provides more than adequate security. At a time when we need the best people available to give our kids an edge in society, the main priority is the education of the kids. A school district is not an employment agency. It is a place where we teach and make kids competitive in society.

JUDY FENTON, School District #16, Havre, said a teacher came to our school district two years ago. Because of the flexibility allowed through the three year probationary program, I have been able to help this teacher significantly in the instruction and management of children. The teacher at the current time is on an improvement plan, and is doing well. There was a joint working between the teacher and myself. If this bill would pass, I do not feel I would have had the flexibility to assist this teacher.

CHIP ERDMANN, Montana School Board Association, said if a teacher is dissatisfied with reasons given for termination of employment, there is an appeal to the county superintendent, and also to the Office of Public Instruction. I would be happy to make available copies of the arbitrator's decision concerning the case in Livingston.

Rep. Jensen closed by responding to some of the comments made on both sides of the bill. I am in no way related to MEA concerning this bill. I have never been so and I am not carrying the bill for the Montana Education Association. My interest was my own, arising from my own background and concerns. If it is the case that there is a necessity for long probationary periods because we have teachers coming out of the universities who are incompetent, then the school administrators aren't doing their job. This law does not take into consideration the burden to the trustees to demonstrate that they can find a better teacher, or the question of due process. Firing a teacher because you think you can find a better teacher, who you have had no experience with, is an indefensible position for the school boards to take. Concerning the question of morality as a criterion for dismissal. What may be moral to me, may not be moral to you. I don't know how one arrives at a judgement of what is moral or immoral. I am very uncomfortable with the idea of states saying morality is an area that can be defined. There must be a better way to get rid of teachers who do not perform well. These are problems that we have at least presented alternatives to. The organizations represented today have not brought any alternative to these problems. Bad teaching is a shared responsibility. It is the responsibility of the parent, administration, and teacher. If I have someone working for me who isn't doing the job, it is my responsibility to get rid of them. It is the job of the administration to find out when people aren't learning. If it is because the teacher has tenure, I submit we should not have tenure. The argument is that maybe we wait until the end of the program to deal with the problems. These deadlines promote putting off responsibility that should have been taken immediately.

HOUSE BILL 395

REPRESENTATIVE JIM JENSEN, District 66, Billings, said this is an MEA bill. Under teacher tenure law, the provisionary period has been lowered from the fourth consecutive year to the second consecutive year. This bill also changes the April 1 date to May 1.

PROPONENTS

DAVE SEXTON, Montana Education Association, said the major distinction is in the approach to the problem. This bill attempts to rectify the present system to make it more workable. It doesn't really change the basic system which still includes the appeal process and still retains a distinction between tenure and nontenure.

OPPONENTS

JOHN MALEE, Montana Federation of Teachers, said the intent of this bill would vary from place to place quite drastically.

WAYNE MARCUS, School District #6, Wibaux, said we feel quality evaluations is the main objective to help the teacher. The board and the local teachers union write up the documents they wish to have used for these evaluations. If the board agrees, this is what we give them.

JESS LONG, School Administrators of Montana, said the one year probationary period is really not even one year. Contracts are offered in April, and observation goes from September to April. This is not enough time for proper evaluation. It is a lengthy and difficult process. Situations are not always repeated right away. Evaluations are based on situations that occur annually. Teachers and administrators are role models for children, and we cannot dismiss the idea of amorality. It is difficult to define morality, but it cannot be ignored in the education of the child.

FRED RANNEY, School District #44, Belgrade, said I would like to have the opportunity to work with my staff and I can't do it if you are going to shorten the time period. It is very important that a teacher be given the time and opportunity to grow.

DIANA NYGARD, School District #4, Forsyth, said administrators make mistakes too. We need some time to help new teachers adjust to their environment.

Rep. Jensen closed by saying the question before us has to do with problems in the system. I think we ought to try to correct the problems and find sollutions. They are problems that may not be constitutionally right, or they give the option or the opportunity to provide a cloak of secrecy that may be in violation to constitutional rights. Probation implies a responsibility to the teacher, the parent, and the administrator. The faster you get at a problem, the better off you are. The children who are being educated today, are our future society.

Questions from committee. Rep. Donaldson asked Ms. Fenton if she finds an attitude difference between the first year teacher and a tenured teacher. She answered yes, the nontenured teacher is much easier to work with and more eager to learn.

Rep. Yardley asked Mr. Erdmann what reasons are used by the Montana School Board Association for not hiring back a non-tenured teacher. The reply was they are able to find a better teacher.

Rep. Yardley asked Mr. Erdmann if he thinks this system is working right now. The response was yes, I do.

Rep. Yardley said given this standard reason, you have a community meeting where a hundred people testify. There are two or three hours of people expressing viewpoints on this teacher, then the meeting is adjourned. Do you feel there is a better way to haldle a situation such as this. Mr. Erdmann replied the role of the school board is to assess public opinion and make a decision accordingly.

