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Article 7

Voluntary Preemployment Waiver of Tenure Rights Held Not to Violate Public Policy

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serve the dual purpose of decreasing the probability of unreasonable intrusions while maintaining the effectiveness of investigative procedures.

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EDUCATION LAW

Voluntary preemployment waiver of tenure rights held not to violate public policy

In order to insure the employment of quality personnel in the public education system, the Education Law provides teachers with certain tenure rights guaranteeing job security.[33] Historically,

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investigative techniques would fail).

[33] *See* N.Y. EDUC. LAW §§ 3012, 3014, 3020-a (McKinney Supp. 1971-1979). Prior to the enactment of tenure statutes, teacher employment contracts were subject to annual renewal. Moritz v. Board of Educ., 60 App. Div. 2d 161, 166, 400 N.Y.S.2d 247, 251 (4th Dep't 1977). The change wrought by the legislature was intended to give permanence to teaching positions, *id.;* Walcott v. Fisher, 274 App. Div. 339, 341, 83 N.Y.S.2d 536, 538 (3rd Dep't 1948), *aff'd,* 299 N.Y. 688, 87 N.E.2d 71 (1949), and to recognize the strong public policy to reward competent teachers with security in the positions to which they were appointed, Boyd v. Collins, 11 N.Y.2d 228, 233, 182 N.E.2d 610, 613, 228 N.Y.S.2d 228, 232-33 (1962), *overruled on other grounds sub nom.* Abramovich v. Board of Educ., 46 N.Y.2d 450, 386 N.E.2d 1077, 414 N.Y.S.2d 109, *cert. denied,* 444 U.S. 845 (1979); Monan v. Board of Educ., 280 App. Div. 14, 18, 111 N.Y.S.2d 797, 800 (4th Dep't 1952).

As a precondition to eligibility for receiving tenure, appointment to a probationary period not exceeding three years is required. N.Y. EDUC. LAW §§ 3012(1), 3014(1) (McKinney Supp. 1971-1979). Probationary appointment is made by majority vote of the BOCES or school board upon the recommendation of the district superintendent. *Id.* To attain the position of a tenured teacher, the district superintendent must, on or before the expiration of the probationary period, recommend that the board grant tenure to those probationary teachers who have been found to be "competent, efficient and satisfactory." *Id.* (2), 3014(2). It is then within the board's discretion to grant or deny tenure. Bergstein v. Board of Educ., 34 N.Y.2d 318, 322, 313 N.E.2d 767, 769, 357 N.Y.S.2d 465, 468 (1974). Probationary teachers who are not recommended for tenure must be notified in writing by the district superintendent no later than sixty days prior to the expiration of the probationary period. Pavilion Cent. School Dist. v. Pavilion Faculty Ass'n, 51 App. Div. 2d 119, 380 N.Y.S.2d 387 (4th Dep't 1976); N.Y. EDUC. LAW §§ 3012(2), 3014(2) (McKinney Supp. 1971-1979). Failure to give notice to the teacher as required may result in tenure by estoppel and acquiescence. *See* Ricca v. Board of Educ., 47 N.Y.2d 385, 392, 391 N.E.2d 1322, 1326, 418 N.Y.S.2d 345, 349 (1979); Baer v. Nyquist, 34 N.Y.2d 291, 313 N.E.2d 751, 357 N.Y.S.2d 442 (1974); Matthews v. Nyquist, 67 App. Div. 2d 790, 412 N.Y.S.2d 501 (3rd Dep't 1979).

