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Lindros v. Governing Board of Torrance Unified School District

I. Introduction

Lindros v. Governing Board of Torrance Unified School District[1] is a case related to the California administrative law regarding teacher employment rights. Specifically, it relates to the termination of a probationary high school teacher for reading a short story entitled "The Funeral," to a coeducational tenth grade high school English class, for instructional purposes. The story contained offensive, indecent and vulgar language. The main issues were whether the disciplinary action taken was a violation of the teacher's rights to academic freedom under the First Amendment, and whether there was sufficiency of notice of the proscribed conduct where there was no specific school board standard as to what readings were impermissible.

II. Background

The employment rights of school teachers in California are protected by the Education Code. To fill educational positions, the local governing board may only select persons who meet the educational and administrative requirements of the Education Code.[2] Teachers initially have *probationary* status; later they achieve *permanent* status, often referred to as *tenure*. Permanent status is achieved by (1) employment by the school district for three complete, consecutive school years in a position requiring certain qualifications, and (2) being selected for the next (fourth) school year to a position requiring certain qualifications.[3] The purpose of the probationary status is to assure that those who are hired as permanent teachers are able to perform at least adequately in the teaching profession. The problem, and the reason for statutory protection of the teacher's employment rights, is that "it is not inconceivable that a qualified—even a highly qualified—person may

1. 9 Cal. 3d 524, 510 P.2d 361, 108 Cal. Rptr. 185 (1973).
2. Cal. Educ. Code §§ 12901-12909 (West Supp. 1974) amending §§ 12902-12905 (West 1969).
3. Cal. Educ. Code § 13304 (West 1969).

be victim of dismissal . . . for reasons having no relation to his fitness as a teacher."[4]

In order to protect the teacher from unjust dismissal, he is granted the following rights by the Education Code:[5]

1) Written notice prior to May 15 that he will not be hired for the following year.

2) He may request a statement of the reasons for not reemploying him.

3) He may request a hearing before the governing board to determine if there is cause for not reemploying him.

4) The cause for not reemploying him must be related solely to the welfare of the schools and the pupils thereof.

In summary, the dismissed (or not rehired) probationary teacher has a right to notice, cause and a hearing. It is these rights that Lindros asserted in his petition for a writ of mandate.

III. Factual Background

Plaintiff and appellant, Stanley M. Lindros, was a probationary secondary school teacher in Torrance, California.[6] In March, 1970, the defendant Governing Board of the Torrance Unified School District served Lindros with written notice that it was recommending that he not be reemployed for the next school year. Lindros requested a hearing, which was held by a hearing officer of the state Office of Administrative Procedure in May, 1970. The hearing officer submitted his proposed decision to the board, in which he made findings of fact and a determination that the three charges which were sustained by the evidence were related to the welfare of the school and the pupils thereof. The principle charge was that Lindros read to his tenth grade English class a short story entitled "The Funeral" which he had written himself, which contained a coarse and vulgar phrase, specifically: white mother fuckin' pig. The governing board in turn determined that

4. Coan, *Dismissal of California Probationary Teachers*, 15 HAST. L.J. 284 (1964).
5. CAL. EDUC. CODE § 13443 (West Supp. 1974) amending § 13443.
6. Lindros v. Governing Board of Torrance Unified School District, 103 Cal. Rptr. 188, 190 (1972).

> . . . sufficient cause exists pursuant to Section 13443 of the Education Code not to reemploy respondent [Lindros] for the 1970-71 school year in that each of the charges found by the hearing officer to be sustained by the evidence and related to the welfare of the schools and the pupils thereof.[7]

Lindros next applied to the Superior Court for a writ of mandate to compel the governing board to set aside its decision not to rehire him. In the mandamus proceeding, the Superior Court found that there was substantial evidence to support the hearing officer's finding of fact as to the principle charge. (The two other charges were not found to be pertinent by the California Supreme Court, and are omitted from the present discussion.) As a conclusion of law, the Superior Court held that the hearing officer's findings of fact related to the two charges involved were supported by substantial evidence and that the charges "were found to be related to the welfare of the school and the pupils thereof, and the Governing Board's determination of sufficiency is conclusive."[8] In short, the Superior Court upheld the governing board and denied the writ of mandate.