Rep. Schye asked Mr. Erdmann if a teacher with tenure could be fired for incompetence. The answer was yes, under the present system it is possible though it is difficult.

Rep. Eudaily asked Mr. Sexton how changing the time period from four to two consecutive years would affect the merit for the teachers. The reply was there needs to be a probationary period. During this two-year period, the school board would be free to make a decision. I don't think it would make any difference in the number of teachers who are looking for employment.

Rep. Eudaily asked Mr. Sexton if there is a doubt at all, wouldn't this put the teacher out of a job. The reply was several school districts that are employing teachers, string them along for three years, run the programs for improving instruction, and then they are nonrenewed without any indication of why. I don't know of any probationary period in any job that is three years long.

Rep. Kadas asked Mr. Long if the only way to get to a teacher who is abusing a student through the immorality provision. The answer was I don't know if this is the only way but it is one way.

Rep. Kadas said of course you can find a better teacher, it just depends on the standard you use. Mr. Erdmann replied this is addressed in the article that was handed out. The basis is where a particular faculty and administration feel that there are better teachers available that would improve the system.

Rep. Peck asked Rep. Jensen if he believes an association can negotiate away lines guaranteed out of due process of law. The response was I think that happens because of the immorality clause in the statute.

Rep. Peck asked Rep. Jensen if he would subscribe to and cooperate with a section that would provide for competency testing. The answer was that is the question with this whole issue, how do we measure competency. I believe it is measurable. Yes, I would be open to that.

Rep. Peck asked Rep. Jensen if he has other ideas on how to measure competency for teachers. The answer was I would be willing to consider measuring the information learned; student performance.

EXECUTIVE SESSION

HOUSE BILL 225

Rep. Kennerly moved House Bill 25, DO NOT PASS.

Rep. Kitselman made a substitute motion to table House Bill 25, the motion passed 8 to 7, with Representatives Hammond, Kadas, Nilson, Schye, Kennerly, Peck, and Daily voting no.

The meeting was adjourned at 2:30 p.m.

Fritz Daily
FRITZ DAILY, Chairman

Cheryl Fredrickson
Cheryl Fredrickson, secretary

VISITORS' REGISTER

HOUSE ~~EEE~~ Education COMMITTEE

BILL 396 Date 1/28

SPONSOR

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Harvey Erdahl	Belgrade	School District		X
William A Cook	Belgrade	School District		X
Jim Shiltz	Belgrade	School Dist		X
Mark Walton	Missoula	School Dist #4		X
Fred Rahney	BELGRADE	School Dist #44		X
[illegible]	Helena	SAM		X
Chip Erdmann	Helena	MSBA		✓
Wayne Buchanan	Helena	MSBA		✓
[illegible]	Plains	School District #1		X
Chuck Hill	Flathead	School Dist #7		X
Greg Hertz	Big Timber	Big Timber School		X
Wayne C. Marcus	Wibaux	School Dist #6		
Mark Johnson	Helena	MEA	X	
WM. ROESSNER	MISSOULA	School Dist. 4		X
D Sexton	Helena	MEA	X	
S. Lewis	Florence	M.E.S.P.A.		X
Joan Hagen	Red Lodge	School Dist #1		X
Dr. Bruce Whitehead	Missoula	—		X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Form CS-33
1-81

VISITOR'S REGISTER

HOUSE Education COMMITTEE

BILL 395 DATE 1/24

SPONSOR

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Jesse W. Long	Helena	SAM		✓
Chip Erdmann	Helena	MSBA		✓
Wayne Buchanan	Helena	MSBA		✓
Gavin D. Erickson	Belgrade	School Boards		✓
Gail Rayn	Plains	School District #1		✓
Larry Harbaugh	Big Timber	Big Timber School Dist.		✓
Mark Walker	Missoula	School Dist. #4		✓
[illegible]	Helena	MEA	✓	
D Sexton	Helena	MEA	✓	
S. Lewis	Florence	M.E.S.P.A.		X
[illegible]	Helena	S. Dist. #16A		X
John Maloe	Butte	M.F.T.		X
Dr. Bruce WHITEHEAD	Missoula, MT	—		X
Eva Mae Larsen	Culbertson	MESPA		X
Donald Gygaard	Forsyth	School Dist #4		X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

Exhibit 1

Proposed Amendments to HB 396

1. Title, line 9.
Following: "TERMINATION"
Insert: "OR DISMISSAL"

2. Page 1, line 17.
Following: "20-3-211"
Insert: "20-4-204, and 20-4-207"

3. Page 1, line 20 through line 4 on page 2.
Following: "county."
Strike: line 20 on page 1 through "he" on line 4, page 2

4. Page 8, line 1 through 4.
Following: "may"
Strike: line 1 through "days." on line 4
Insert: "appeal the dismissal to final and binding arbitration on the grounds provided in 20-4-204(4) and in the manner provided in subsection (5) of that section.
(3)"