Once granted tenure, a teacher can only be removed by a school board acting in strict compliance with the Education Law. *See* N.Y. EDUC. LAW §§ 3012, 3014, 3020-a (McKinney Supp. 1971-1979). Indeed, a tenured teacher has been held to enjoy a constitutionally protected property interest in his compensation and employment which cannot be deprived without due process. Abramovich v. Board of Educ., 91 Misc. 2d 481, 485, 398 N.Y.S.2d 311, 315 (Sup. Ct. Suffolk County 1977), *rev'd on other grounds,* 62 App. Div. 2d 252, 403 N.Y.S.2d 919 (2d Dep't 1978), *aff'd,* 46 N.Y.2d 450, 386 N.E.2d 1077, 414 N.Y.S.2d 109, *cert.*

the courts have invalidated the advance waiver of these rights on public policy grounds.[34] Recently, however, in *Feinerman v. Board of Cooperative Educational Services*,[35] the Court of Appeals held that in certain limited circumstances, employment contracts wherein a "probationary" teacher voluntarily relinquishes her rights to tenure do not contravene public policy.[36]

In *Feinerman*, the plaintiff was appointed in February 1974, as a teacher in a Board of Cooperative Educational Services (BOCES) program.[37] The employment contract provided for a per diem wage and stipulated, in accordance with a collective bargaining agreement, that her position was nontenured.[38] She was reappointed for the next two school terms, and subsequently signed a letter restating the provisions contained in the initial contract.[39] After being notified in June 1976, that her position would be terminated at the end of the month due to a decrease in enrollment, she brought a CPLR article 78 proceeding to compel BOCES to reinstate her with full back pay and benefits.[40] Special Term de-

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denied, 444 U.S. 845 (1979). A probationary teacher, on the other hand, may be dismissed at any time during the probationary period without a hearing and without being informed of the reasons for dismissal. *Id.*; Sikora v. Board of Educ., 51 App. Div. 2d 135, 380 N.Y.S.2d 382 (4th Dep't 1976); Central School Dist. v. Three Village Teachers Ass'n, Inc., 39 App. Div. 2d 466, 467, 336 N.Y.S.2d 656, 658 (2d Dep't 1972).

[34] *E.g.*, Boyd v. Collins, 11 N.Y.2d 228, 182 N.E.2d 610, 228 N.Y.S.2d 228 (1962), *overruled on other grounds sub nom.* Abramovich v. Board of Educ., 46 N.Y.2d 450, 386 N.E.2d 1077, 414 N.Y.S.2d 109, *cert. denied*, 444 U.S. 845 (1979); Matthews v. Nyquist, 67 App. Div. 2d 790, 412 N.Y.S.2d 501 (3d Dep't 1979); Dwyer v. Board of Educ., 61 App. Div. 2d 859, 402 N.Y.S.2d 67 (3d Dep't 1978); Neer v. Board of Educ., 57 App. Div. 2d 963, 395 N.Y.S.2d 66 (2d Dep't 1977); Baer v. Nyquist, 71 Misc. 2d 471, 336 N.Y.S.2d 476 (Sup. Ct. Albany County 1972), *aff'd*, 34 N.Y.2d 291, 313 N.E.2d 751, 357 N.Y.S.2d 442 (1974); *cf.* John J. Kassner & Co. v. City of New York, 46 N.Y.2d 544, 551, 389 N.E.2d 99, 103, 415 N.Y.S.2d 785, 789 (1979) (waiver of statute of limitations prior to accrual of cause of action held void).

[35] 48 N.Y.2d 491, 399 N.E.2d 899, 423 N.Y.S.2d 867 (1979), *modifying* 62 App. Div. 2d 1036, 404 N.Y.S.2d 37 (2d Dep't 1978).

[36] 48 N.Y.2d at 495-96, 399 N.E.2d at 901, 423 N.Y.S.2d at 869.

[37] *Id.* at 494, 399 N.E.2d at 900, 423 N.Y.S.2d at 868.

[38] *Id.* The collective bargaining agreement provided that tenure was not applicable to teaching positions in the annually funded day-time adult educational programs. *Id.*; *see generally* note 59 and accompanying text *infra*.

[39] 48 N.Y.2d at 494, 399 N.E.2d at 900, 423 N.Y.S.2d at 868.

