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I. Administrative Law

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I

ADMINISTRATIVE LAW

A. Determination of Postinjury Earnings Potential

_Goytia v. Workmen's Compensation Appeals Board._ In ruling for a second time on the same workmen's compensation claim, the supreme court reaffirmed its original holding that the appeals board, in determining an applicant's earning capacity under section 4453(d) of the Labor Code, must give "due consideration" to his postinjury earnings. In the second decision, the court rejected as arbitrary the attempt of the appeals board to limit consideration of postinjury earnings to those cases in which there was specific evidence that, prior to an applicant's injury, he had taken actual steps to increase his income. The court held that its initial decision required the appeals board to inquire into the "applicant's actual intentions" at the time of injury in determining the relevance of his postinjury earnings to his earning capacity.

_Goytia's_ significance lies in its expansion and liberalization of the concept of "earning capacity." The tortuous history of the case also demonstrates the increasing tension between the courts and the appeals board.

On April 15, 1966, Ruth Goytia injured her right hand and wrist while working as a packer for the California Packing Corporation (now Del Monte Corporation). Before her injury, she had worked as a seasonal employee of the company for several years, working part time in order to stay at home with her children. Her earnings in this position entitled her to a minimum compensation rate of $20 a week. Goytia alleged, however, that at the time of the injury she already had

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1. 6 Cal. 3d 660, 493 P.2d 864, 100 Cal. Rptr. 136 (1972) (Tobriner, J.) (unanimous decision).
2. _Goytia v. Workmen's Comp. App. Bd.,_ 1 Cal. 3d 889, 464 P.2d 47, 83 Cal. Rptr. 591 (1970). This was a 4-3 decision. Former Chief Justice Traynor wrote the dissent in which Justices McComb and Burke joined. Justice Traynor retired before the second _Goytia_ decision, Justices McComb and Burke concurred in Justice Tobriner's opinion.
3. _CAL. LABOR CODE_ § 4453(d) (West 1971) provides:
   Where the employment is for less than 30 hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 95 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments.
4. 6 Cal. 3d at 663-65, 493 P.2d at 866-68, 100 Cal. Rptr. at 138-40.
5. _Id._ at 663, 493 P.2d at 867-68, 100 Cal. Rptr. at 139-40.
decided to seek full-time employment as soon as her children were old enough to care for themselves. A little more than a year after her injury, Goytia obtained a full-time, permanent job as a cashier at a salary of $81.90 a week, which would have produced a compensation rate of $50.57 a week.6

After two hearings in 1968, the referee for the appeals board issued a rating of 15 ½ percent permanent disability and found that Goytia's earning capacity for purposes of permanent disability was $81.90 a week; he thus determined her earning capacity by reference to her postinjury earnings.7

Del Monte petitioned the appeals board for reconsideration. In January 1969, the board granted the reconsideration, annulled the referee's award, and found that Goytia's compensation rate must be based on her earning capacity at the time of the injury which entitled her to only the minimum compensation payment.8 Goytia then petitioned the court of appeal for a writ of review. On May 27, 1969, the writ was denied.9 In June, the supreme court granted Goytia's writ of review. Its opinion remanding the case to the appeals board for consideration of Goytia's postinjury earnings was handed down in January 1970.10 In October 1970, the board, en banc, affirmed its original decision after reconsideration. The board held no new hearing and accepted no new evidence.

Goytia again petitioned for a writ of review to the court of appeal. Again the appellate court denied the writ.11 The supreme court then granted a writ in November 1970; it issued an opinion in February 1972.12

I. THE CONCEPT OF EARNING CAPACITY

Workmen's compensation benefits are computed on the basis of the injured employee's average weekly earnings at the time of injury and his percentage of permanent disability. In California, both statute13 and judicial opinion14 require the use of a threefold test for meas-

6. 1 Cal. 3d at 891, 464 P.2d at 48, 83 Cal. Rptr. at 592.
7. Id. at 892, 464 P.2d at 48, 83 Cal. Rptr. at 592.
8. Id.
uring the amount of permanent disability. This test takes into account the nature of the injury, the occupation and age of the injured worker, and his diminished capacity to compete in an open labor market.15

The employee's average weekly earnings are calculated according to statute,16 and the amount is not the same as his actual earnings. Several methods of computing average earnings are provided by the Labor Code, each method contemplating a different employment situation.17 When none of these methods can be "reasonably and fairly" applied, or when employment is for less than 30 hours a week, the concept of the applicant's earning capacity comes into play. In such instances, average weekly earnings are to be computed on the basis of a "sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments."18 Since a determination of an employee's earning capacity includes an appraisal of his potential earning power, subjective and indeterminate factors necessarily enter into the referee's or the appeals board's evaluation. Not surprisingly, calculation of "earnings" is contested in more than one quarter of the cases coming before the appeals board,19 and most of these cases involve applicants whose employment has not been steady.20 In these cases the applicant's earning data frequently are incomplete.21 Moreover, as Goytia illustrates, the legal principles that are to be applied to determine earning capacity are not yet fully settled.22

The legislature has offered only limited guidance for determining earning capacity. The Labor Code is ambiguous in that while it may be read to reveal a legislative policy that an injured worker should not receive more in compensation than he could have earned had he not been injured,23 it also reflects a policy of providing the injured employee with a more equitable arrangement than he might receive from simply applying a rigid formula to all cases.24 But the leg-


In practice, the percentage of permanent disability is calculated by reference to a rather complicated predetermined rating schedule that purportedly takes these factors into consideration.

17. CAL. LABOR CODE § 4453 (West 1971).
18. CAL. LABOR CODE § 4453(d) (West 1971).
21. Id.
22. Id.
24. CAL. LABOR CODE §§ 4453(d), 4454-55 (West 1971). Section 4454
The legislature has provided little in the way of specific guidelines as to the factors that should be used by the referees and the appeals board in determining earning capacity under section 4453(d).25

From time to time, the courts have attempted to fill this gap. Early court decisions tended to view earning capacity restrictively. The first time the supreme court addressed itself to this issue, in Mahaffey v. Industrial Accident Commission,26 it annulled a commission decision that had determined the average annual earnings of a man who had been employed on an occasional and irregular basis by multiplying his daily wage by 300. The court held that the commission should have used the methods prescribed by a subdivision of the Workmen’s Compensation Act,27 which essentially parallels Labor Code section 4453(d), because the method it used incorrectly contemplated permanent and steady employment.28 By directing the commission to “[ascertain] from the evidence what [the applicant’s] earning capacity in fact was,”29 the court, in effect, tied the concept of earning capacity to the applicant’s actual past earnings.

The problem with this interpretation, from the point of view of a worker who was seasonally or irregularly employed prior to his injury, is that it fails to consider the reasons he was not permanently and steadily employed. His irregular employment history may not reflect his earning capacity under different economic or personal circumstances. The permanent disability he suffered from his injury, however, seriously hampers his ability to find full-time employment in the future. Thus, if actual past earnings alone determine earning capacity, the risk of prior unemployment is entirely on the worker. As a result, the injured worker, and ultimately society at large rather than the industry in which the worker was disabled, bears the cost of the injury.30

provides that overtime pay and the market value of room and board, fuel, etc. received by the employee as a part of his remuneration be considered in determining average weekly earnings. Section 4455 provides that in the case of a permanently injured minor an estimate be made of his probable average weekly earnings at the age of 21.

25. The legislature did, however, by its 1933 amendments to the 1917 statute, liberalize the concept of earning capacity in favor of the injured worker by removing the requirement that it be tied to the type of employment in which the employee was working when he was injured. Ch. 586, § 12, [1917] Cal. Stat. 842, as amended Ch. 522, § 1 [1933] Cal. Stat. 1343.
26. 176 Cal. 711, 171 P. 298 (1917).
28. 176 Cal. at 713, 171 P. at 299.
29. Id.
30. Despite the conflicting theories regarding the purpose of workmen’s compensation laws, the initiators of the laws in California were motivated by the desire to keep injured workers and their dependents from becoming a burden on society. See P. Nonet, ADMINISTRATIVE JUSTICE 16-24 (1969). The original commission appears to
Not only did the early cases link the concept of earning capacity to actual past earnings, but both statutory language and appellate court decisions restricted the measure to the maximum wages that the worker was receiving at the time of injury. For example, in Wingard v. Industrial Accident Commission, the court computed the award of a riveter who usually earned $6.40 a day, but who was temporarily employed as a rivet passer at $4.16 a day when injured, on the basis of the lower wage rate.