5. Page 8, line 4.
Following: "the"
Strike: "county superintendent"
Insert: "arbitration"

Exhibit 1-A

ARTICLE

SEEKING EXCELLENCE: NOT REAPPOINTING AN "AVERAGE" TEACHER IN ORDER TO EMPLOY A BETTER TEACHER *

by

ROBERT E. PHAY, J.D.
Professor, Institute of Government
The University of North Carolina at Chapel Hill

A standard of excellence that insists on the best teacher the market can provide is seldom the measure by which a public school probationary teacher is tested in determining whether to reappoint him. Civil service employment standards—i.e., unless the new employee is clearly unsuitable, he is retained—and not the university practice of weeding out all but the best of the probationary faculty [1] is the way most public schools decide on whether to reappoint. The result is that if a teacher is employed, he almost always is awarded tenure three years later. Very few are given notice of nonreappointment at the end of one of their probationary years. Teachers are hardly ever closely scrutinized in an effort to eliminate all but the best—to dispense with any probationary teacher when the market is likely to provide a better teacher in the near future.[2] This failure to use the probationary period to weed out a weak teacher or even an average teacher when a better teacher can be employed is a primary reason that schools are not better than they are. One reason the probationary period is not used

*The views expressed are those of the author and do not necessarily reflect the views of the publisher.

1. The difference between the university merit system and the civil service system was clearly delineated in a recent article on performance of tenured faculty, which stated:

> Personnel decision, particularly those involving the retention or nonretention of faculty, and the award or denial of tenure, have always been based on the premise of excellent past performance and anticipated future promise. It is this merit principle which ultimately separates the educational tenure system from civil service or other types of job security systems that principally rely on longevity or seniority as the primary factor for retention and promotion.

Olswang & Fantel, Tenure and Periodic Performance Review: Compatible Legal and Administrative Principles, 7 J. of C. & U.Law 1 (1980).

2. "Near future" should extend for five years. It is important not to reappoint a teacher even if the school cannot immediately replace him or her with a better teacher. The school system should keep a teaching position open (that is, not occupied by a tenured teacher) until it can employ a teacher who is excellent.

for weeding out all but the best is that many school administrators think the law prohibits not reappointing an average teacher in order to seek a better one. It does not. This article will review the issues that arise when a school board's standard for reappointment is that the probationary teacher be as good as the job market provides. Questions of subjective judgments, subterfuge, and who has the burden of proof in nonreappointment also will be examined.

Authority to Not Reappoint in Order to Seek a Better Teacher

Because few public schools use the probationary period as a weeding-out time, it is not surprising that few courts have had to consider a defense to a nonreappointment based on the school board's assertion that although the teacher has no particular failing, the board thinks it can find a better one. After an exhaustive search, seven cases were found that supported this justification for a nonreappointment. The only rejection of it occurred when the board's claim was found to be a cover-up: Instead of not renewing in order to find a better teacher, the school actually was getting rid of a person who had been an adversary in collective bargaining or critical of the school's operation. The "subterfuge" cases are discussed in the next section.

The clearest statement of the board's right to weed out all but the best teachers was made by a federal district court in Montana. In upholding a nonreappointment that the school board justifies on the basis that only average teaching could be expected from the teacher, the court said:

> It is quite clear that Montana has adopted an employment policy . . . which frees a school board from any tenure problems during the first three years of a teacher's employment. These three years are the testing years during which not only may the teacher's merits be weighed but the school's needs for a particular teacher assessed . . . . [I]n the interests of creating a superior teaching staff a school board should be free during a testing period to let a teacher's contract expire without a hearing, without any cause personal to the teacher, and for no reason other than that the board rightly or wrongly believes that ultimately it may be able to hire a better teacher.[3]

This position was reaffirmed five years later by the same court when another board said that it refused to reappoint a teacher because it "could hire a better teacher to complement the system."[4] The teacher sued, claiming that retaliation for her criticism was the real reason for the nonreappointment. In upholding the board the court noted that "[t]he problem posed here is not whether there was good cause for not reviewing the plaintiff's contract but whether it was not

3. *Cookson v. Lewiston School Dist. No. 2*, 351 F.Supp. 983, 984-85 (D.Mont.1972).

4. *Branch v. School Dist. No. 7*, [illegible] F.Supp. 608 (D.Mont.1977).

reviewed for some impermissible cause."[5] In the court's opinion, the plaintiff was "an able and effective teacher," but the court refused to substitute its judgment for the school board's.[6] It was the board's prerogative, the court said, to select the type of teachers it wanted to put in the classroom as long as the decision was not taken to stop an activity protected by the First Amendment or for any other constitutionally impermissible reason.