[40] *Id.* at 494, 399 N.E.2d at 900, 423 N.Y.S.2d at 868-69. Two teachers employed in the same program, but having less seniority than the plaintiff, were retained, 48 N.Y.2d at 495, 399 N.E.2d at 901, 423 N.Y.S.2d at 869, even though a tenured teacher in the plaintiff's position would have had seniority rights over other probationary and substitute teachers whose service was of shorter duration. Lezette v. Board of Educ., 35 N.Y.2d 272, 282, 319 N.E.2d 189, 195, 360 N.Y.S.2d 869, 876 (1974); *see* N.Y. EDUC. LAW § 2510 (McKinney 1970 & Pam. 1971-1979).

nied her request, reasoning that the agreement to accept a "temporary, non-tenure bearing position" constituted a relinquishment of any tenure benefits to which she otherwise would have been entitled.[41] The Appellate Division, Second Department, unanimously affirmed, but modified the judgment, awarding the plaintiff sixty days back pay.[42]

On appeal, a divided Court of Appeals affirmed,[43] holding that absent any evidence of coercion or duress, where the right to be appointed to a tenured position is "voluntarily" waived, public policy considerations must yield to the employment agreement between the parties.[44] Writing for the majority,[45] Judge Jasen noted at the outset that the plaintiff had knowingly and freely accepted the nontenured position for consecutive one-year terms.[46] While acknowledging that the tenure statutes had been enacted to attract qualified teachers by providing job security,[47] Judge Jasen stated that a prospective teacher's waiver of tenure rights was not prohibited by either the express provisions of the statute[48] or by public

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[41] 48 N.Y.2d at 494, 399 N.E.2d at 900, 423 N.Y.S.2d at 869.

[42] 62 App. Div. 2d 1036, 1038, 404 N.Y.S.2d 37, 39 (2d Dep't 1978). The appellate division found that the plaintiff had been appointed to a position bearing tenure by law and therefore her status was that of a probationary teacher. *Id.* at 1037, 404 N.Y.S.2d at 39. Since the probationary three-year term had not expired, *see* N.Y. EDUC. LAW § 3014 (McKinney Supp. 1979), the court found that the plaintiff could have been terminated upon the vote of the board, *see* note 33 *supra*, and, therefore, was entitled only to the back pay which she would have been entitled to as a probationary teacher, and not reinstatement. 62 App. Div. 2d at 1038, 404 N.Y.S.2d at 39.

[43] 48 N.Y.2d at 495-96, 399 N.E.2d at 901, 423 N.Y.S.2d at 869. In affirming the decision of the appellate division, the Court modified the order by eliminating the award of sixty days pay. *Id.* at 495, 399 N.E.2d at 901, 423 N.Y.S.2d at 869.

[44] 48 N.Y.2d at 499, 399 N.E.2d at 903, 423 N.Y.S.2d at 872.

[45] Judges Jones, Fuchsberg, and Meyer joined Judge Jasen in the majority. Chief Judge Cooke and Judge Gabrielli concurred in the dissent authored by Judge Wachtler.

[46] 48 N.Y.2d at 496, 399 N.E.2d at 901, 423 N.Y.S.2d at 869.

[47] *Id.*; *see generally* Ricca v. Board of Educ., 47 N.Y.2d 385, 391, 391 N.E.2d 1322, 1325, 418 N.Y.S.2d 345, 348 (1979); Boyd v. Collins, 11 N.Y.2d 228, 233, 182 N.E.2d 610, 613, 228 N.Y.S.2d 228, 232-33 (1962), *overruled on other grounds sub nom.* Abramovich v. Board of Educ., 46 N.Y.2d 450, 386 N.E.2d 1077, 414 N.Y.S.2d 109, *cert. denied*, 444 U.S. 845 (1979); Moritz v. Board of Educ., 60 App. Div. 2d 161, 166, 400 N.Y.S.2d 247, 251 (4th Dep't 1977); note 33 *supra*.

