Terms Matter: Reflections on the Wyoming Debate Over the Teachers’ “Union” and Teacher “Tenure”

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Invariably, in Wyoming, as in other states, the educational debate swirls around two topics: the extent to which school teachers’ unions influence educational policy, and the related, but distinct, question of whether teachers are unreasonably entrenched in their jobs through systems of “tenure.” These questions in turn are closely intertwined with the broader national debate over public employee unionism. In Wyoming, however, the broader debate is not at issue, a fact that will be revealed in this article through close scrutiny of the terms “union” and “tenure.” Evaluating those terms through a Wyoming prism discloses that the Wyoming “teacher’s union,” the Wyoming Education Association (WEA), is not a “union” at all, and that teachers do not in fact enjoy “tenure,” at least as that term has been commonly understood in post-secondary, higher education contexts such as the University of Wyoming.
A Union By Any Other Name?

A union can be defined generally as an organization in which employees participate, and which exists for the purpose of dealing with employers – whether public or private – concerning conditions of work. But the bare existence of a union is of minimal legal significance unless an employer has a statutory obligation to bargain with it. In Wyoming, school districts have no statutory obligation to bargain with the WEA. Of course, if a school district chooses to bargain with the WEA and comes to voluntary agreement over wages or other working conditions, the district is bound to comply with the agreement. That unremarkable proposition follows from ordinary principles of contract law.

Even in a statutory regime in which a public or private employer is required to bargain with a union (so that the union possesses meaningful legal existence), an employer is never required to agree to a union’s bargaining proposal. In the private sector union-represented employees’ recourse to a bargaining impasse is a work stoppage, a right that is protected even in a “right to work” state. As a practical matter, that right is severely circumscribed by the correlative right of an employer to permanently replace striking employees, subject to limited exceptions beyond the scope of this article. In the public sector, however, questions of work stoppage and employee replacement do not arise, for public sector employees are almost universally forbidden to engage in work stoppages on pain of dismissal.

In Wyoming, unlike the situation in states like Wisconsin, the rights of public sector unions have been largely symbolic. Apart from firefighters, public employees in Wyoming have no statutory right to engage in collective bargaining. In all U.S. jurisdictions in which unions are afforded statutory legal recognition, the status is not conferred until the union has demonstrated that it represents a majority of employees in “an appropriate bargaining unit.” School districts appear not to have required the WEA to make such a showing in advance of negotiations, a fact intensifying the inference that the WEA is not viewed by the state as a union.

Thus, the WEA is an organization with whom no school district is obligated to bargain, which possesses no right to strike, and which apparently counts administrators among its ranks. Although I am aware of no private sector union that would suffer inclusion of managers or supervisors as members, one may argue that the WEA, by drawing on its membership dues for resources, influences the political process to a much greater degree than unorganized individuals. While the U.S. Supreme Court equates such influence with mere speech, reasonable people may disagree with the characterization. Legislators, however, operate constantly in a lobbying environment. In order for the argument to have practical bite, one would need to demonstrate a WEA lobbying influence exceeding that of other interest organizations. I have not seen
such evidence, though I am not in a position to claim it does not exist.11

The foregoing is not meant to diminish the general value of voluntary negotiation. Employers – including school districts – may choose to negotiate and enter into voluntary agreements with employee organizations, of whatever stripe, for many reasons. For one thing, group negotiation is efficient because associated transaction costs are normally reduced. Even when a group like the WEA does not demonstrably represent the perspective of a majority of teachers, it may represent a plurality viewpoint that is relatively inexpensive to ascertain and to utilize as a baseline. Additionally, voluntary discussions with employee groups may have labor and public relations value. Employers willing to discuss workplace issues may be seen as reasonable and non-autocratic. The claim that the WEA is somehow dictating educational policy does not withstand scrutiny;12 and one may well wonder whose interests are served through perpetuation of such a myth.