Federal district courts in Colorado[7] and Indiana[8] and federal courts of appeal for the Fourth[9] and Tenth[10] circuits, plus a New Jersey appellate court,[11] have all upheld the board's right not to reappoint in order to "strengthen the staff" or to "obtain a better teacher." Although in some of these cases the school introduced evidence of "disappointment in the teaching" or "poor teaching practices," the thrust of these court opinions is to uphold the board's right not to reappoint in order to seek excellence in the teaching faculty.

Two of these cases are particularly noteworthy. In the first, the New Jersey appeals court upheld the board's right to rank its nontenured teachers and not reappoint the lowest-ranked teachers. The school board ordered that all nontenured teachers be ranked on the basis of their performance evaluations. The board then notified the four lowest-ranked teachers that they would not be reappointed. After a hearing, two of these teachers were reappointed. The other two filed a grievance, arguing that although it is the board's prerogative not to renew contracts, ranking untenured teachers exceeded the evaluation procedures set out in the collective bargaining agreement and denied due process. The arbitrator who was appointed to settle the dispute interpreted the agreement's evaluation procedures as indeed assuring re-employment to a teacher who did an acceptable job, and he viewed the board's ranking procedure as running counter to the agreement by conditioning re-employment on the teacher's relative performance. He therefore found for the teachers. The board sued to have the arbitrator's decision reversed, and then appealed the trial court's decision that affirmed the arbitrator's award.

The appellate court reversed, saying that the ranking of nontenured teachers was within management's prerogative to adopt criteria for making decisions on renewals. It said that the board was not obliged to rehire all nontenured teachers who did a "good job." The

5. *Id.* at 610.

6. *Id.* at 611. Other courts have emphasized that the court should not substitute its judgment for the school board's. *See, e.g., Weathers v. West Yuma County School Dist.*, 530 F.2d 1335 (10th Cir. 1976); *Powers v. Mancos School Dist. RE-6*, 539 F.2d 38, 44 (10th Cir. 1976).

7. *Powers v. Mancos School Dist. RE-6*, 391 F.Supp. 322 (D.Colo.1975), *aff'd*, 539 F.2d 38 (10th Cir. 1976).

8. *Phillippe v. Clinton-Prairie School Corp.*, 394 F.Supp. 316 (S.D.Ind.1975).

9. *Mayberry v. Dees*, 663 F.2d 502 (4th Cir. 1981).

10. *Powers v. Mancos School Dist. RE-6*, 539 F.2d 38 (10th Cir. 1976).

11. *Board of Educ. v. Wyckoff Educ. Ass'n*, 168 N.J.Super. 497, 403 A.2d 916, *cert. denied*, 81 N.J. 349, 407 A.2d 1222 (1979).

criteria that the board selected for its decision were matters of "major educational policy and as such must be considered managerial prerogative." Having the rights not to renew and to select criteria for the decision, the board may rank teachers to determine which ones to renew. This board only did explicitly and with a formal procedure what it could and would have done "subjectively"—" 'rank' the teachers under consideration to determine which to renew and which not to renew. To express [officially adopt] such a process is no less logical, natural or desirable."

The second major case on the nonreappointment of an adequate teacher in order to seek a superior one is the Fourth Circuit Court's decision of *Mayberry v. Dees.*[12] Although it involved a state university, it offers the best analysis of the probationary period as a time for weeding out all but the best teachers and supports the use of the probationary period for that purpose. In upholding a nonreappointment of a Romance languages teacher, who the chairman said was not "the best man possible for the position," the court stated:

> [N]ot everyone satisfying the requisite qualifications will necessarily be granted tenure. "Many are called, but few are chosen." American universities are replete with distinguished full professors who, when the time came at their first university, went "out and not up." It is not any sense denigrating when a university concludes, at the moment of decision, that its best educational interests will not be served by a conferral of tenure, however capable and collegial the candidate may be.[13]

The court also stressed that a school should carefully review a teacher before it confers tenure. Noting that tenure effectively precludes "for possibly a very long time, the replacement of a less good teacher by a better one . . . [it carries] a duty that great care be exercised in its conferral."

The *Mayberry* case also spoke to the "tenured-in" situation that exists, without exception as far as I know, in every public school system in the country in which tenure is awarded. To be "tenured-in" means to have such a large proportion of teachers with tenure that the school is limited in its ability to replace mediocre teachers and to hire different types of teachers when curriculum changes are desired. The Fourth Circuit Court recognized and supported the legality of denying tenure solely because so many teachers already have tenure that there will be no opportunity to grant tenure to well-qualified teachers. It is sometimes necessary, the court said, "to terminate those considered for, but not granted tenure, even though qualified . . . to make place for those following behind."[14] In times of nonexpansion and retrenchment, it will sometimes be necessary to deny tenure to

12. 663 F.2d 502 (4th Cir. 1981).

13. *Id.* at 509, n. 19.

14. *Id.* at 516, n. 35.

even well-qualified teachers in order to make it possible for future appointees to be considered for tenure.