[48] 48 N.Y.2d at 496, 399 N.E.2d at 901, 423 N.Y.S.2d at 869-70; *see* Abramovich v. Board of Educ., 46 N.Y.2d 450, 455, 386 N.E.2d 1077, 1079, 414 N.Y.S.2d 109, 112, *cert. denied*, 444 U.S. 845 (1979). Although concluding that a voluntary waiver was not precluded by the tenure provisions, Judge Jasen observed that a board of education nevertheless may not attempt to circumvent the tenure statutes by filling a vacancy with a "temporary" teacher rather than a "probationary" teacher, *see* Board of Educ. v. Allen, 12 N.Y.2d 980, 981, 189 N.E.2d 500, 501, 238 N.Y.S.2d 968, 968 (1963); Board of Educ. v. Nyquist, 59 App. Div. 2d 76, 77-78, 397 N.Y.S.2d 201, 202-03 (3d Dep't 1977), *rev'd on other grounds*, 45

policy.[49] Moreover, the majority found that public policy considerations do not prevent BOCES from hiring a teacher for a limited period in a position not carrying tenure rights,[50] since a probationary teacher's claim to tenure rights is a mere expectancy — his or her employment being subject to termination "without a hearing and without giving reasons for such action."[51]

Writing for the dissent, Judge Wachtler maintained that public employers should not be permitted to require a waiver of tenure rights as a condition of employment.[52] Where such a complete abdication of statutory protection has been extracted contractually, the dissent noted, there is a significant possibility that the relinquishment was the result of "ignorance, improvidence, an unequal bargaining position or was simply unintended."[53] Consequently, since strong public policy considerations supported the tenure provisions, Judge Wachtler concluded that waiver of the protection by agreement of the parties was impermissible.[54]

N.Y.2d 975, 385 N.E.2d 628, 412 N.Y.S.2d 891 (1978); Serritella v. Board of Educ., 58 App. Div. 2d 645, 645, 396 N.Y.S.2d 57, 58 (2d Dep't 1977); *In re* Henshaw, 15 N.Y. Dep't Ed. R. 386, 388 (1976), or by delaying the formal appointment of a teacher to a probationary status, *see* Ricca v. Board of Educ., 47 N.Y.2d 385, 391, 391 N.E.2d 1322, 1325, 418 N.Y.S.2d 345, 348 (1979). 48 N.Y.2d at 496, 399 N.E.2d at 901, 423 N.Y.S.2d at 869.

[49] 48 N.Y.2d at 496-97, 399 N.E.2d at 902, 423 N.Y.S.2d at 870. Judge Jasen stated that public policy would appear to pose a greater barrier to a waiver of tenure rights by a tenured teacher than by a prospective teacher's advance waiver of such protection in accepting non-tenured positions. *Id.* at 498, 399 N.E.2d at 902-03, 423 N.Y.S.2d at 871. *See generally* note 55 *infra.*

[50] *Id.* at 497, 399 N.E.2d at 902, 423 N.Y.S.2d at 870.

[51] *Id.* at 498, 399 N.E.2d at 902-03, 423 N.Y.S.2d at 871. Kinsella v. Board of Educ., 378 F. Supp. 54, 58-59 (W.D.N.Y. 1974), *aff'd mem.*, 542 F.2d 1165 (2d Cir. 1976); Lezette v. Board of Educ., 35 N.Y.2d 272, 280-83, 319 N.E.2d 189, 193-95, 360 N.Y.S.2d 869, 875-77 (1974); Yanoff v. Commissioner of Educ., 66 App. Div. 2d 919, 410 N.Y.S.2d 713 (3d Dep't 1978); *In re* Milman, 9 N.Y. Dep't Ed. R. 51, 51-52 (1969). *But see* Baronoff v. Board of Educ., 72 Misc. 2d 959, 340 N.Y.S.2d 128 (Sup. Ct. Nassau County 1973). *See also* Russo v. Central School Dist., 469 F.2d 623, 628 n.6 (2d Cir. 1972), *cert. denied,* 411 U.S. 932 (1973).

[52] 48 N.Y.2d at 499, 399 N.E.2d at 904, 423 N.Y.S.2d at 872 (Wachtler, J., dissenting). Judge Wachtler stated that an advance waiver of statutory rights by a teacher or other public employee "should be unenforceable as against public policy." *Id.* at 499-500, 399 N.E.2d at 904, 423 N.Y.S.2d at 872 (Wachtler, J., dissenting). While the dissent acknowledged that tenure rights may be waived in a situation where there exist competing considerations of public policy, or where a tenured teacher's waiver was given as a "quid pro quo" for other benefits, it observed that such a situation was not present in this case. 48 N.Y.2d at 499, 399 N.E.2d at 904, 423 N.Y.S.2d at 872 (Wachtler, J., dissenting).