In 1933, legislative amendments and two appellate court decisions combined to broaden the concept of earning capacity. The legislature, probably in response to the economic hardships caused by the Depression, eliminated the provisions in the statute which set the maximum wage to be used in determining the earning capacity of seasonal or irregularly employed workers at the wage received at the time of injury. The courts of appeal in Aetna Life Insurance Co. v. Industrial Accident Commission and California Casualty Indemnity Exchange v. Industrial Accident Commission both held that the earning capacity of an irregularly employed worker could not be determined solely on the basis of the applicant’s actual earnings in the year previous to his injury.

The court in Aetna stressed the importance of considering “all the surrounding circumstances and conditions . . . which may indicate one’s usual and ordinary ability to earn wages” when determining the applicant’s earning capacity. The applicant in Aetna, an irregularly employed laborer, presented evidence that he had been employed for 86 days by his employer at the time of injury, that he had earned $273 from another employer over a period of about 4 months, and that, had he wished, he could have been employed for several additional months during the year. The petitioner, his employer’s insurance company,
contended on the basis of Mahaffey and Wingard that only the average weekly earnings actually received by the applicant during the year preceding the injury should be considered in determining the amount of the award.\textsuperscript{39} In rejecting this contention, the court of appeal opened the door to the development of a more flexible definition of earning capacity.

In the same year, the court in California Casualty quoted Aetna at length when it also rejected an insurance company's contention that actual past earnings should be the sole determining factor of earning capacity. In California Casualty, the court stated that "the entire risk of inability to secure employment shall not be cast upon the employee."\textsuperscript{40} Although the opinion is not clear, it can be read to imply that where objective economic conditions prevented an applicant from obtaining regular full-time employment in the year preceding his injury, his actual earnings during that year are of minor importance in determining his earning capacity. The significance of California Casualty was perhaps limited, however, for although the applicant had worked irregularly for his employer during the year immediately prior to his injury, he had been in his employ for approximately 20 years.

In practice, the commission did not utilize Aetna and California Casualty to alleviate the effect of the business depression on the injured worker's earning capacity.\textsuperscript{41} In 1936, Neahr v. Industrial Accident Commission\textsuperscript{42} upheld a commission award that calculated the earning capacity of a riveter on the basis of his work record for the year preceding the date of injury (which included lower paying jobs) rather than on the wages he received when injured in his trade. Although the earlier decisions had broadened the concept of earning capacity to favor the injured worker, this decision reflected the ease with which the commission and the courts could employ the more restrictive view when they chose, using the legislative amendment to the worker's detriment. While giving lip service to the need to examine the "surrounding circumstances affecting his earning ability,"\textsuperscript{43} the court in Neahr sanctioned the practice of tying the injured worker's earning ability to his actual past earnings.

The next two appellate court decisions regarding earning capacity, however, marked a return to a more liberal view. In Howell v. Industrial Accident Commission,\textsuperscript{44} the court upheld a commission award

\begin{footnotes}
\footnote{39. Id. at 490, 20 P.2d at 373.}
\footnote{40. 135 Cal. App. at 753, 27 P.2d at 784.}
\footnote{41. See Regello v. Industrial Acc. Comm'n, 1 Cal. Comp. Cas. 58 (1936).}
\footnote{42. 13 Cal. App. 2d 146, 56 P.2d 568 (2d Dist. 1936).}
\footnote{43. Id. at 148, 56 P.2d at 569.}
\footnote{44. 47 Cal. App. 2d 326, 117 P.2d 919 (3d Dist. 1941). See also the commission's}
\end{footnotes}
that calculated the earning capacity of a logger who was killed on the
job by dividing his total yearly earnings by the number of months that
weather conditions permitted him to work rather than by 12. The
court rejected the petitioner's argument that because there was no other
employment available during the periods in which the weather pre-
vented logging, the worker's earning capacity should be limited to the
amount he actually earned. In Colonial Mutual Compensation In-
surance Co. v. Industrial Accident Commission, an opinion consisting
largely of quotations from California Casualty the court of appeal re-
jected a similar contention by the petitioner insurance company and af-
firmed the commission's order basing the award on the union wage
paid to the temporary employee at the time of his injury. The court
stated that although "due consideration is to be given to earnings in the
past, such earnings are not the controlling factor in determining earn-
ing capacity." After World War II, another series of appellate court decisions
again restricted the concept of earning capacity by reemphasizing the
importance of the applicant's earning history.

The court in West v. Industrial Accident Commission annulled
a commission award that calculated average earnings on the basis of
the worker's pay rate at the time of injury in the case of a practical
nurse who had been employed in the past and had worked only one
week prior to her injury. The court stressed the discontinuity in the
applicant's employment record and the fact that she had been on re-
lief during the year before her injury. This decision, in effect, placed
the risk of unemployment solely on the worker who could not find
regular employment, justifying this on the ground that to compute
earning capacity on the basis of the pay rate at the time of injury might
give the disabled employee a greater income than he would have if he
had not been injured. This result would "invite both carelessness on
the job and malingering and is therefore contrary to public policy." It is somewhat ironic that earlier in the opinion the court took notice
of the fact that after her injury, the applicant remained on welfare
while stressing its opinion that the aim of a workmen's compensation

45. Id. at 328, 117 P.2d at 920.
47. Id. at 490, 118 P.2d at 363.
49. Id. at 725, 180 P.2d at 981.
50. Id. at 717, 180 P.2d at 976.
award is to keep the injured worker and his dependents off the welfare rolls.\textsuperscript{51}

Although some courts of appeal followed \textit{West},\textsuperscript{52} there was no general uniformity among the courts and the commission in their emphasis on actual earnings as a factor in determining earning capacity. In \textit{California Compensation Insurance Co. v. Industrial Accident Commission},\textsuperscript{53} the court upheld the commission's award based on the earnings at the time of injury of a temporarily employed gardener who had worked only intermittently in the past. And in \textit{Emsco Concrete Cutting Co. v. Industrial Accident Commission},\textsuperscript{54} the court of appeal denied a writ of review where the commission had based the average earnings of an intermittently employed laborer on his wages at the time of injury.

Finally, in 1962, the supreme court again ruled on the concept of earning capacity. In the so-called "Montana Case," \textit{(Argonaut Insurance Co. v. Industrial Accident Commission)},\textsuperscript{55} the court adopted a compromise position. It concluded that in cases involving intermittent, seasonal, or temporary work [section 4453(d) cases], short-term earnings (earnings at the time of injury) are to be emphasized in determining temporary disability compensation awards, whereas earning history over a longer period should be used to compute earning capacity for permanent disability awards. The commission ruled that Montana, a laborer, was a "permanent employee working irregularly due to business conditions,"\textsuperscript{56} although he had been employed only sporadically during a five-year period before his injury working on a temporary job. In discussing the relevance of business conditions to the concept of earning capacity, the court distinguished short recessions from longrun business conditions.\textsuperscript{57} It found that earnings during a temporary recession probably would not truly reflect earning capacity for the purposes of an award for permanent disability, thus taking the burden of the full risk of unemployment off the injured worker. In the court's view, however, longrun business conditions are bound to affect a worker's ability to earn. Thus, if the long-term record of irregular employ-

\textsuperscript{51} Id. at 721, 180 P.2d at 978. The sympathies of the court in this case may have been influenced by the fact that the applicant's employer was an uninsured woman whose husband was bedridden.


\textsuperscript{53} 86 Cal. App. 2d 861, 195 P.2d 880 (1st Dist. 1948).

\textsuperscript{54} 13 Cal. Comp. Cas. 192 (1948).

\textsuperscript{55} 57 Cal. 2d 589, 371 P.2d 281, 21 Cal. Rptr. 545 (1962).

\textsuperscript{56} Id. at 596, 371 P.2d at 284-85, 21 Cal. Rptr. at 548-49.

\textsuperscript{57} Id. at 596-97, 371 P.2d at 285, 21 Cal. Rptr. at 549.
ment of an applicant for permanent disability benefits results from a prolonged period of high unemployment in his occupation, the injured applicant, rather than his employer's insurer, bears the risk of unemployment.