Lindros next appealed to the Court of Appeal, Second District. After considering the issues of academic freedom, due process and some pertinent statutory aspects of California administrative law, this court affirmed the decision of the lower court. Reading of a story with a vulgar phrase was without the pale of academic freedom, was conduct which related to the welfare of the school and the pupils thereof, and constituted cause for declining to rehire a probationary teacher.[9]

Lindros appealed next to the California Supreme Court. In an opinion by Justice Tobriner, the court held that the incident for which Lindros was disciplined did not establish cause for termination which was reasonably related to the welfare of the schools and pupils thereof, and remanded the case to the Superior Court for further proceedings.[10] There was a dissent by Justice Burke, in which Justice McComb concurred, taking the position that the Education Code[11] gave the local school board the authority to determine the sufficiency of the cause for refusing to reemploy a probationary teacher, without judicial interference.[12]

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7. *Id.* at 193.
8. *Id.*
9. *Id.* at 195.
10. 9 Cal. 3d 524, 541, 510 P.2d 361, 372, 108 Cal. Rptr. 185, 196 (1973).
11. Cal. Educ. Code § 13443(d) (West Supp. 1974).
12. 9 Cal. 3d 524, 541, 510 P.2d 361, 372, 108 Cal. Rptr. 185, 196 (1973).

Certiorari was denied to the *Lindros* case by the United States Supreme Court on December 17, 1973.[13]

IV. REASONING OF THE APPELLATE COURT

The Court of Appeals, Second District, in the opinion by Justice Ford, reviewed four basic contentions of the appellant, Lindros, in its reasoning on the charge relating to the reading of "The Funeral":

1) Refusal to rehire plaintiff because of his reading of "The Funeral" constituted a violation of academic freedom protected by the First Amendment of the United States Constitution.

2) Reading of "The Funeral" could not be a basis for refusal to rehire plaintiff because he was not given adequate notice that conduct of that nature would subject him to disciplinary action.

3) The board's decision is void because it determined that there was sufficient cause not to rehire plaintiff without reading the transcript of the proceedings before the hearing officer.

4) The governing board violated the Brown Act (Government Code Sections 54950-54960), by deliberating while in executive session.

The Issue of Academic Freedom

Plaintiff cited two federal cases in support of his argument that there was a violation of academic freedom. *Parducci v. Rutland*[14] involved a high school teacher who assigned outside reading in books which contained several vulgar words and a reference to an involuntary act of sexual intercourse. The court stated that academic freedom was a special concern of the First Amendment, subject however to balancing against the question of whether the conduct would "*materially* and *substantially* interfere with the requirements of appropriate discipline in the operation of the school."[15] The court found that the conduct for which the plaintiff in *Parducci* was dismissed did not interfere with discipline in

13. Lindros v. Governing Board of Torrance Unified School District, 9 Cal. 3d 524, 510 P.2d 361, 108 Cal. Rptr. 185 (1973), *cert. denied*, 94 S. Ct. 842 (1973).
14. 316 F. Supp. 352 (N.D. Ala. 1970).
15. *Id.* at 355.

the school.[16] *Keefe v. Geanakos* involved another high school teacher who assigned reading of a magazine article which included an offensive vulgar term, and held a discussion of the article in a twelfth grade English class. The issue as posed by the court was "whether a teacher may, for demonstrated educational purposes, quote a 'dirty' word currently used in order to give special offense, or whether the shock is too great for high school seniors to stand."[17] The court, holding that academic freedom was indeed at stake, reversed a decision of the district court denying an interlocutory judgment, and remanded the case.[18]

The California Court of Appeals did not specifically address the reasoning in *Parducci*. It did, however, make note of *Mailloux v. Kiley*,[19] a later (1971) First Circuit case which appeared to modify *Keefe v. Geanakos*:

> The court in no way regrets its decision in Keefe v. Geanakos [Citation], but it did not intend thereby to do away with what, to use an old fashioned term, are considered the proprieties, or to give carte blanche in the name of academic freedom to conduct which can reasonably be deemed both offensive and unnecessary to the accomplishment of educational objectives.[20]

The California Court of Appeals also distinguished *Keefe v. Geanakos* from *Lindros* in that in the former "the students were in the twelfth grade and . . . the use of vulgar language could reasonably be said to be justified in that it served a legitimate professional purpose."[21] In *Lindros*, the students were in the tenth grade, and the story containing the vulgarity was to be a model for writing by the students. The latter instance, it found, "substantially transcended any legitimate professional purpose and was without the pale of academic freedom."[22]

The Issue of Adequate Notice

Plaintiff contended that he was not given adequate notice that conduct such as reading a story containing a vulgar phrase would subject him to disciplinary action. Instructional material had been used at the school, and books were in the school library, which contained words falling within the classification of vulgarity. Nevertheless, the court took the position that:

16. *Id.* at 356.
17. 418 F.2d 359, 361 (1st Cir. 1969).
18. *Id.* at 363.
19. 436 F.2d 565 (1st Cir. 1971).
20. *Id.* at 566.
21. 103 Cal. Rptr. 188, 195 (1972).
22. *Id.* at 195.