[53] *Id.* (quoting John J. Kassner & Co. v. City of New York, 46 N.Y.2d 544, 551, 389 N.E.2d 99, 103, 415 N.Y.S.2d 785, 789 (1979)).

[54] 48 N.Y.2d at 499, 399 N.E.2d at 904, 423 N.Y.S.2d at 872. The dissent concluded that although the plaintiff, as a probationary teacher, could have been dismissed without cause, her dismissal was irregular since she possessed seniority over other probationary teachers.

The *Feinerman* Court's approval of a waiver of tenure rights pursuant to an initial employment agreement appears to be a logical extension of two recent decisions by the Court which sustained a voluntarily proffered waiver by a tenured teacher[55] and recognized the possibility of a valid waiver by a probationary teacher tendered subsequent to the initial employment agreement.[56] In-

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Id. at 501, 399 N.E.2d at 905, 423 N.Y.S.2d at 873 (Wachtler, J., dissenting). Indeed, Judge Wachtler noted, it is settled that where termination results from the abolition of the teacher's position, she is entitled to assert her seniority to obtain reinstatement. *Id. See generally* Lezette v. Board of Educ., 35 N.Y.2d 272, 282, 319 N.E.2d 189, 195, 360 N.Y.S.2d 869, 876 (1974).

[55] The Court recently held that a tenured teacher may waive his tenured status. Abramovich v. Board of Educ., 46 N.Y.2d 450, 386 N.E.2d 1077, 414 N.Y.S.2d 109, *cert. denied*, 444 U.S. 845 (1979). In *Abramovich*, 49 specific charges were brought against a tenured teacher at a disciplinary hearing. *Id.* at 453, 386 N.E.2d at 1078, 414 N.Y.S.2d at 110. In return for dismissing the charges and allowing him to retain his position, the teacher, represented by counsel, agreed to remain subject to dismissal without the benefit of statutory hearing procedures if his work was found to be unsatisfactory. *Id.* Upholding the teacher's subsequent dismissal, the Court refused to prohibit categorically the relinquishment of tenure rights, stating:

> [T]he shield of [the tenure statute] is not lightly to be put aside. But that does not mean that it is never waivable. For, when a waiver is freely, knowingly and openly arrived at, without taint of coercion or duress, the sturdy public policy underpinnings . . . are not undermined.

46 N.Y.2d at 455, 386 N.E.2d at 1079, 414 N.Y.S.2d at 111.

The inviolable position that tenure once held was further eroded in Chambers v. Board of Educ., 47 N.Y.2d 279, 391 N.E.2d 1270, 418 N.Y.S.2d 291 (1979). In *Chambers*, a fully tenured teacher's area of certification had been reduced to a part-time position due to decreased enrollment. *Id.* at 281, 391 N.E.2d at 1271, 418 N.Y.S.2d at 292. After the teacher refused to accept part-time employment, and the board was unsuccessful in finding him a full-time schedule within his field, he was assigned to a subject outside his own area as provided by law in an effort to allow him to work on a full-time basis. *Id.* at 282, 391 N.E.2d at 1271, 418 N.Y.S.2d at 292. Shortly thereafter, the board dismissed him for failing to maintain his certification within the area to which he had been assigned. *Id.; see* N.Y. EDUC. LAW § 3014(2) (McKinney Supp. 1971-1979). Upholding the dismissal, the Court noted that retention of the teacher would neither be academically nor economically feasible. 47 N.Y.2d at 285, 391 N.E.2d at 1273, 418 N.Y.S.2d at 294.