Although Montana followed the West line of decisions in its emphasis on the role of earning history in determining earning capacity (at least insofar as permanent disability benefits were concerned), it still left room for further expansion of the concept by stressing its predictive function. In two companion cases, the court again stressed that an estimate of earning capacity is a prediction of what the future would have been but for the injury. In both cases, the commission had granted maximum temporary disability awards to workers with spotty employment records on the basis of their wage rates at the time of injury. The court sustained one award on the basis of evidence that the job on which the worker was injured would have lasted throughout the period of his disability. It annulled the other on the ground that since there was no evidence that the job would have continued during the period of disability, the commission did not give due consideration to the injured worker's actual past earnings as required by Labor Code section 4453(d).

Montana and its companion cases have had a dual effect. First, the appeals board and the referees have given closer consideration to the applicant's actual earning history and to the likely duration of the job on which he was injured. The three cases themselves and two subsequent court of appeal decisions reveal that for a period during the 1960's the appeals board's view of the concept of earning capacity was more liberal than the court's. Second, the court's stress on the predictive purpose of the concept of earning capacity opened the way to the consideration of postinjury earnings and future employment prospects.

Prior to the first Goytia decision in 1970, the appeals board appeared for a time to be ready to use postinjury earnings or evidence of postinjury job offers for the benefit of the applicant in determining

58. Id. at 594, 371 P.2d at 284, 21 Cal. Rptr. at 548, where the court stated that: "An estimate of earning capacity is a prediction of what an employee's earnings would have been, had he not been injured."


60. 57 Cal. 2d at 599, 371 P.2d at 286-287, 21 Cal. Rptr. at 550-51.

61. 57 Cal. 2d at 601, 371 P.2d at 287-288, 21 Cal. Rptr. at 551-52.

earnings capacity. In *Dole Corp. v. Industrial Accident Commission*, the commission's panel adopted a referee's report that computed an applicant's permanent disability award on the basis of his postinjury earnings. The applicant, who injured his back while working as a seasonal employee in a cannery, had been employed only sporadically during the period before his injury. A year after his injury, he became permanently employed as a school janitor, and the referee based his earning capacity on his salary in this job. *Dole*, a self-insured corporation, sought a writ of review, which the court of appeals denied in 1966. In the same year, in *Esparza v. Regents of the University of California*, the appeals board held that in computing earning capacity for purposes of a permanent disability award to a student employed part time while working for a master's degree, the applicant's likely future earnings must be taken into account. The board found that if the applicant had not been injured, his earnings after he received his degree would have entitled him to maximum benefits. In still another case, the appeals board upheld a referee's award of maximum temporary disability benefits based on evidence of postinjury job offers to the injured applicant who had a history of irregular employment and minimum earnings.

By the time *Goytia* reached the appeals board, however, composition of the board had changed. In the two decisions in *Goytia* and in *Jeffares v. Workmen's Compensation Appeals Board*, the appeals board exhibited its reluctance to consider postinjury earnings in determining earning capacity. In *Jeffares*, the board relied solely on actual earnings at the time of injury to set the temporary disability award of a student who was injured while working part time as a recreation instructor. The appellate court found that if the applicant had not been injured, she would have begun her teaching career several months before she actually did, and that the board erred in not considering both her career plans at the time of the injury and her actual employment as a teacher after the termination of her temporary disability. Similarly, in its first ruling in *Goytia*, the appeals board based its award on the applicant's actual past earnings, rather than on the salary she received as a full-time employee after the injury.

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64. 31 Cal. Comp. Cas. 433 (1966).
66. Appeals board members are appointed by the governor for four-year terms.
69. *Id.* at 553, 86 Cal. Rptr. at 291. (The court of appeal ruled after the supreme court's first *Goytia* decision.)
70. 1 Cal. 3d at 891, 464 P.2d at 48, 83 Cal. Rptr. at 592.
The supreme court, however, resisted the board's attempt to restrict the concept of earning capacity. In its first *Goytia* decision, the court clarified the principle developed in *Montana* that implied that postinjury earnings should be considered in determining earning capacity. The court reasoned that:

If, as in *Montana*, the board may reduce an appraisal of earning capacity based exclusively on immediate pre-injury earnings because of the total history of the applicant, it must by the same token possess the corollary power to take into account postinjury earnings in order to increase its appraisal of such earning capacity.71

Indeed, as the court pointed out, two board decisions in the wake of *Montana* already had interpreted Labor Code section 4453(d) to permit consideration of postinjury earnings.72

Even though the appeals board now seemed committed to a narrow concept of earning capacity, it could not, given the supreme court decision and its own prior rulings,73 simply refuse on remand to consider postinjury earnings. Instead, it attempted to justify its original decision in *Goytia* by formulating a rule under which postinjury earnings become relevant to determining earning capacity only if the applicant had "formed an intent to improve [himself] or to work on a permanent basis prior to the date of injury."74 Moreover, the board apparently would not consider postinjury earnings until the applicant provided specific evidence of the actual steps taken to improve himself prior to the injury.75

In the second *Goytia* opinion, the supreme court, characterizing as arbitrary the requirement of specific evidence of actual steps taken by the applicant, rejected the board's proposed test of intention. The court still found, however, that to give "due consideration" to postinjury earnings required an investigation into the applicant's actual intentions at the time of injury. While an intention of the applicant to improve himself is a persuasive reason to consider postinjury earnings, it is questionable whether absence of such intention should preclude the usage of postinjury earnings in determining "earning capacity." A person's intention to work full or part time usually is determined by the situation in which he finds himself. Even though a worker at the time of his injury intended only to work part time in the future, the circum-

71. 1 Cal. 3d at 896, 464 P.2d at 51, 83 Cal. Rptr. at 595.
72. 1 Cal. 3d at 896-97, 464 P.2d at 52, 83 Cal. Rptr. at 596. See text accompanying notes 63-65 supra.
73. Perhaps, however, the political nature of the appeals board should preclude its being characterized as a continuous entity.
75. *Id.* at 450.
stances which determined his intention are subject to change. For instance, an applicant who worked only part time when he was injured and intended at the time to continue to do so in the future might be forced to seek full-time employment upon the unexpected death of his spouse. If intention at the time of injury is determinative, his post-injury earnings at a full-time job could not be considered in determining his earning capacity.

Still, taken together, the two supreme court opinions in *Goytia* represent an effort to define the concept of earning capacity somewhat more favorably for the injured worker by taking into account future earnings. In contrast, *Montana*, although opening the way for the *Goytia* decisions, tended to favor insurance companies. While *Montana* permitted use of past actual earnings to reduce permanent disability benefits, *Goytia* should have the effect of allowing use of post-injury earnings or potential earnings to increase benefits. The importance of *Goytia*, however, is limited, since the principle it establishes probably applies in relatively few instances compared to the principle established in *Montana*.

II. THE APPEALS BOARD AND THE COURTS

Perhaps more significant than the substantive law created by *Goytia* is the decision's implicit commentary on the relationship between the appeals board and the courts. It is, of course, unusual that a case from the appeals board comes up for a second hearing before the supreme court on the same issue the court decided in its first hearing. Indeed, the court's opinion reflects its displeasure with the board's attempt to limit the principle stated in its first opinion. Yet the appellate history of *Goytia* is not unique.

Recent years have seen a flood of petitions for writs of review from appeals board decisions. In 1971 alone, the supreme court and the district courts of appeal wrote opinions in 66 cases originating from the appeals board. In recent years, hundreds of other cases have been denied appellate review.76 In the vast majority of the recent appellate opinions, the courts have annulled the decision of the appeals board,77

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76. In 1967 the courts wrote 24 such opinions; in 1968, 63; in 1969, 44; and in 1970, 42. The number of cases that were denied hearings by the supreme court also has increased dramatically. In 1967 the court denied 42 hearings; in 1968, 68; in 1969, 85; in 1970, 82; and in 1971, 115. The cases in which the district courts of appeal have denied writs of review without opinions have numbered in the hundreds in recent years.