Subterfuge

Although a board may refuse to keep a competent teacher in order to seek a better one, it may not use that explanation to cover up a nonrenewal for a constitutionally impermissible reason. Thus it may not refuse to renew a contract when the real reason for nonrenewal is the teacher's race, sex, national origin, or religion or a desire to get rid of a teacher who has criticized the school's administration. For example, a federal district court in Florida rejected the superintendent's explanation that he was replacing two probationary teachers "to upgrade the system by selecting more qualified teachers." It found his stated reasons to be a "flimsy after-the-fact-rationalization" for not rehiring the teachers.[15] There was considerable evidence that the refusal to renew was retaliation for the teachers' activities with the teacher association—and therefore a violation of the teachers' rights of speech, assembly, and association. The federal district court ultimately concluded that the teachers had exercised their "First Amendment rights in a manner that interfered with the normal operation of the school," [16] but the school's original statement that it was seeking better teachers was rejected.

Although the Florida case does not directly address whether a school district may refuse to renew the contract of a probationary teacher on the grounds that a better one may be available, it does make clear that such a claim must meet minimal standards of credibility. A federal district court in Indiana made the same point in a case in which the principal said that the reason for replacing a math teacher was "to strengthen the staff." [17] The court said that if it found the reasons stated to be "a sham and without any basis," [18] it would have to reject the school's action.

Two situations create a credibility problem for the school when it says that the nonreappointment is to "upgrade the faculty" and the teacher claims a constitutional violation. The first occurs when the teacher has consistently been rated above average. Unfortunately, many if not most probationary teachers who are not reappointed because they are mediocre have been given high ratings by the principal. Nowhere in the school's operation is grade inflation more rampant than in teacher evaluation ratings. High evaluations for a teacher that the school decides not to renew puts the school in a difficult position.

15. *Hastings v. Bonner*, 578 F.2d 136, 138 (5th Cir. 1978).

16. On appeal, the Fifth Circuit Court held that the district court had not resolved a conflict in the evidence regarding an alleged insubordination of one teacher, and questioned whether the trial court had applied the correct legal standard of "material and substantial disruption" in holding that the disruptive conduct of two of the teachers involved in this case justified the nonreappointment.

17. *Phillippe v. Clinton-Prairie School Corp.*, 394 F.Supp. 316 (S.D.Ind.1975).

18. *Id.* at 320.

If the teacher sues the school, a judge may require it to explain the official record. The teacher's claim of a First Amendment violation becomes more believable, and the school may be forced to *prove* that this is not a superior teacher but only an average or below-average teacher, notwithstanding the high evaluations. The school's difficulty is increased if the school has one of those ill-advised policies that provide that any shortcoming or failing of a teacher must be placed in his personnel file. When no deficiency appears in his file, the teacher reasonably can assume that the school system has found no area of performance that needs improvement.[19]

The second situation that makes a school's claim of "upgrading the faculty" suspect after the teacher has alleged bad faith occurs when the school's explanation is not consistent with past practices. If a school has regularly reappointed teachers unless they are clear failures, it is hard to make believable the assertion that there is nothing particularly wrong with the teacher but he is not renewed because he is not as good as the market provides. On the other hand, a school that regularly has weeded out all but the best in its reappointment decisions is much more believable when it makes this claim. Thus a board may be hoisted on its own past practice and forced to reappoint the teacher. Clearly a board that adopts a new weeding-out policy should act early to show that a new day has dawned in teacher reappointments and publicize that change before it applies the new policy.

Responsibility for Challenging the Nonreappointment

When a teacher has been notified that his employment contract will not be renewed, he is responsible for initiating a review of that decision if he wants one. Furthermore, if the school has a procedure for internal review,[20] the employee must request this review before he seeks judicial review. In an Alabama case, a federal district court addressed the question of who bears the burden of initiating a hearing. Citing the U.S. Supreme Court decision in *Board of Regents v. Roth*,[21] the court said that a teacher who believes that his nonreappointment is constitutionally impermissible must assert that claim and request a hearing in order to protect his "due process right." It is elemental, the court said, that there be some opposition to the nonreappointment before any obligation is placed on the school to observe due process requirements.[22]

19. *See, e.g., Prewit v. Transylvania Bd. of Educ.*, No. 79-CVS-226 (N.C.Super.Ct. Sept. 1981), digested in 13 School L.Bull. 18 (Jan. 1982). The school board's policy of this kind was one reason that the judge found that the board had been arbitrary.

20. For a recommended board policy on nonreappointment, see R. Phay. Nonreappointment, Dismissal, and Reduction in Force of Teachers and Administrators: Proposed Board Policies (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1982). It is strongly recommended that procedures separate from the regular teacher grievance procedure be provided for nonreappointments, just as a separate procedure is used for discharge for cause.

21. 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

22. *Stewart v. Bailey*, 396 F.Supp. 1381 (N.D.Ala.1975).