[56] Baer v. Nyquist, 34 N.Y.2d 291, 313 N.E.2d 751, 357 N.Y.S.2d 442 (1974). In *Baer*, the plaintiff teacher who was appointed to a probationary position in the general science area, requested and received a transfer to the social studies department at the end of his first year. *Id.* at 294, 313 N.E.2d at 752, 357 N.Y.S.2d at 444. Prior to the transfer, the plaintiff had been warned orally by the principal that under the school district's vertical tenure system, the transfer would commence a new probationary period. *Id.* The plaintiff's annual notice of salary, moreover, reflected this new probationary period. *Id.* at 295, 313 N.E.2d at 753, 357 N.Y.S.2d at 445. Before the expiration of the new period, the plaintiff was discharged notwithstanding that under his original probationary period he would have been tenured. *Id.* The Court held that the plaintiff was entitled to reinstatement, but in so doing noted that "the school system's lack of formality in warning petitioner militates against a finding of waiver . . . ." 34 N.Y.2d at 297, 313 N.E.2d at 754, 357 N.Y.S.2d at 446. The *Feinerman* Court observed that the *Baer* decision implied that a waiver may in some

deed, it is submitted that no overriding public policy concern militates against permitting a prospective teacher to accept a position to which, in accordance with a collective bargaining agreement, no tenure rights attach. Although, concededly, it is of paramount importance to prevent coerced waivers of statutory protection,[57] provisions granting employee collective bargaining rights have fostered a rough equivalency in bargaining power between teachers and school boards, thus minimizing the possibility of overreaching.[58] It is notable that collective bargaining agreements have secured job protection for probationary teachers where statutory protection has been insufficient or even nonexistent.[59] Conse-

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cases be valid. 48 N.Y.2d at 497, 899 N.E.2d at 902, 423 N.Y.S.2d at 870.

[57] The legislature has acknowledged the necessity of precluding involuntary waivers of statutory employment protection. *See* N.Y. CIV. SERV. LAW § 96 (McKinney 1973). *See generally* Ricca v. Board of Educ., 47 N.Y.2d 385, 391 N.E.2d 1322, 418 N.Y.S.2d 345 (1979).

[58] *See* N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973 & Supp. 1979-1980) (Taylor Law). Public employees, including teachers employed in the public school system, were provided collective bargaining rights in order to preclude the imposition of unfavorable contract terms resulting from an unequal bargaining position of the parties. *See generally* Lanzarone, *Teacher Tenure—Some Proposals For Change*, 42 FORDHAM L. REV. 526, 548, 553-54 (1974). A teacher may not be penalized by a school district for exercising these rights. City School Dist. v. Peekskill Faculty Ass'n, 59 App. Div. 2d 739, 398 N.Y.S.2d 693 (2d Dep't 1977); Port Jervis City School Dist. v. New York State Public Employment Relations Board, 68 Misc. 2d 1065, 1067, 328 N.Y.S.2d 760, 761 (Sup. Ct. Orange County 1972). The broad scope of collective bargaining rights permits teachers and school boards to negotiate all disputed issues, provided it is not prohibited "plain[ly] and clear[ly]" by statute or case law, Syracuse Teachers Ass'n v. Board of Educ., 35 N.Y.2d 743, 744, 320 N.E.2d 646, 646, 361 N.Y.S.2d 912, 912 (1974); Board of Educ. v. Associated Teachers of Huntington, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972), or by public policy, Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers Ass'n, 37 N.Y.2d 614, 616-17, 339 N.E.2d 132, 133-34, 376 N.Y.S.2d 427, 429 (1975); *e.g.*, Cohoes City School Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 778, 358 N.E.2d 878, 880-81, 390 N.Y.S.2d 53, 55-56 (1976); Board of Educ. v. Yonkers Federation of Teachers, 40 N.Y.2d 268, 274, 353 N.E.2d 569, 572-73, 386 N.Y.S.2d 657, 659 (1976).