77. In 1972, the courts overruled the board (at least in part) in 41 of 59 cases. The proportion of cases overruled in 1971 and 1970 was comparable: 50 of 65 and 33 of 42, respectively.
and most of the opinions have favored the injured worker.78

Although this pattern of reversals of appeals board decisions represents nothing new,79 the volume of cases in which appellate review has been sought is unprecedented.80 The appeals board's action in Goytia illustrates the reason behind the recent avalanche of appellate litigation. The conservatism of the board members appointed by Governor Reagan is forcing the applicants' attorneys to seek appellate review with increasing frequency.81 Although the courts, and not the appeals board, have generally been the agency for expanding workmen's compensation,82 today, they must also act as a brake upon the board's attempts to restrict these benefits. Rather than construe the law liberally in favor of the worker as required by the Labor Code,83 the appeals board appears to interpret it to the benefit of employers and insurance companies.84

The idea of the board as a court long since has replaced its original conception as a paternalistic agency safeguarding the interests of the injured employee.85 Strangely, the recent increase in litigation has led many critics of the workmen's compensation system to advocate a return to the paternalistic model.86 The California experience, however, suggests that the opposite remedy is called for. Further steps should be taken to secure the rights of the applicants, and a more realistic appeals system should be devised.87 If a politically appointed appeals

78. In 1972, the appeal courts favored the worker in about 2/3 of their decisions. In 1970 and 1971, about 3/4 of the court decisions favored the worker or his survivors. 79. See W. HANNA, supra note 20, at § 8.03(1) n.1; Witt, Book Review, 58 CALIF. L. REV. 346, 350 (1970). 80. In the five years from 1961 through 1965, the number of appellate decisions on cases originating from the appeals board averaged less than 21 a year. The number of appeals also was proportionately lower in these years. 81. Witt, supra note 79, at 351 n.23. Witt's view that appellate reversals were bringing about a change in the board's restrictive policy, however, has proved too optimistic. The number of appeals and appellate decisions rose to a new high in 1971. 82. See P. NONET, supra note 30, at 254. 83. CAL. LABOR CODE § 3202 (West 1971). 84. See also Jones v. Workmen's Comp. App. Bd., 68 Cal. 2d 476, 480, 439 P.2d 648, 650, 67 Cal. Rptr. 544, 546 (1968), where the supreme court, for the second time in two years, reminded the board of its duty to construe the workmen's compensation laws liberally "with the purpose of extending their benefits for the protection of persons injured in the course of their employment." 85. See P. NONET, supra note 30 at ch. 7. 86. See Witt, supra note 79, at 349; REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS ch. 6 (1972). Some critics such as Witt and Nonet express a legitimate concern that the present system operates to the disadvantage of nonunion workers who frequently are unrepresented. 87. See S HERLICK, supra note 15, at 7, for the suggestion that the writ of review is an archaic appellate procedure in compensation cases. A former chairman of the appeals board, on the other hand, has suggested that the scope of judicial review has be-
board acting as a court can place a restrictive interpretation on compensation laws even in the face of judicial review, how could it be expected to act, given more discretion?  

CONCLUSION

Goytia expanded the concept of earning capacity by requiring that future earnings be given due consideration in determining an applicant’s earning capacity. The expansion was required by the logic of Montana that declared earning capacity to be a prediction of what the injured worker would have earned had he not been injured. However, this concept is still too narrow. Since it is tied to actual business conditions, the irregularly employed worker bears both the burden of his disability and the burden of his past record of unemployment which may have depended upon larger economic forces. The likelihood that the court will expand the concept of earning capacity in this direction, however, seems remote. Change through the appeals board also is unlikely. The present appeals board, as Goytia illustrates, opposes the expansion of the concept, and judging from history, there is little likelihood that an activist, worker-oriented board will emerge without a major change in the political climate.

Thomas Rankin

B. Dismissal of Probationary Teachers

Bekiaris v. Board of Education.¹ The California Supreme Court held that, when a probationary public school teacher demands an administrative hearing relative to his impending dismissal, evidence offered to show he is being dismissed for protected first amendment behavior must be admitted and findings made. The court outlined a procedure whereby a reviewing court must independently assess the established facts and determine whether the true reason for dismissal was of-

¹. 6 Cal. 3d 575, 493 P.2d 480, 100 Cal. Rptr. 16 (1972) (Sullivan, J.) (6-1 decision).
ficial disapproval of the teacher's exercise of constitutional rights rather than dissatisfaction with his job performance. 2

Petitioner Christo Tom Bekiaris was a probationary teacher at a high school in Modesto. During his second full year of teaching, he was notified that he would not be rehired for an additional year. Following the procedure outlined in California Education Code section 13443, 3 Bekiaris requested a hearing. He was then served with a formal accusation alleging numerous violations of school regulations, improper presentation of course subject material, and failure to cooperate with superiors and fellow teachers. 4 At the hearing conducted by a hearing officer appointed by the state Office of Administrative Procedure, Bekiaris sought to refute the school board's allegations by attempting to introduce evidence indicating that the true reason for his not being retained was official dissatisfaction with his exercise of first amendment rights—especially his appearance before the Modesto City Council on behalf of the Peace and Freedom Party, his work with farm workers, and his letters to the editor of the local paper expressing his political viewpoint. 5 The hearing officer refused to admit this evidence.

2. Id. at 592-93, 493 P.2d at 490, 100 Cal. Rptr. at 26.
3. Cal. Educ. Code § 13443 (West Supp. 1972). Although this section of the code has been amended since Bekiaris was originally dismissed, the added language concerns only the time and confidentiality of notice. For the purposes of this Note, the substantive portions remain the same. See also 6 Cal. 3d at 580 n.1, 493 P.2d at 482 n.1, 100 Cal. Rptr. at 18 n.1.
4. The formal accusation contained the following charges:
   "1) Persistent violations of and refusal to obey school regulations and instructions to teachers, including:
      "Failure to respond to direction to prepare and supply course outline (October, 1968).
      "Failure to follow prescribed course of study (1968-1969).
      "2) Lack of proper presentation of course subject material.
      "Teaching material for 'top' class (X) taught at 'average' class (Y) level (Fall-1968).
      "Lecture, or 'teacher-telling' method of teaching used, without preparation of students for involvement in discussion (observed September 25, 1968; October 10, 1968; January 9, 1969).
      "Classes used as platform for presentation of personal views (such as on use of marijuana, consensual homosexuality as a crime, legal suppression of 'obscenity') instead of taking unbiased and broad approach and thus developing student inquiry (observed January 9, 1969).
      "3) Failure to cooperate with department head, supervisor of instruction, fellow teachers.
      "Failure to consult with department head as to new teaching areas and subjects (Fall 1968).
      "Inability, or refusal, to cooperate in 'team teaching' program, requiring separation therefrom (first year—1967-1968).
      "Demand for advance notice of, and right to have witness present, at conferences with school administration (January 20, 1969).
      "Threats to 'drag others through the mud' if school authorities sought dismissal (January, 1969)."

Petitioner's brief, quoted at, 6 Cal. 3d at 580-81 n.2, 493 P.2d at 482 n.2, 100 Cal. Rptr. at 18 n.2.
5. 6 Cal. 3d at 581-82, 493 P.2d at 482-83, 100 Cal. Rptr. at 18-19.
except for impeaching witnesses. Although the hearing officer made no finding concerning Bekiaris' contention that he was being penalized for the exercise of constitutional rights, the officer did recommend that the board find insufficient cause for refusing to reemploy Bekiaris for an additional year. The school board, rejecting the hearing officer's recommended decision, refused to take additional evidence and concluded that the original charges against Bekiaris were supported by the evidence and constituted sufficient cause for not rehiring him. On petition for a writ of mandate in superior court, the judge denied the petition indicating that the findings and decisions of the board were supported by the record of the case. On appeal, the supreme court reversed the decision and remanded the case to the trial court with instructions that it make an independent determination of the true reason for the board's decision not to rehire Bekiaris.

The balance of this Note begins with a summary of the procedure necessary to dismiss a probationary teacher in view of the Bekiaris decision and recent amendments to the Education Code. This procedure is then evaluated against constitutional requirements specified by the United States Supreme Court in related decisions during its last term. Finally, both the California dismissal procedure and the Supreme Court's requirements are analyzed to determine if either presents a fair and practical method for reviewing dismissals of probationary teachers.

6. Id. at 582, 493 P.2d at 483, 100 Cal. Rptr. at 19. The hearing officer relied on Neely v. California State Personnel Bd., 237 Cal. App. 2d 487, 47 Cal. Rptr. 64 (1st Dist. 1965), which held that the motivations of superiors in bringing disciplinary action are not material if the facts justify the disciplinary action. In Bekiaris, the court specifically discredited this rule. 6 Cal. 3d at 587-88 n.7, 493 P.2d at 487 n.7, 100 Cal. Rptr. at 23 n.7.

7. Id. at 584, 493 P.2d at 484, 100 Cal. Rptr. at 20. Technically, a hearing officer has no authority even to recommend the disposition of the matter and must limit his findings to whether the charges, sustained by the evidence, relate to the welfare of the students and schools. CAL. EDUC. CODE § 13443(c)(3) (West Supp. 1972).