Burden of Proof

The law is clear that a teacher who alleges that a nonreappointment decision was based on a constitutionally impermissible reason has the burden of proving that allegation. The Fifth Circuit Court, in a case involving the nonrenewal of two probationary faculty in order to "upgrade its faculty and academic standing," said that "neither the burden of going forward nor the burden of proof shifts to the state until it has been established by the complainant" that the nonrenewal was based on his exercise of constitutional rights.[23] Moreover, the Supreme Court said in *Mt. Healthy v. Doyle*[24] that even if a faculty member can show that the board based its decision not to reappoint him in part on constitutionally protected conduct and its decision not to reappoint him was thereby based in part on constitutionally protected conduct, its decision will be sustained if it can show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[25]

The Fourth Circuit applied the *Mt. Healthy* case in the *Mayberry* case, which involved the nonreappointment of a teacher who was up for tenure.[26] The court said that it is not enough for a teacher simply to show an exercise of First Amendment rights, followed by a denial of tenure. That approach wrongly ignores the "manifold other requirements" to be satisfied before tenure is granted, some of which are independent of the candidate's qualifications.[27] "[I]f the possibility of retaliation were all Mayberry had to prove to allow a jury to find in his favor, there would be no practical way to deny tenure to anyone." If that were the case, the court said, the distinction between probationary and tenured employment "would largely evaporate."[28] The court also made clear that past satisfactory performance does not justify an inference that the teacher should now be given tenure. The court rejected this argument, saying that no favorable inference "is to be drawn from previous satisfactory, annually renewed probationary service."[29]

Evaluations Based on Subjective Judgments

Many public school administrators are confused about whether they may base nonreappointment on subjective evaluations. Some think that subjective considerations are inherently unfair and therefore are arbitrary and illegal. These are mistaken conclusions. Subjective judgments are both legal and necessary in making reappointments.

23. *Fluker v. Alabama State Bd. of Educ.*, 441 F.2d 201, 206 (5th Cir. 1971). Accord, *Adams v. Campbell County School Dist.*, 511 F.2d 1242, 1246 (10th Cir. 1975).

24. 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), digested in 8 School Law Bull. (April 1977).

25. 429 U.S. at 287, 97 S.Ct. at 576.

26. *Mayberry v. Dees*, 663 F.2d 502 (4th Cir. 1981).

27. *Id.* at 518.

28. *Id.* at 519.

29. *Id.* at 519.

In the Fourth Circuit's opinion in *Mayberry v. Dees*,[30] the court made clear that subjective evaluations are inherent and inevitable in making the tenure decision. Quoting with approval its 1979 opinion in *Clark v. Whiting*,[31] it said:

> A teacher's competence and qualifications for tenure or promotion are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement or the use of standardized tests.[32]

The right to base nonreappointment on subjective evaluations has been upheld many times. The Fifth Circuit said, "[T]here are an enormous number of fact situations in which the nonreappointment of an employee may be justified by highly subjective and perhaps unforeseeable considerations."[33] The Tenth Circuit Court,[34] in another nonreappointment case in which the principal said that he thought the school board "could obtain a better teacher than the plaintiff," made the following observation about subjective judgments:

> [S]chool board members and school administrators . . . charged with the duty of exercising discretionary judgment in the tender areas of hiring and terminating personnel . . . apply both objective and subjective rationale. While correct objective rationale is more credible in that it exists independent of personal "reflections" or "feelings" (involving such matters as a teacher's academic accomplishments measured by grades achieved, degree or degrees earned, attendance at classes, prior employment records, and teaching status), it would be unrealistic to deny to Board members the right to employ subjective rationale in the decisional processes. Subjective considerations are, of course, those personal to the individual Board members. They involve, *inter alia*, personal impressions or judgments of the teacher in terms of characteristics as vague and indefinable as "feelings," relating to matters such as personal grooming habits, manner of speech, wearing apparel habits, friendliness, kindness, consideration of others, qualities of cooperation, sense of humor, general demeanor and attitude. It is, of course, impossible to prove the subjective by any "right" or a "wrong" measurement standard. Nevertheless, subjective rationale factors bear significant import in the area of employment concern. We suggest it is both impossible and inadvisable to eliminate subjective rationale from the decisional process.[35]

30. 663 F.2d 502 (4th Cir. 1981).

31. 607 F.2d 634 (4th Cir. 1976).

32. *Id.* at 639.

33. *Fluker v. Alabama State Bd. of Educ.*, 441 F.2d 201, 207 (5th Cir. 1971).

34. *Powers v. Mancos School Dist. RE-6*, 539 F.2d 38 (10th Cir. 1976). *Accord, Cookson v. Lewiston School Dist.*, 351 F.Supp. 983, 986 (D.Mont.1972); *Higgins v. Board of Educ.*, 286 S.E 2d 682, 685 (W.Va.1982).

35. *Powers v. Mancos School Dist. RE-6*, 539 F.2d at 43-44.