[59] Collective bargaining has been successfully employed to obtain contract provisions governing the dismissal and status of probationary teachers. Cohoes City School Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 777, 358 N.E.2d 878, 880, 390 N.Y.S.2d 53, 55 (1976). Provided that the collective bargaining agreement does not result in the abdication by a board of education of its nondelegable duty to grant or deny tenure, *id.; see, e.g.*, Conte v. Board of Educ., 58 App. Div. 2d 219, 397 N.Y.S.2d 471 (4th Dep't 1977); Morris Cent. School Dist. v. Morris Educ. Ass'n, 54 App. Div. 2d 1044, 388 N.Y.S.2d 371 (3rd Dep't 1976), a board's absolute authority to discharge a probationary teacher without cause may be contractually restricted or bargained away. Cohoes City School Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 777, 358 N.E.2d 878, 880, 390 N.Y.S.2d 53, 55 (1976); *see, e.g.*, Candor Cent. School Dist. v. Candor Teachers Ass'n, 42 N.Y.2d 266, 366 N.E.2d 826, 397 N.Y.S.2d 737 (1977); Board of Educ. v. Carle Place Teachers Ass'n, 63 App. Div. 2d 714, 405 N.Y.S.2d 118 (2d Dep't 1978) (per curiam); Simpson v. North Collins Cent. School Dist., 56 App. Div. 2d 166, 392 N.Y.S.2d 107 (4th Dep't 1977). Notably, predismissal procedural guarantees for

quently, it is suggested that where, as in *Feinerman,* a collective bargaining agreement covering probationary teachers has already waived statutory tenure rights with respect to a particular position, considerations of public policy which underlie the tenure provisions[60] no longer provide sufficient justification for impairing contractual freedom to negotiate the terms of employment.

In the absence of a collective bargaining agreement which denotes certain positions as nontenured, however, it is questionable whether sufficient safeguards exist so as to guarantee that a prospective teacher's waiver of statutory rights will not be implicitly coerced as a quid pro quo for appointment to the position.[61] Indeed, the most troubling aspect of *Feinerman* is that the Court establishes no criteria for evaluating when and to what extent a knowing and freely proffered waiver of statutory rights may be found.[62] Viewed most favorably, the tenor of the Court's decision may portend an inadvertent abuse of the tenure system by school boards to the detriment of prospective teachers.[63] It is hoped,

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nontenured teachers obtained through collective bargaining have been upheld. *See, e.g.,* Angelica Cent. School Dist. v. Angelica Teachers Ass'n, 59 App. Div. 2d 301, 399 N.Y.S.2d 522 (4th Dep't 1977); *see* Northeast Cent. School Dist. v. Webutuck Teachers Ass'n, 71 App. Div. 2d 673, 418 N.Y.S.2d 952 (2d Dep't 1979) (per curiam). *But see* Board of Educ. v. Middle Island Teachers Ass'n, 68 App. Div. 2d 926, 414 N.Y.S.2d 372 (2d Dep't 1979); *cf.* Port Washington Union Free School Dist. v. Port Washington Teachers Ass'n, 45 N.Y.2d 411, 380 N.E.2d 280, 408 N.Y.S.2d 453 (1978) (decision of arbitrator cannot grant relief depriving school board of supervisory responsibilities). *See also* Board of Educ. v. Bellmore — Merrick United Secondary Teachers, Inc., 39 N.Y.2d 167, 347 N.E.2d 603, 383 N.Y.S.2d 242 (1976). Indeed, collective bargaining has been effectively used to negotiate and secure concessions from school boards favorable to probationary teachers covering a wide range of bargaining subjects. *See, e.g.,* Board of Educ. v. Nyquist, 48 N.Y.2d 97, 104, 397 N.E.2d 365, 368, 421 N.Y.S.2d 853, 857 (1979); Schlosser v. Board of Educ., 62 App. Div. 2d 207, 404 N.Y.S.2d 871 (2d Dep't 1978); Elsberg v. Board of Educ., 99 Misc. 2d 1101, 418 N.Y.S.2d 273 (Sup. Ct. Kings County 1979). *See generally* Lanzarone, *Teacher Tenure — Some Proposals For Change,* 42 FORDHAM L. REV. 526, 548, 553-54 (1974).

[60] *See* note 33 and accompanying text *supra.*

[61] *See generally* John J. Kassner & Co. v. City of New York, 46 N.Y.2d 544, 551, 389 N.E.2d 99, 103, 415 N.Y.S.2d 785, 789 (1979); Boyd H. Wood Co. v. Horgan, 291 N.Y. 422, 426, 52 N.E.2d 932, 933 (1943); Shapley v. Abbott, 42 N.Y. 443, 452 (1870).