8. 6 Cal. 3d at 584, 493 P.2d at 484-85, 100 Cal. Rptr. at 20-21. The court seems to imply, by setting out the text of section 11517(c) of the California Administrative Procedure Act [CAL. GOV'T CODE § 11517(c) (West Supp. 1972)] in a footnote, that the school board violated the provision by not providing Bekiaris with an opportunity to present either oral or written argument before the board itself. 6 Cal. 3d at 584 n.4, 493 P.2d at 484-85 n.4, 100 Cal. Rptr. at 20-21 n.4. The court could have rested its entire decision on this narrow procedural point except that this error might not have been prejudicial, for section 11517(c) does not even require the board to make a finding concerning any evidence introduced in this fashion.


10. 6 Cal. 3d at 594, 493 P.2d at 492, 100 Cal. Rptr. at 28. After remand of the case, the school board again voted to dismiss Bekiaris. The superior court found that no constitutional rights had been violated. Thus, Bekiaris lost his job anyway. CALIFORNIA AFT TEACHER, Feb. 1973, at 6.
I. PROCEDURE FOR DISMISSAL OF CALIFORNIA PUBLIC SCHOOL TEACHERS

a. General: teacher classification

The procedure followed in dismissing a public school teacher in California depends upon the status of the teacher involved. The scheme outlined in the California Education Code classifies public school teachers into four groups: permanent, probationary, temporary, and substitute employees. Due to both the larger number of teachers involved and the individual teacher's greater interest in continued employment, this Note discusses only permanent and probationary teacher dismissals. Also, because of the factual setting in Bekiaris, this Note concerns only dismissals at the end of the school year and does not discuss the suspension procedures leading to dismissals during the school year.

Probationary employees are persons serving in school positions requiring certification qualifications who have not been classified as permanent or substitute employees. They are usually newly certified teachers who have recently completed college. Under traditional personnel management theory, this probationary status is regarded as the final phase of the application process during which school authorities evaluate the teacher's "on-the-job" performance. After completing three successful consecutive years, the probationary teacher, in most school districts, is classified as a permanent employee upon commencement of his fourth year of employment. Advancement to a permanent position is a statutory form of tenure which, according to traditional personnel theory, marks the completion of the formal application procedure.

b. Dismissals not involving constitutional claim

Although school authorities have broad discretion in refusing to rehire a probationary teacher, they must follow detailed statutory pro-
If school administrators decide not to rehire a probationary teacher, they must give confidential notice of that decision to both the teacher and the school board no later than the March 15 prior to the lapse of his contract. The teacher may request a hearing to determine if there is cause for not rehiring him for another year. If a hearing is demanded, it is conducted according to the provisions of the California Administrative Procedure Act (APA) with certain enumerated exceptions. The most important variation from the usual procedure is the content of the hearing officer's recommendations upon conclusion of the hearing. Under normal APA procedure, the hearing officer drafts a proposed decision which is submitted to the concerned agency. Under the Education Code limitation, the hearing officer makes only a proposed finding. He determines whether the allegations sustained by the evidence are related to the welfare of the schools and students, but does not make a finding "as to the sufficiency of the cause or a recommendation as to disposition . . .." Sufficiency of cause and disposition of the case are matters considered and decided exclusively by the school board. Judicial review of the board's determination may be obtained by petitioning for a writ of mandate in superior court. Although the board's determination of the sufficiency of cause is conclusive, the court may inquire as to whether there was jurisdiction, a fair proceeding, and substantial evidence to support the legal conclusion that the allegations were solely related to the welfare of the schools and students.

Permanent status gives the teacher greater security from arbitrary dismissal by the school district. A permanent teacher may be dismissed only for one or more of eleven enumerated causes ranging

33. The causes for dismissal of a permanent teacher are:
(a) Immoral or unprofessional conduct.
(b) Commission, aiding, or advocating the commission of acts of criminal syndicalism . . . .
(c) Dishonesty.
(d) Incompetency.
(e) Evident unfitness for service.
from incompetency to knowing membership in the Communist Party.\textsuperscript{34} A complaint requesting the dismissal of a permanent teacher may be filed by anyone, including, of course, the superintendent or administrative staff.\textsuperscript{35} When a teacher is specifically charged with unprofessional conduct or incompetency, however, the school board must allow an opportunity for improvement by giving the teacher notice within the last half of the school year and at least 90 days before acting on the charges.\textsuperscript{36}

When acting on the complaint, the school board may, by a majority vote, decide to give the permanent employee notice of its intention to dismiss him within 30 days unless the teacher demands a hearing.\textsuperscript{37} Before the recent legislative modifications of the procedure became effective, the school board, upon the demand by an employee for a hearing, had the option either to rescind its decision or to file a complaint in superior court setting forth the charges against the employee and requesting the court to inquire into the validity and sufficiency of the charges for dismissal.\textsuperscript{38}

Amendments to this procedure, which passed during the 1971 legislative session and became effective in February, 1973,\textsuperscript{39} substituted a bifurcated administrative hearing procedure for the judicial procedure previously provided. When charges directly concern a permanent teacher’s classroom behavior,\textsuperscript{40} the judgment of a commission on pro-

\textsuperscript{34} This and other political grounds for dismissal are of dubious constitutionality in light of Keyishian v. Board of Regents, 385 U.S. 589, 609-10 (1967), which requires the showing of a specific intention to bring about the unlawful goals of an organization before a dismissal based on “mere knowing membership” may be upheld.

\textsuperscript{35} CAL. EDUC. CODE § 13404 (West Supp. 1972).

\textsuperscript{36} CAL. EDUC. CODE § 13407 (West Supp. 1972).

\textsuperscript{37} CAL. EDUC. CODE §§ 13404, 13406 (West Supp. 1972). A written demand for a hearing is now necessary.

\textsuperscript{38} CAL. EDUC. CODE § 13412 (West 1969), as amended, CAL. EDUC. CODE § 13412 (West Supp. 1972).

\textsuperscript{39} CAL. EDUC. CODE § 13412 (West Supp. 1972), amending CAL. EDUC. CODE § 13412 (West 1969).

\textsuperscript{40} Such charges include immoral or unprofessional conduct, dishonesty, incompetency, evident unfitness for service, or persistent violation of school laws or “reasonable” regulations. CAL. EDUC. CODE § 13403 (West Supp. 1972).
fessional competence is invoked. This ad hoc commission is comprised of a person selected by the teacher, a person selected by the school board, and a hearing officer from the state Office of Administrative Procedure who serves as chairman. After a hearing conducted in accordance with the provisions of the APA, the commission decides by majority vote whether the teacher should be dismissed. This decision is deemed to be the final decision of the school board. When, however, the charges urging dismissal of the permanent teacher do not directly result from the employment situation (e.g., charges of mental or physical unfitness or having been convicted of a felony), the hearing is conducted solely by the hearing officer. His decision is also binding upon the school board.41

Either party, when unsuccessful before the hearing officer or commission on professional competence, may petition for review in superior court.42 In review of a hearing officer's decision, the court seems to be limited to determining whether there was jurisdiction, a fair trial, and substantial evidence supporting the decision.43 If the review is of the decision of a commission, however, the court must exercise independent judgment on the evidence.44

c. Dismissal involving constitutional claim

School teachers do not surrender their constitutional rights upon assuming public employment;45 this principle extends to a teacher's statements and actions both within and without the classroom. In the schoolroom, a teacher's freedom of expression has been recognized by the United States Supreme Court as "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."46 Thus, a teacher's right to use a controversial story for instructional purposes has been upheld absent a showing that the material was inappropriate reading for the class or that it resulted in "a significant disruption to the educational processes . . . ."47 Even

41. See CAL. EDUC. CODE § 13413 (West Supp. 1972) for the procedures to be followed in permanent teacher dismissals.
42. CAL. GOVT. CODE §§ 11517, 11523 (West Supp. 1972) (hearing officer's decision considered decision of board for purposes of judicial review); CAL. EDUC. CODE § 13414 (West Supp. 1972) (judicial review of decision of commission on professional competence).
43. CAL. CODE CIV. PRO. § 1094.5(b) and (c) (West 1967).
44. CAL. EDUC. CODE § 13414 (West Supp. 1972).
a teacher's right to wear a beard, which may violate a school's grooming policy, has been protected as "liberty" within the meaning of the fourteenth amendment. Often, however, the exercise of constitutional rights within the classroom is subtly punished by school authorities by assignment to undesirable duties or social ostracism.