Tenure by Any Other Name?
The assertion that teachers in Wyoming possess “tenure” derives from a statutory provision that has recently been amended – the “teacher tenure” statute13 – stating, in relevant part, that a school board may “suspend or dismiss any teacher or terminate any continuing contract teacher,” that is, a teacher who has been continued in employment for three consecutive years, “for incompetency, neglect of duty, immorality, insubordination, unsatisfactory performance or any other good or just cause.”14 The provision confers on such continuing contract teachers the right to an administrative hearing, with ultimate appeal to Wyoming courts.15 These procedures approximate constitutional due process requirements.16 The question is whether the procedures in themselves create “tenure,” which in the employment context is normally defined as “status granted to an employee, usually after a probationary period, indicating that the position or employment is permanent.”17

To flesh out the question, consider dismissal standards applicable to tenured faculty at the University of Wyoming. There, dismissal for cause is permissible when a faculty member has engaged in “any conduct which (sic) seriously impairs the ability of the University of Wyoming to carry out its functions, including physical or mental incapacity, incompetency, neglect of duty, dishonesty, immorality or conviction of a felony.”18 On its face the breadth of the standard would suggest that a tenured university faculty member is nearly as vulnerable to dismissal as a “tenured” school teacher. This readership will know that this could not be true.

Significant characteristics distinguish higher education tenure from K-12 school teacher security. Most importantly, an established and complex system of internal peer review, policed scrupulously by experienced academics, protects tenured university faculty from arbitrary dismissal.19 K-12, “tenured” school teachers, by contrast, are subject to summary removal by school officials without mandatory peer review.20 Under the former “teacher tenure” scheme, external administrative hearing officers found facts surrounding tenured school teacher removal actions.21 These officials could be expected to know little of the professional culture of any particular school, and, indeed, they were not required generally to possess expertise in employment or educational matters. In this atmosphere generalist administrative officials would be understandably reluctant to second guess the decisions of educational experts. The system, as it existed during the broad debate over these matters in early 2011, stood in stark contrast to the strict scrutiny of dismissal actions that can be anticipated in higher education.22

It is true that at the University of Wyoming the Provost, the President, and the Board of Trustees possess ultimate authority to overturn peer rejection of proposed faculty dismissal actions.23 All understand, however, that such nullification would carry with it high institutional costs, both in terms of diminished faculty morale and through the foregoing access to a tribunal of uncertain expertise – particularly when there has been no peer involvement in the preliminary development of “facts” – seems a faint approximation of what is usually meant by “tenure.”

Thus, a union is not a union, and tenure is not tenure. What could be clearer? As always, close examination of events can carry one far from the headlines. Such demystifying examination is the lawyer’s burden.


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ENDNOTES

2. This is what the fight in Wisconsin is all about. The controversy in that state is whether the requirement that public employers engage in collective bargaining should be abrogated. It is understood by all involved that such abrogation would render public sector unions a nullity. In Wyoming, such a controversy could not arise, for, apart from firefighters’ unions, public employers are not required in the first instance to engage in collective bargaining.
3. NLRA, 29 U.S.C. § 163; see generally Local 513 Transport Workers v. Keating, 66 Fed. Appx. 768 (10th Cir. 2003) (holding that portions of Oklahoma right to work law clearly conflicting with federal policy were preempted)
4. Under the common law this is the majority rule in the absence of a statute specifically prohibiting public employee strikes. 37 A.L.R. 3rd 1147 § 3[a]. Although I find no authority on point in Wyoming, I have no reason to think this state would depart from the rule. See also Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547 (D.C. Cir. 1982)
5. WYO. ST. 27-10-102
7. Those with whom I spoke confirming the fact were unwilling to be quoted.
8. Indeed, under federal labor law this would probably violate 29 U.S.C. §158(a)(2), a provision outlawing, for practical purposes, any employer involvement in labor organizations.
13. Conventional wisdom has it that the statute as amended has preserved teacher tenure. While I have my doubts, my reasons for doubting are beyond the scope of this piece.
14. Former WYO. ST. 21-7-110(a), as it existed at the time of this writing. The recent amendment of the statute has expanded slightly the scope of allowable reasons for discharge. In either version of the statute, the language is quite similar to “just cause” provisions commonly found in collective bargaining agreements.
15. Id., In former subsections (c) - (h)
17. RANDOM HOUSE UNABRIDGED DICTIONARY 1957 (2nd ed. 1993)
19. See, e.g., the University of Wyoming’s dismissal regulations, University of Wyoming Regulation 5-801 available at http://www.uwyo.edu/generalcounsel/_files/docs/UW-Reg-5-801.pdf
20. Former WYO. ST. 21-7-110
21. Former WYO. ST. 21-7-110(c)
22. Id. Although the amended statute substitutes Office of Administrative Hearings officials for “privately” procured hearing officers, there continues to be no explicit requirement for hearing officer employment or educational expertise.
23. University of Wyoming Regulation 5-801, supra., n.xix.
24. S.F. 146, 61st. Leg. (WY. 2011)
25. Present WYO. ST. 21-7-110(c)