[62] *See* 48 N.Y.2d at 499, 399 N.E.2d at 903, 423 N.Y.S.2d at 872. By failing to require that the existence of nontenured positions be established by a preexisting agreement between parties of equal bargaining power, the Court appears to suggest that an individual's "voluntary" waiver, motivated merely by the competitiveness of the job market, will be sufficient to allow subversion of the public policy concerns which underlie the statutory provisions. *See id.* at 498-99, 399 N.E.2d at 903, 423 N.Y.S.2d at 871-72.

[63] The Court has acknowledged that abuse of the tenure system by a particular school district may occur, noting that it would be imprudent in "dealing with a personnel system to have too much confidence in the 'choices' made by a school teacher who must seek and receive accommodations from his superiors. Otherwise, doctrines of waiver and estoppel

therefore, that the Court will take the earliest opportunity to clarify the extent to which statutory tenure rights may be waived in an initial employment agreement.

Thomas A. Leghorn

LABOR LAW

Labor Law § 222: Held violative of privileges and immunities clause

The privileges and immunities clause of the United States Constitution guarantees to "[t]he citizens of each State . . . all privileges and immunities of citizens in the several States."[64] Not-

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could be used facilely to avoid ever giving tenure. The tenure statutes are intended to protect the teacher and not become a trap to those not guileful to avoid it." Baer v. Nyquist, 34 N.Y.2d 291, 299, 313 N.E.2d 751, 755, 357 N.Y.S.2d 442, 448 (1974); *see, e.g.*, Board of Educ. v. Ambach, 69 App. Div. 2d 949, 415 N.Y.S.2d 496 (3d Dep't 1979).

[64] U.S. CONST. art. IV, § 2. The purpose of the privileges and immunities clause was to unify a nation of independent sovereign states by eliminating destructive intrastate rivalry and competition. Knox, *Prospective Applications of the Article IV Privileges and Immunities Clause of the United States Constitution*, 43 Mo. L. REV. 1, 7 (1978); *see* Toomer v. Witsell, 334 U.S. 385, 395 (1948); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-32, at 404-05 (1978).

Although similar language appears in the fourteenth amendment, *see* U.S. CONST. amend. XIV, § 1, the provisions are not coextensive. The privileges and immunities clause of article IV precludes a state from denying to nonresidents certain rights accorded residents, while the fourteenth amendment clause protects from state encroachment rights arising from federal citizenship. For a general comparison of the two provisions, see L. TRIBE, *supra*, § 7-2 at 416-17.

Early cases construing the provision viewed the privileges and immunities clause as a source for affording federal protection to the natural or fundamental rights of state citizenship. *See, e.g.*, Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). It was not long, however, before the Court rejected this attempt to incorporate the natural rights doctrine into the Constitution, adopting instead the position that the clause was intended merely to prohibit discriminatory legislation aimed at nonresidents. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1872); L. TRIBE, *supra*, § 6-32, at 406. Accordingly, defining fundamental rights was relegated to a subordinate position and the initial inquiry became whether those fundamental rights which a state did grant its own citizens were granted or denied to citizens of another state. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1872). Under this view, a state could deny fundamental rights to citizens of different states if such rights were also denied to the state's own citizens. L. TRIBE, *supra*, § 6-32, at 407.

Much later, in Toomer v. Witsell, 334 U.S. 385 (1948), this comparative standard was supplanted by the substantial reason test. In *Toomer*, the Supreme Court determined that the protection afforded nonresidents by the privileges and immunities clause was not absolute and hence did not preclude discrimination in all cases, but only in those where the discrimination could not be reasonably and substantially justified. *Id.* at 396. Notably, however, the Supreme Court recently has held that the substantial reason test, enunciated in *Toomer*, does not alter the general rule that only *fundamental* rights accorded state citizens need be granted to nonresidents. *See* Baldwin v. Montana Fish and Game Comm'n, 436 U.S.