Because teachers serve in a "sensitive area in a schoolroom," they are often made to account to school authorities for their extracurricular activities. Yet, both statutory regulation and covert attempts to punish behavior thought inappropriate have been broadly litigated; and, in recent years, teachers have come to enjoy increased protection in the extramural exercise of their constitutional rights. Statutory prohibitions of active participation in political campaigns have been thrown into doubt by a recent three-judge opinion in National Association of Letter resulting from the presentation of an erotic love poem to an undergraduate English class.


49. See, e.g., Verret v. Calcasieu Parish School Bd., 85 So. 2d 646 (La. Ct. App. 1956). Concerning the demotion of a tenured high school principal to the position of junior high school principal, the court said: [T]he tenured teacher is protected from disturbance not only by change in salary, but also by transfer to unpleasant duties, or duties not of the "particular type of teaching position or status which the teacher has attained," [citation omitted]. For a school board could thus indirectly accomplish the removal of a tenured teacher from the school system, although unable to do so directly by proven charges. Id. at 648.


Carriers v. Civil Service Commission\textsuperscript{58} voiding the Hatch Act\textsuperscript{54} as an unconstitutional infringement on free speech. Striking down state loyalty oaths, the Supreme Court in Wieman v. Updegraff\textsuperscript{55} upheld innocent membership even in subversive organizations; and, in Keyishian v. Board of Regents,\textsuperscript{56} the Court declared that mere knowing membership in a "subversive" organization is an insufficient basis for disqualification from public employment. A teacher must also have the specific intent to bring about the illegal objectives of the organization.\textsuperscript{57} The protections for free speech have also been extended to public criticism of school officials. In Pickering v. Board of Education,\textsuperscript{58} the plaintiff had written a letter to the local paper criticizing the school board's financial policy. Pickering was dismissed on the grounds that publication of the letter was "detrimental to the efficient operation and administration of the schools of the district."\textsuperscript{59} His dismissal was reversed by the Supreme Court, which held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."\textsuperscript{60}

California cases have held that a compelling state interest is necessary to justify the imposition of restraints upon the political activities of public employees.\textsuperscript{61} The California Supreme Court has required that governmental agencies, to satisfy the compelling interest test, must demonstrate:

(1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available.\textsuperscript{62}

The failure to demonstrate such a compelling interest has prevented the dismissal of a nurse's aid from a township hospital for her off-duty activities in a recall campaign of certain of the hospital's board of directors.\textsuperscript{63} Similarly, even a " provisionally appointed" assistant

\textsuperscript{55} 344 U.S. 183 (1952).
\textsuperscript{56} 385 U.S. 589 (1967).
\textsuperscript{57} Id. at 606.
\textsuperscript{58} 391 U.S. 563 (1968).
\textsuperscript{59} Id. at 564.
\textsuperscript{60} Id. at 574.
\textsuperscript{61} Fort v. Civil Service Comm'n, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964).
\textsuperscript{63} Bagley v. Washington Hospital Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).
health officer could not be dismissed for his failure to withdraw from membership in an organization known as the "Ad Hoc Committee to End Discrimination" absent a showing by his employer that the requirements of the three-part test had been met.\textsuperscript{64}

In light of the above discussion, it would appear that Bekiaris' extramural political activities, if truly the hidden grounds for his dismissal, would be insufficient to deny him reemployment. His associations with the farm workers and the Peace and Freedom Party did not qualify as membership in subversive organizations, much less indicate any specific intent to bring about subversive goals. Nor did the school board demonstrate, by use of the three-part test or otherwise, a compelling public interest sufficient to justify his dismissal on the basis of his out-of-class conduct. By refusing to consider even the possibility that his extramural conduct was the actual reason for dismissal, the hearing officer and the school board effectively denied Bekiaris the opportunity to prove the unconstitutionality of his dismissal. It was this procedural defect that caused the supreme court to remand his case.

To cure this defect, the court in Bekiaris judicially amended the procedure followed by the hearing officer in making a proposed finding whether the probationary teacher is being dismissed for reasons related to the welfare of the schools and students. Though the exact legal principle that justifies its decision was never made clear, the court required that a teacher's defensive offer of evidence tending to show that his exercise of constitutional rights was being penalized must be substantively received in the administrative hearing process.\textsuperscript{65} The court never expressly mentioned procedural due process, but its logic indicates that due process is the motivating force behind the requirement. The court stressed that both the hearing officer and school board, by not substantively receiving such evidence, made their determinations from an incomplete record.\textsuperscript{66} Although the court did not explicitly say so, it appears that this incompleteness violates due process.\textsuperscript{67}

\textsuperscript{64} Rosenfield v. Malcolm, 65 Cal. 2d 559, 421 P.2d 697, 55 Cal. Rptr. 505 (1967).
\textsuperscript{65} 6 Cal. 3d at 588, 493 P.2d at 487-88, 100 Cal. Rptr. at 23-24.
\textsuperscript{66} The court concluded that:
[T]he administrative record is infected with legal error in that the Board failed to give adequate consideration to petitioner's contention .... Thus the administrative record, although actually containing the pertinent evidence, was nevertheless incomplete because of the restriction placed upon it under the rule of limited admissibility. The hearing officer, erroneously concluding that his competence in the premises did not extend to a determination of petitioner's defensive issue, made no finding on that issue ....
\textit{Id.} at 588, 493 P.2d at 488, 100 Cal. Rptr. at 24.
\textsuperscript{67} While administrative agencies tend to follow the judicial pattern of receiving
Since Bekiaris concerned the nonretention of probationary teachers and as such applies to the conduct and review of the hearing officer, one can only speculate as to the impact the decision will have on the dismissal procedures for permanent teachers. If indeed the court considered the admission of defensive evidence to be a due process requirement for maintaining the integrity of the record, then the holding in the case should also apply to the dismissal procedures for permanent teachers. If so, a state hearing officer or a commission on professional competence would also have to admit, and make a finding concerning, any evidence tending to show that a teacher is being penalized because of official dissatisfaction with his exercise of constitutional rights.

II. THE REQUIREMENTS OF DUE PROCESS

The Bekiaris decision and the recent amendments to the California dismissal procedure cannot be adequately analyzed in isolation, for during the past several years the United States Supreme Court has also grappled with the due process requirements of administrative proceedings. This section first examines the general principles of administrative due process established by the Court most recently in Goldberg v.
The section then analyzes how the Court applied these general principles to specific instances of dismissals of public school teachers in the last term.

a. Emerging principles of due process

The most recent, comprehensive statement of the requirements of due process was made by the Court in Goldberg. Written by Justice Brennan, it held that a welfare recipient was entitled to notice and a hearing prior to the termination of his public assistance benefits. Though the pretermination hearing need not assume the characteristics of a judicial or quasi-judicial trial, "rudimentary due process" requires that the welfare recipient at least be afforded the opportunity to review the evidence against him, testify and present witnesses on his own behalf, and confront and cross-examine adverse witnesses.

For the purposes of this Note, Goldberg is important for two reasons. First, it obliterated any remaining significance attached to the historic "right-privilege" dichotomy used to condition the protection of the due process clause. Second, it phrased the due process requirement in terms of a flexible balancing process:

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.

Because welfare payments are "a matter of statutory entitlement" for those qualified to receive them, and because their arbitrary termination deprives the recipient of his very means of support, the Court, using the balancing process, prescribed a high level of procedural protection before those benefits might be even temporarily withdrawn. The Court's due process requirements for the termination of welfare payments include most of the characteristics of a formal, trial-type hearing.

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69. Id. at 266.
70. Id. at 268-70.
72. 397 U.S. at 262-63.
73. Id. at 262.
74. K. Davis, Administrative Law Text 170 (3d ed. 1972). As Davis indicates, the only characteristics of a formal hearing that are lacking seem to be a verbatim transcript and testimony under oath. Id. To his list might be added the appointment of counsel for indigents, although this has never been a requirement for even formal hearing procedures except in certain criminal proceedings and strict evidentiary rules.

In a recent discussion of the evolution of due process appearing in a national
b. Roth and Sindermann: specific application of the general principle

The application of the due process balance, as illuminated by Goldberg, to the dismissal proceedings of teachers will not normally result in a complete trial-type hearing as required for the termination of welfare benefits. Only when a teacher, whether tenured or not, is summarily and immediately dismissed during a school term can an analogy be made to Goldberg: only the immediate termination of employment would sufficiently threaten the teacher's means of support to necessitate the full procedural protection afforded by Goldberg. Of course, such a case rarely arises. When it does, statutory or contractual provisions often specify constitutionally sufficient procedures to be followed to obtain the immediate dismissal of the teacher.