Subjective judgments in making reappointment decisions in public institutions of higher education are not only legal but also required by law in many institutions. For example, the special assistant to the chancellor at The University of North Carolina at Chapel Hill said recently in speaking to a conference for community college administrators. "All faculty reappointments are based on subjective evaluations." In fact, she said, all probationary faculty in the university system *must* be so judged because the university code requires that each faculty member's "potential for future contribution" [36] be gauged when he is considered for reappointment. This determination finally comes down to a judgment based on past performance about that faculty member's ability to make worthwhile future contributions. Thus subjective evaluations not only *may* be made but *must* be made.

Conclusion

This review of the issues in teacher nonreappointment that arise when a school seeks to upgrade the quality of its teaching faculty by not reappointing "average" teachers and even those that do a "fine job" in order to hire a better teacher suggests that the civil service standard that is now the basis for most public school employment decisions conflicts with the basic assumption that the tenure statutes make—that no teacher should be reappointed or given tenure if a better teacher can be hired. Schools have a legal responsibility to put the best available teacher in the classroom despite objections from teacher unions and the controversy and unpleasantness that this task often produces.

36. *See* Sec. 602(4), "Academic Tenure," The Code of the University of North Carolina (1975).

Exhibit 4

MONTANA SCHOOL BOARDS ASSOCIATION
501 North Sanders
Helena, Montana 59601

DATE: January 28, 1983

TO: House Education Committee

FROM: Wayne Buchanan, Executive Director

SUBJECT: Opponent Testimony on HB 395 and 396

For at least the last four legislative sessions the MEA has introduced legislation which would abolish or reduce the probationary period for nontenured teachers. Each of those sessions the Montana School Boards Association has opposed those attempts.

In consideration for the committee's time I will testify in opposition to the two bills at the same time since the bills are similar in their effect, differing primarily in the means by which the tenure provisions are enforced.

I would say at the outset that HB 395 and 396 are not all bad. Throughout the two bills we see a genuine attempt to correct some of the problems which exist in our present tenure statutes. The proposed methods of resolution of submitting the question to the county superintendent or to an arbitrator have some advantages over litigating rehire questions in the courts. Moving the rehire deadlines from April 1 and April 15 to May 1 is a significant improvement in the present system, allowing school districts to run at least one levy election prior to being forced to make staffing decisions.

Our opposition to the two bills before you centers around two main objections: the reduction or abolishment of the probationary period and the total elimination of the judgement of the elected school boards in the determination of who is going to teach in the schools of their communities.

As a high school English teacher for eight years, I find the incessant attacks by the MEA on the probationary period the most difficult to understand. I regarded my three years prior to tenure as a learning period, as an apprenticeship to both my profession and the community in which I taught. I would ask the committee to remember that a significant number of nontenured teachers come from the colleges with very little real knowledge of how to teach with sustained effort over a 9 month period and with little appreciation for the difficulties and the demands of their chosen profession. A few are superstars, identifiable almost immediately as individuals who will be excellent teachers. But most are not, requiring several years of systematic effort before they feel comfortable in the classroom.

The present three year probation period seems long but it is not even for experienced teachers coming into the system. If we allow the fall months for a settling in period it is January before the first reliable evaluation can be made. Under the present system the decision to grant tenure must be made in March two years later, giving the administration and the school board about 21 months of actual teaching to evaluate the individual for tenure. Under the best of the proposals before us today, HB 395, the district would have about 2½ months to evaluate for tenure. Under the worst, HB 396, there would be no probationary period.

We have been roundly criticized for using the statement that the school board felt that it could find a better teacher as a reason for terminating nontenure teachers. This language came not from the School Boards Association but from a decision by Federal Judge Russell E. Smith which said in part:

> "In the interests of creating a superior teaching staff a school board should be free during a testing period to let a teacher's contract expire without a hearing, without any cause personal to the teacher, and for no other reason than that the board rightly or wrongly believes that ultimately it may be able to hire a better teacher."
> *(Cookson vs Lewistown School District, 1972)*

At first I was uneasy about the validity of this reason. Three sessions ago I even apologized for using that reason to some legislators--some of you who are sitting on this committee. Last session you may remember I defended that reason before this committee. Late this fall we came upon an article in the University of North Carolina Law Review by Robert E. Phay, a professor of law in the Institute of Government at that university. The article concludes :

> "This review of the issues in teacher nonreappointment that arise when a school seeks to upgrade the quality of its teaching faculty by not reappointing "average" teachers and even those that do a "fine job" in order to hire a better teacher suggests that the civil service standard that is now the basis for most public school employment decisions conflicts with the basic assumption that the tenure statutes make--that no teacher should be reappointed or given tenure if a better teacher can be hired. Schools have a legal responsibility to put the best available teacher in the classroom despite objections from teacher unions and the controversy and unpleasantness that this task often produces."