> It is not unreasonable to assume that a person engaged in the profession of teaching will have a reasonable concept of generally accepted standards relating to propriety of conduct, including the avoidance of vulgarity, and will adhere to such standards in his relationship with his pupils.[23]

The Issue of Failure to Follow the Statutory Procedure

Plaintiff contended that the governing board, by failing to read the transcript of the administrative hearing prior to rendering a decision not to rehire him, violated the procedure set forth in Government Code Section 11517, and failed to follow the requirements of due process.

The thrust of plaintiff's contention was that there was a conflict between the procedure prescribed by statute for such a hearing and governing board action as set forth in the Education Code and that in the Government Code. The Education Code gives the hearing officer the role of trier of fact only; the governing board makes the decision as to "sufficiency and disposition".[24] On the other hand, the Government Code provides that if a contested case is heard by a hearing officer alone, he must prepare a proposed decision in such form that it may be adopted as a decision in the case.[25] Plaintiff further contended that the procedure under the Government Code must be followed because it met federal due process requirements and the Education Code procedure did not: "The one who decides must hear."[26] Therefore, the members of the governing board were required to read the transcript of the proceedings before the hearing officer because that officer was not empowered to recommend an ultimate disposition and did not do so.[27]

The Court of Appeals denied plaintiff's contention, finding support in the decision of the California Supreme Court in *Bertch v. Social Welfare Dept.*[28] That case arose out of an analogous conflict: whether a hearing to determine who was a "needy" person under the Old Age Security Act was to be governed by Section

23. *Id.*
24. CAL. EDUC. CODE § 13443(c) (West Supp. 1974), amending § 13443 (c) (West 1969).
25. CAL. GOVT. CODE § 11517(b) (West 1966).
26. Morgan v. United States, 298 U.S. 468, 481 (1936).
27. Lindros v. Governing Board of Torrance Unified School District, 103 Cal. Rptr. 188, 196 (1972).
28. 45 Cal. 2d 524, 289 P.2d 485 (1955).

11517 of the Government Code, or sections 104.1, 104.2, 104.3 and 104.5 of the Welfare and Institutions Code.[29] The Supreme Court statement in *Bertch* quoted in *Lindros*[30] appears right on point:

> It would appear that under the situation here present where petitioners were given a full opportunity to be heard before the hearing officer whose report was then reviewed by the board, there was no denial of procedural due process of law.[31]

It appears correct to find, as the Court of Appeals did, that by analogy the Education Code procedure is to be followed in a hearing under Education Code Section 13443, and not the procedure under the Government Code.

The Issue of the Secret Session

Plaintiff's last contention was that the governing board, by deliberating in executive session, after plaintiff had requested a hearing in open session, violated the Brown Act. In support of this contention, plaintiff cited *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.*,[32] which held that deliberation as well as action were encompassed by the Brown Act (Government Code Section 54950). The court defined deliberation as the examination, weighing and reflecting upon the reasons for or against the choice.[33]

The Court of Appeals countered with a reference to *Huntington Beach Unified High School Dist. v. Collins*:[34]

> The record does not show that the board took any action toward appellant's dismissal or heard any additional evidence pertaining thereto at the executive session. The only decision reached during the executive session was to allow appellant another opportunity to answer the questions which he had failed to answer at the first meeting. Then, during the second public hearing, appellant again refused to answer the questions. After this second refusal, the board approved a motion stating that appellant's answers were evasive and that he should be suspended. If there was a technical violation of the Brown Act (Gov. Code, §§ 54950-54960), it in no way prejudiced appellant's rights and did not invalidate the action of the board.

A technical violation of the Brown Act does not invalidate action subsequently taken by the governing board.[35]

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29. Lindros v. Governing Board of Torrance Unified School District, 103 Cal. Rptr. 188, 197 (1972).
30. *Id.* at 198.
31. 45 Cal. 2d 524, 529, 289 P.2d 485, 488 (1955).
32. 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968).
33. *Id.* at 47, 69 Cal. Rptr. at 485.
34. 202 Cal. App. 2d 677, 682, 21 Cal. Rptr. 56, 59 (1962).
35. Lindros v. Governing Board of Torrance Unified School District, 103 Cal. Rptr. 188, 198 (1972).