What remains is the question of the required procedural protection for teachers, either probationary or employed under a nontenure system with no statutory or contractual dismissal procedure, who are simply not rehired for an additional year of teaching. It was to this question that the Supreme Court addressed itself during the last term in the cases of Perry v. Sindermann\(^7\) and Board of Regents v. Roth.\(^8\)

In the Sindermann case, the respondent was a professor of government and social science at a Texas junior college who had worked in the state system for ten years. On one occasion, he had served as co-chairman of his department. During the 1968-69 school year, Sindermann was elected president of the Texas Junior College Teachers Association. In this capacity, he failed to meet his classes on several days so he could testify before committees of the Texas legislature. Soon he became embroiled in a public disagreement with the policies of the college's board of regents. In the spring of 1969, Sindermann

news magazine, it was suggested that such trial-type hearings might contain the seeds of their own destruction. In part, the article said:

Officials may well cease abuses which they cannot justify at a hearing; but they may also duck making needed decisions to avoid the trouble of defending their actions. Kenneth Culp Davis, a top scholar at the University of Chicago, unintentionally conjures up another danger in his standard work, Discretionary Justice. "The 1968 version of the Federal Tax Regulations," he says, "fills 4,400 double-column pages, a truly magnificent body of law." But surely that is a body only a lawyer could love. The idea of even 40 double-column pages devoted, say, to the process of fighting with the electric company is enough to leave one yearning for a return to the pleasures of candlelight.

It would indeed be tragic if the humane gains were stifled by an intervening layer of rule-making bureaucrats. But the major point about due process is that its central concern is fairness, not form. Thus it is not inconceivable that some day the concept could be used against hearings, on the ground that they have become an unconstitutional impediment to fairness.

\(^7\)5. 408 U.S. 593 (1972).
\(^7\)6. 408 U.S. 564 (1972).
was notified that he would not be rehired for an additional year. As the Texas junior college system has no tenure provisions, he was given no official statement of the reasons for his dismissal and was afforded no opportunity for a hearing.

The Court reached two issues in its decision in *Sindermann*. First, it held that, since Sindermann contended that he was being dismissed because of dissatisfaction with his exercise of free speech, it was inappropriate for the trial court to have granted the regents’ motion for summary judgment without considering this claim.\(^7\) The Court made clear that the protection of a teacher’s first amendment rights does not depend on the existence of a contractual or tenure right to reemployment.\(^7\)

Second, the Court noted that, while Sindermann had neither contractual nor tenure rights to reemployment, he might prove a sufficient “entitlement” to reemployment to warrant due process protection of that interest.\(^7\) To find such an “entitlement” in a nontenured system, the Court indicated that it would look to the unwritten policies and historic practices of the institution. Thus, the Court indicated that there might be “an unwritten ‘common law’ in a particular university that certain employees shall have the equivalent of tenure.”\(^\text{70}\) If such an “entitlement” could be proved, the Court, although vague concerning the specific due process requirements, indicated that at least the information as to the grounds for nonretention and a hearing at which to challenge the sufficiency of the reasons for the nonretention would be required.\(^\text{81}\)

It is because *Sindermann* went so far to invite proof of an entitlement to continued employment that the Court’s decision in the companion case of *Board of Regents v. Roth*\(^\text{82}\) seems so strange. There the petitioner was a probationary teacher at Wisconsin State University, Oshkosh, which has a tenure system. Employed for one year, Roth was notified in midwinter that he would not be rehired for an additional year. No reason was given; no hearing was provided.\(^\text{83}\)

Attacking the decision in federal court,\(^\text{84}\) Roth alleged that the university’s decision violated both substantive and procedural fourteenth amendment rights. He asserted that the true reason for his nonretention was punishment for certain critical remarks he had made con-

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77. 408 U.S. 593, 598 (1972).
78. Id. at 597-98.
79. Id. at 603.
80. Id. at 602.
81. Id. at 603.
82. 408 U.S. 564 (1972).
83. Id. at 568.
cerning the university administration. He argued that the administration denied him due process when it failed to provide him with official notice of the reasons for the decision and an opportunity for a hearing.

The Court had no difficulty in disposing of the petitioner's claims. Holding that Roth's free speech claim was not before it but had been stayed at the district court, the Court directed its attention to the requirements of procedural due process. Urging an examination of the "nature of the interests at stake," the Court asserted that the university had complete discretion in rehiring its probationary teachers and that Roth had neither a "liberty" nor a "property" interest in his continued employment. No "liberty" was involved as the university's action did not stigmatize him so as to damage his reputation in the community or his future employment potential. No "property" interest was infringed as Roth did not have a "legitimate claim of entitlement" to reemployment.

At best, it appears that Roth ignores both the facts established in the trial court and the logic of Sindermann. Roth was one of only four out of 442 nontenured teachers not rehired for an additional year. As one of the few teachers not rehired, the university administration's decision obviously reflects upon his reputation and professional ability. Also, Wisconsin statutory provisions not to the contrary, such a high rate of retention strongly suggests an "unwritten common law" of rehiring equivalent to that alluded to in Sindermann. Since the Court in Sindermann indicated that a "legitimate claim of entitlement" could be proved by referring to the institution's policies and practices, there is reason to believe Roth could have made the same showing concerning Wisconsin State University.

85. Id. at 974.
86. Id.
87. 408 U.S. at 574-75.
88. Id. at 570-71.
89. Id. at 573.
90. Id. at 578.
91. 310 F. Supp. at 974.
92. The Court circumvented Roth's argument by saying, "The State ... did not make any charge against him that might seriously damage his standing and associations in his community." 408 U.S. at 573 (emphasis added). While it is true that no formal charge was made against Roth, there is no reason to believe that the stigma attaching to him was any less as he was one of only a few not rehired. Indeed, the stigma may be worse, as withholding any explanation allows people to form exaggerated speculations about the true reason for his nonretention.
93. Wis. STAT. ANN. § 37.31(1) (West 1966), as amended, Wis. STAT. ANN. § 37.31 (West Supp. 1972). At the time Roth was fired, the statute provided that:

All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher.
At worst, Roth appears to be a reembodiment of the seemingly discredited "right-privilege" dichotomy. When the Court begins to look at the "nature of the interest at stake," its purpose seems to be to isolate those privileges gratuitously bestowed by government which, therefore, are not treated as legally protected interests.

From a policy approach, it is unfortunate that the Roth Court failed to find a protected interest in Roth's continued employment. The decision resulted in no procedural protection for the respondent. Had the balance of interests test, suggested by Goldberg, been applied, several informal devices, not at all burdensome upon the state, could have been used to give some measure of fairness and protection to the teacher. For instance, notice of the reasons for nonretention is not required under Roth even though giving notice would tend to deter arbitrary dismissals, result in little or no burden on the administration, and give the dismissed teacher some feedback as to the inadequacy of his professional performance.

c. Drown: the use of intermediate methods

Because the absence of an "entitlement" to continued employment deprives a probationary teacher of all procedural protection, unless gratuitously bestowed, a solution that would more adequately protect the interests of all parties should be considered for the dismissal of probationary teachers. Judge Coffin, in Drown v. Portsmouth School District, suggests a model procedure that may be an acceptable alternative. He finds a protected expectancy interest in the continued employment of a probationary teacher, a finding which must now be reexamined in light of Roth, and then applies a balancing test which recognizes certain minimum due process rights.

The probationary teacher in Drown raised no claim of being dismissed for the exercise of constitutional rights; only a procedural due process issue was urged. The court held that due process requires that a probationary teacher be given "a written explanation, in some detail, of the reasons for nonretention, together with access to evaluation reports in the teacher's [own] personnel file." The court found that, as a product of the balancing test, this requirement does not impose an unmanageable burden on the school district. To the extent that such nonrenewal decisions are made on the basis of supporting reasons, the administrative cost of communicating those reasons to the concerned probationary teacher is insignificant. Since Drown did not

94. See Van Alstyne, supra note 71.
95. 408 U.S. at 571 (emphasis in original).
97. 435 F.2d at 1185.
require an administrative hearing, the statement of reasons apparently does not have to be compelling. Potential embarrassment to the teacher or the administration can be alleviated by issuing the reasons in confidence.