Proponents of these bills have argued that nontenure teachers need protection from school boards and administrators. In reality there is a redundancy of protection already afforded nontenure teachers. Nonrenewal based on sex, marital status, age and disability is banned by the Human Rights Act. Nonrenewal because of the exercise of the basic civil rights may be prevented by the federal courts. Nonrenewal based on union activity is not allowed by the Public Employees Collective Bargaining Act.

The subject of protection for nontenured teachers brings up another major area of concern in these bills. In 1975 the legislature included teachers in the Public Employees Collective Bargaining Act. One of the mandatory subjects for negotiation under that act is employee security or just cause dismissal. Collective bargaining agreements now provide about 75% of the nontenured teachers in Montana with some measure of renewal protection.

One of the criticisms expressed by opponents of public sector collective bargaining is that the employees, failing to achieve concessions on a particular issue at the bargaining table will come to the legislature to statutorily mandate the concession.

Since the legislature saw fit to impose collective bargaining on school districts we beg the legislature to stay out of areas which are mandated bargaining subjects. If not, we face the risk of having you impose a dual process on us. The issue at hand is an example. If a teacher is nonrenewed he may exercise his rights under the negotiated agreement and failing to be rehired may exercise his rights under the statute. In the last legislature Representative Carl Siefert proposed a bill which would exempt teachers who opt for collective bargaining from the tenure statutes. You may wish to reconsider that bill if you feel strongly that teachers need more statutory job protection.

The national experience demonstrates that tenure statutes almost always become tougher and more restrictive. Once entrenched in the law books they become sacred cows despite a growing body of evidence that suggests that restrictive tenure statutes may be at the heart of the difficulties in public education today. How many of you sitting at this table would be willing to carry a bill that would abolish or reduce the tenure statutes of this state?

HB 395 and 396 are in keeping with the national trend. Both are identical in provisions that would drastically increase the scope of tenure. A recent Montana Supreme Court decision, Yanzick vs the Polson School District, affirmed the right to nonrenew a tenure teacher for "good cause." These bills would limit the reasons for nonrenewal to four: unfitness, incompetence, violation of the adopted policies of the trustees, and reduction in force--reasons specifically rejected by the court in Yanzick as being the sole reasons for nonrenewal. If confined to these reasons the question would become how much damage must a teacher cause the young people

in his charge before he becomes unfit? How poor or ineffective in the classroom before he becomes incompetent? It is pertinent to note at this point that immorality, the reason most prominent in Yanzick, has been stricken from the list.

But the greatest proposed change from the present tenure statute is nearly invisible. It is found on page 4, lines 12 and 13 in HB 395; and page 5, lines 17 and 18 in HB 396 and simply requires that the action taken by the board be supported by the evidence. Usually the legal presumption is that the original triers of fact weighed the evidence and came to a just conclusion. Subsequent appeals may center on questions of procedure, whether all the evidence was heard or whether there was demonstrable malice, fraud, or prejudice. The appeal tribunal will usually refuse to substitute its judgement for that of the original agency.

20-4-704 Standards of Review states in pertinent part:

> "The court may not substitute its judgement for that of the agency as to the weight of the evidence on questions of fact."

It is interesting to note that grounds for appeal in both bills were taken verbatim from the grounds for appeal of an arbitrator's award (see section 27-5-301 MCA). Only one part has been added—the requirement that the appeal tribunal hear and decide whether the school board's decision was supported by the evidence.

The bills before us would effectively revoke that law as it applies to school boards.

In conclusion, administrators and school boards have the awesome responsibility to select teachers that will teach in their schools. I will not deny that abuses exist—but for every horror story on the teachers' side, I can relate one about a teacher who should not be in the classroom—who is—because of the restrictive tenure statutes. In seven years with the School Boards Association I know of one contested case of tenure teacher dismissal which has been successful—Yanzick. I suggest to you the law is tough enough.

NAME: Pat Underwood DATE: 2 85ad 83

ADDRESS: 502 S. 19th ave Bozeman, MT 59715

PHONE: 587-3153

REPRESENTING WHOM? Montana Farm Bureau

APPEARING ON WHICH PROPOSAL: ~~SB~~ HB 396

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: The Montana Farm Bureau has long favored legislation as provided for in HB 396 and we go on record as supporting this bill and recommend you give it a DO PASS

Pat R Underwood

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

OLL CALL VOTE EDUCATION January 31 COMMITTEE

		Date: No. HB 419	Date: No.	Date: No.	Date: No.	Date: No.	Date: No.	Date: No.
DONALDSON	P	YES						
EUDAILY	P	YES						
HAMMOND	EX	XXX						
HANNAH	EX	XXX						
KADAS	P	YES						
KEENAN	P	YES						
KITSELMAN	P	YES						
LORY	P	YES						
MILLER	P	NO						
NILSON	P	NO						
NISBET	P	NO						
PECK	P	YES						
SANDS	P	YES						
SCHYE	P	NO						
YARDLEY	EX	XXX						
KENNERLY	P	XXX						
DAILY	P	NO						

Form CS-31
1-81

DO PASS 8-5