V. Reasoning of the California Supreme Court

In deciding the *Lindros* case, the California Supreme Court took sharp issue with the Court of Appeals on the issues of academic freedom and due process. The California Supreme Court made its decision on the academic freedom and due process issues, and did not discuss the questions of proper administrative procedure.

Cause for Termination is a Question of Law

Citing several California cases,[36] the court stated that the courts have consistently held that whether particular conduct establishes cause for refusal to rehire a probationary teacher relates "solely to the welfare of the schools and the pupils thereof" is a question of law that must be determined by the courts.[37] Further, the relation must *adversely affect* the welfare of the schools and pupils; more than the simple relationship is required.[38] The administrative agencies have restricted roles. The role of the hearing officer together with the governing board is to determine findings of fact, which will be upheld by the courts so long as supported by substantial evidence. The governing board alone determines "sufficiency of the cause".[39]

Cause for Dismissal is not Found

The court made two main points in finding that there was no cause for dismissal as a matter of law.

First, it found that there was no adverse effect on the welfare of schools and pupils. Words that are manifestly coarse and vulgar are acceptable, if used for a bona fide educational purpose. Further, in the *Lindros* case, there were no student or parent complaints about the teacher's conduct in reading the story. Also, books con-

36. Griggs v. Board of Trustees of Merced Union H.S. Dist., 61 Cal. 2d 93, 389 P.2d 722, 37 Cal. Rptr. 194 (1964); Bekiaris v. Board of Education of City of Modesto, 6 Cal. 3d 575, 493 P.2d 480, 100 Cal. Rptr. 16 (1972); Blodgett v. Board of Trustees Tamalpais U.H.S. Dist., 20 Cal. App. 3d 183, 97 Cal. Rptr. 406 (1971); Thornton v. Board of Trustees of Snelling-Merced Falls S.D., 262 Cal. App. 2d 761, 68 Cal. Rptr. 842 (1968).

37. Lindros v. Governing Board of Torrance Unified School District, 9 Cal. 3d 524, 534, 510 P.2d 361, 367, 108 Cal. Rptr. 185, 191 (1973).

38. *Id.* at 535, 510 P.2d at 368, 108 Cal. Rptr. at 192.

39. *Id.* at 534, 510 P.2d at 367, 108 Cal. Rptr. at 191.

taining similar words were in the school library. The court also pointed out four United States Supreme Court cases, (principally *Cohen v. California*) in which use of similar language was held to be constitutionally protected speech.[40]

Second, the court found that one isolated classroom use of material later deemed objectionable by school administrators, without reasonable prior notice, is not sufficient as a matter of law to constitute cause for termination. The court quoted its prior decision in *Morrison v. State Board of Education*:

> Teachers, particularly in the light of their professional expertise, will normally be able to determine what kind of conduct indicates unfitness to teach. Teachers are further protected by the fact that they cannot be disciplined merely because they made a reasonable, good faith, professional judgment in the course of their employment with which higher authorities later disagreed.[41]

In a footnote supporting this point,[42] the court tied its reasoning into the Federal cases of *Keefe v. Geanakos*,[43] and *Parducci v. Rutland*,[44] which had been cited by appellant in his behalf, but which had been rejected or distinguished by the Court of Appeals.[45] The Supreme Court found support in the federal cases which accepted the notice argument in the context of constitutional due process and academic freedom challenges to teacher dismissals.

VI. Analysis and Evaluation

The difference in the result obtained in the Supreme Court from that obtained in the Court of Appeals is primarily due to a sharp difference in judgment as to the character of Lindros' conduct. Both courts were exercising the right of the courts to review the acts of the governing board to determine whether there was any abuse of discretion in the board's determination that the cause for dismissal related solely to the welfare of the schools and pupils thereof. The result in either court reaffirms the leading cases, *Riggins*[46] and *Griggs*.[47]

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40. Cohen v. California, 403 U.S. 15 (1971); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Brown v. Oklahoma, 408 U.S. 914 (1972); Lewis v. City of New Orleans, 408 U.S. 913 (1972).
41. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 233, 461 P.2d 375, 389, 82 Cal. Rptr. 175, 189 (1969).
42. Lindros v. Governing Board of Torrance Unified School District, 9 Cal. 2d 524, 538, 510 P.2d 361, 370, 108 Cal. Rptr. 185, 194 (1973).
43. 418 F.2d 359, 362 (1st Cir. 1969).
44. 316 F. Supp. 352, 357 (N.D. Ala. 1970).
45. Lindros v. Governing Board of Torrance Unified School District, 103 Cal. Rptr. 188, 193 (1972).
46. 144 Cal. App. 2d 232, 300 P.2d 848 (1956).
47. 61 Cal. 2d 93, 389 P.2d 722, 37 Cal. Rptr. 194 (1964).