If nonretention decisions are made on the basis of unexpressable intuitive judgment or on the basis of reasons which, although important in the context of the educational setting, would not withstand public scrutiny, then the Drown procedure will somewhat reduce the discretion of school administrators. Teachers might be retained who, except for the requirement of stated reasons, would otherwise be fired. To the extent that nonrenewal decisions are made for no reason at all or for constitutionally impermissible reasons, the required statement of those reasons may deter such dismissals.

Drown does not go so far as to require an administrative hearing upon the request of the dismissed probationary teacher, for Coffin suggests that such a hearing would significantly burden the administration and curtail its valid discretion while only marginally increasing the protection of the teacher. In cases involving a clash between a probationary teacher and his supervisor concerning teaching philosophy, Coffin suggests that in "light of the school board's wide discretion, and its prerogative to be short-sighted and narrowminded," such a hearing would be no more suitable to resolve such value differences than informal discussion. When school administrators have acted in good faith in dismissing a teacher, any factual mistake could be corrected by informally bringing the matter to the attention of superiors. When administrators act in bad faith or for impermissible reasons, a hearing before the school board will likely be fruitless. Coffin further suggests that nonretentions based on the exercise of first amendment rights are more properly remedied in court rather than by allowing the school board to use administrative procedures to delay any decision and subject the teacher to two full scale presentations of the case.

Many situations might be hypothesized in which the Drown notification procedures would not remedy a wrongful dismissal of a probationary teacher. Yet, the decision is a much better solution than the vacuum of protection left by Roth. In sum, Drown offers a "creative

98. Id. at 1188.
99. Id. at 1186.
100. Id. at 1184-85.
101. Id. at 1186-87.
102. Id. As notice of nonretention is most often given in early spring, it is likely that a great majority of these cases could be considered by courts before the beginning of the new school term in the fall. Thus, stays of dismissals would be unnecessary and classes not disrupted by changes in teachers.
use of intermediate methods of implementing the protection afforded by due process.  

III. BEKIARIS AND CALIFORNIA STATUTORY PROVISIONS: AN EVALUATION

The California statutory procedure for the dismissal of tenured teachers and the nonrenewal of probationary teachers must be evaluated in light of both Sindermann and Roth. While Sindermann arose from a junior college not having a formal tenure system, the decision makes clear that quasi-tenure status may be achieved if the institution's policies and practices in fact recognize such a status. For teachers who have obtained this "legitimate claim of entitlement" to their job, either through a formal or informal tenure system, Sindermann suggests that reasons for the dismissal or nonretention, and a hearing at which to attack the sufficiency of those reasons, must be provided. Of course, as discussed earlier, the California procedure for the dismissal of tenured teachers goes far beyond this and is generally a model of fairness.

It is clear, however, that the Roth decision, absent compelling proof of a "legitimate claim of entitlement" to continued employment, provides no procedural protection for probationary teachers who are not retained for an additional year. The statutory provisions of section 13443 of the California Education Code, on the other hand, provide for notice of the reasons for nonretention to be communicated to the probationary teacher and for an opportunity for an administrative hearing. Bekiaris further guarantees that evidence indicating that constitutionally impermissible reasons are responsible for the decision must be considered at the hearing; and, upon review, a court must exercise independent judgment concerning the true reasons for the nonretention. Thus, the California procedure for the dismissal of probationary teachers is laudable: it gives the appearance and, most often, the substance of fairness.

Yet, in light of the Drown approach, it may be argued that parts of the California procedure are cumbersome and needlessly repetitive.

104. 408 U.S. at 603.
105. See text accompanying notes 33-44 supra.
107. 6 Cal. 3d at 592-93, 493 P.2d at 490-91, 100 Cal. Rptr. at 26-27.
108. A better solution might be simply to allow the teacher immediately to
process violations in light of the Roth decision, may still be open to abuse.

One example is the sufficiency of cause necessary to dismiss a probationary teacher. While a probationary teacher may be denied reemployment only for cause, the school board itself conclusively judges the sufficiency of cause so long as it relates to the welfare of the schools and pupils. In the hands of a board intent upon dismissing a teacher, its determination of sufficient cause may be so slight as to be no cause at all. When such abuses occur, they are the unfortunate price that may have to be paid to retain the school board's discretion in evaluating probationary teachers.

Another weakness of the California procedure concerns the impartiality of the school board in determining whether cause exists not to rehire a probationary teacher. In the usual case, the school board is equipped to assume an impartial role when confronted with a dismissal. Yet, it can be expected that a school board, not wishing to destroy the harmony of the working relationship between itself and the administration, will rarely overturn nonrenewal decisions strongly urged by the administration. In a case when a teacher maintains that he is being penalized for the exercise of constitutional rights, other considerations may be involved. In such instances, the exercise of constitutional rights, such as free speech, might have concerned the school board itself. Parental or community complaints about the teacher's behavior might also have been directed to the board. Either due to political expediency or premature judgment on the case, the result may be a biased or hostile tribunal. The necessity of pursuing ad-

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110. CAL. EDUC. CODE § 13443(c) (West Supp. 1972).
111. For instance, as was the case in Pickering v. Board of Educ., 391 U.S. 563 (1968), teachers often place themselves in a precarious position in relation to the school board and administration when they critically comment on policies or programs supported by the latter. Yet, such comment provides the public with an often essential perspective on important public matters. Id. at 572-73.
112. It is unclear when such hostility rises to a violation of due process. In its decision concerning the requirements of due process in an evidentiary hearing, Goldberg specifies that "an impartial decision maker is essential." 397 U.S. at 271. In fact, however, some partiality is tolerated—even encouraged—in administrative proceedings. An administrative tribunal may have a built-in policy bias which is "a planned ingredient of the original legislation." W. GELLHORN & C. BYSE, AD-
Administrative remedies in such a case will only delay vindication of the teacher's constitutional guarantees. In the interim, the exercise of first amendment rights by other teachers will be chilled.

CONCLUSION

Administrative procedures for the dismissal of public school teachers have been thrown into some confusion by the recent amendments to the California Education Code, the Bekiaris decision, and the United States Supreme Court's statements in Sindermann and Roth. For tenured California teachers, the procedure, as now amended, provides much protection from arbitrary and unreasoned dismissal. If Bekiaris is taken to apply when tenured teachers claim dismissal because of the exercise of constitutional rights, the result will be an even higher level of judicial vigilance.

Full procedural protection for tenured teachers is desirable since

MINISTRATIVE LAW: CASES & COMMENTS 789 (1970). The best known example is the creation of the National Labor Relations Board to help the labor movement compensate for its weakness in comparison to the historic strength of management.

While it is acceptable for the members of an administrative tribunal to have a particular policy perspective hostile to a petitioner's claim, improper bias may result in other ways. In American Cynamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966), the petitioner successfully set aside a decision of the FTC because of Commissioner Dixon's prior involvement in the case as counsel to a Congressional committee. In overturning the Commission's decision, the court indicated that Dixon's opinions concerning the case were not limited to an "underlying philosophy" or a "crystallized point of view" on questions of law or policy." Id. at 794. Dixon had, through previous involvement, made factual determinations concerning the case. Id. at 763.

Yet, in Richardson v. Perales, 402 U.S. 389 (1971), the Court considered an appeal from adverse action by a Social Security hearing examiner who had denied a disability claim. While the examiner had prime responsibility for gathering the facts upon which he rested his determination, the Court distinguished between the officer's prior involvement resulting from a judicial role and involvement in the past as an advocate:

Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts. Id. at 410. See generally U.S. ATT'Y GEN. COMM. ON ADMIN. PROC., FINAL REPORT 55-59 (1941); Comment, Adversary Presentation and Bias in Legal Decisionmaking, 86 HARV. L. REV. 386 (1972) (an empirical inquiry into the incidence of bias in the adversary process).

Given the narrow distinction between these two cases, it is difficult to predict the implications for dismissal proceedings before school boards. A board's involvement in the case before it is formally presented to the board on appeal would seem to be proper as long as it could masquerade that prior involvement as an extension of its adjudicatory or policy-making function. If, however, one or more members of the board has instigated the dismissal, he should then be disqualified from participating in a subsequent hearing. In cases where the entire board has become embroiled in the controversy, the board may still be allowed to act, if no other board is empowered to act, under the "rule of necessity." K. DAVIS, supra note 74, at 251-53.