However, there is a sharp dichotomy as to what is concluded as to the nature of Lindros' acts. The Court of Appeals states:

> . . . it was not unreasonable to conclude that the embodiment of vulgarity in a model of a story of the genre which the teacher sought to have his students write substantially transcended any legitimate professional purpose and was without the pale of academic freedom. Manifestly, such conduct related to the welfare of the schools and the pupils thereof.[48]

On the other hand, the Supreme Court states:

> In reading "The Funeral" petitioner sought to pursue a bona fide educational purpose and in so doing did not adversely affect the welfare of the school and pupils thereof.[49]

Were they reading the same story? Are these matters that subjective?

While reactions to four-letter words are certainly subjective, there are some other factors to be considered. The law was changing. The United States Supreme Court was moving fast in granting First Amendment protection to the use of four-letter words in some situations. *Cohen v. California*[50] was decided in 1971; the three other cases cited by the California Supreme Court relating to four-letter words were decided in 1972.[51]

The Court of Appeals distinguished *Lindros* from *Keefe* on the slim difference between the tenth and twelfth grades.[52] It also cited *language* in *Mailloux* which seemed to weaken appellant's reliance on *Keefe*; the *decision* in *Mailloux*, however, had the same effect as that in *Keefe*: a teacher was granted an injunction allowing him to continue teaching until the court decided the case.[53] It is not clear at all what *Mailloux* means; the clearest statement is that "[t]he court in no way regrets its decision in *Keefe v. Geanakos*,"[54] which supports appellant's case. *Keefe* and *Parducci* were entitled to much greater weight in favor of academic freedom and support of Lindros' appeal than they were given. The Court of Appeals seems to have concluded that a school board was to be given wide latitude in its determination of the appropriateness

48. 103 Cal. Rptr. 188, 195.
49. 9 Cal. 3d 524, 535, 510 P.2d 361, 368, 108 Cal. Rptr. 185, 192.
50. 403 U.S. 15 (1971).
51. 9 Cal. 3d 524, 536, 510 P.2d 361, 369, 108 Cal. Rptr. 185, 193.
52. 103 Cal. Rptr. 188, 194.
53. 436 F.2d 565 (1st Cir. 1971).
54. *Id.* at 566.

of the conduct of a teacher in the classroom. This was properly corrected by the decision of the Supreme Court.

The Supreme Court also differed sharply from the Court of Appeals as to whether there was reasonable prior notice that use of vulgar language was impermissible in the classroom. The Court of Appeals took the position that:

> It is not unreasonable to assume that a person engaged in the profession of teaching will have a reasonable concept of generally accepted standards relating to propriety of conduct, including the avoidance of vulgarity, and will adhere to such standards in his relationship with his pupils.[55]

The Supreme Court found no reasonable prior notice; it also held that a single incident was insufficient grounds for disciplinary action. Only one California case was cited on the issue of due process —*Morrison v. State Board of Education*.[56] The objectionable conduct in that case was a homosexual act committed in private, outside of school, and not related to classroom conduct. However, the court also cited several federal cases which accepted the notice argument in the context of constitutional due process and academic freedom challenges to teacher dismissals.[57] It seems clear that classroom conduct is not cause for dismissal unless there is more than a single instance of violation of clear school board policy which is generally enforced in all classrooms.

That the *Lindros* case changed California law is forcefully stated in the dissenting opinion by Justice Burke:

> The majority have wholly emasculated the provisions of section 13443, subdivision (d) of the Education Code which, until now, assured that a local school board's decision as to the sufficiency of the cause for failure to reemploy a probationary teacher was *conclusive* and free from judicial interference.[58]

"Emasculation" is perhaps too strong a term. But the court did more than state that in a conflict between First Amendment academic freedom and Section 13443, that academic freedom will be protected. A local board's decision as to *what constitutes cause* is not conclusive, and is subject to review by the courts.

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55. 103 Cal. Rptr. 188, 195.
56. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).
57. Mailloux v. Kiley, 323 F. Supp. 1387 (Mass. 1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Webb v. Lake Mills Community School District, 344 F. Supp. 791 (N.D. Iowa 1972); Parducci v. Rutland, 316 F. Supp. 352 (N.D. Ala. 1970).
58. 9 Cal. 3d 524, 541, 510 P.2d 361, 372, 108 Cal. Rptr. 185, 196.